13

ANNULMENT OF DIVORCE IN ISRAELI RABBINICAL COURTS

by

AMIḤAI RADZYNER*

In recent years we have witnessed a rise in the number of cases in which panels of *dayanim* in rabbinical courts have ruled that a breach of the divorce agreement on the part of the woman results in a declaration to the effect that the divorce is a "wrongful" one.[1] In such cases, the divorce may be annulled and a new *get* is required. This situation can also arise if the breach occurred long after the divorce was granted and even if the former husband has re-married. Furthermore, it may arise in a case in which the woman has already had children from another man.[2] In most cases, the substance of the breach involves the woman appealing to the civil (family) court, on behalf of her children, with a request for an increase in the amount of child support that was agreed upon in the divorce settlement. This is what happened in the ruling examined below. This phenomenon is clearly spreading, and we are aware [at this writing] of some fifteen similar rulings by rabbinical courts, including some handed down by the Great Rabbinical Court [that is the rabbinical appellate court].[3] We have also encountered several additional cases in which men filed claims to annul divorces they granted to their former

* Professor, Faculty of Law, Bar Ilan University.

1 For a summary of wrongful *get* from the Talmud through the writings of the *Rishonim* and recent generations, see: U. Lavi, "Is There a Concern for the Validity of the *Get* When the Husband Was Misled in the Divorce Agreement" (Heb.), *Shurat Hadin* 2 (1994), 146-190. Recently, Rabbi Lavi published this article with the addition of sources and an expanded discussion in his book, *Ateret Devorah* (Keshet, 2009, Heb.), vol. 2, 577. Examination of the article appears to point to extensive problems with the claim (to be investigated below) that breach of the divorce agreement leads directly to doubts about the validity of the *get,* and shows R. Lavi's clear rejection of this claim. One wonders, therefore, why some use R. Lavi's article to reinforce this claim (see para. 6 of the decision, *infra*).

2 One case (of two known to me) is: T.A. DRC 7164-21-1, 21.11.2005, *Hadin Vehadayan* 12 (2006), 7. The Great Rabbinical Court accepted the woman's appeal in this case, but it is clear that the majority opinion granted the appeal only because of fear of *mamzerut* (the minority opinion pointed to additional halakhic considerations for granting the appeal). See: GRC 9225-64-3, 25.8.2008, http://www.rbc.gov.il/judgements/docs/324.doc. It transpires from this text that the decision of the District Rabbinical Court was issued after the woman already had a son from her second husband.

3 For a survey of numerous cases, see A. Radzyner, "From Lvov to Tel-Aviv: 'Wrongful Divorce' Judgments in the Israeli Rabbinical Courts" (Heb.), *Mishpatim* 39 (2009), 155, 167-85.

wives, or in which *dayanim* threatened women that they would annul their divorces based on the halakhic precedent discussed below. Note, further, that prior to the last 10-12 years, no divorce had ever been annulled under such circumstances.[4]

The ruling with which we are concerned was handed down by a panel of Tel-Aviv District Rabbinical Court *dayanim* (R. Avraham Sheinfeld, R. Avraham Rieger, and R. Dov Domb) whose separate opinions were drawn from almost identical halakhic sources. *It is noteworthy that these are the first opinions that specify the halakhic arguments upon which the concept of the annulment of a divorce due to an error is derived*. Thus, when the ruling of this panel was accepted by the Great Rabbinical Court (in a later case), the Court stated:[5] "We will not repeat the halakhic arguments supporting the concept of 'wrongful divorce', because they are elucidated in the opinion of the Tel Aviv District Rabbinical Court decision referring to the case discussed here."

The District Rabbinical Court decision dealt with a valid divorce agreement approved by the rabbinical court, whereby the father was to pay NIS 500 (i.e., about $130 US) per month for the support of the child, and the woman agreed not to demand an increase in the amount. Only eight days after the divorce was granted, the woman filed suit in the Family Court to increase the child support payment, and won the case. The District Rabbinical Court held that having violated a term of the divorce decree, the woman must obtain a second divorce, a requirement that was also accepted by the majority opinion (R. Shlomo Amar and R. Zion Boaron against the opinion of R. Shlomo Daikhovsky) in the Great Rabbinical Court.[6]

Below I reproduce a generally verbatim account (with some ellipses for the sake of expediency) of the arguments and halakhic sources on which the District Rabbinical Court relied:[7]

1. The Court drew the attention of the woman's counsel to the fact that the divorce was problematic because shortly after it was granted the woman breached its terms. The woman's counsel questioned the jurisdiction of the Court to raise an issue which had not been raised by the husband. The Court responded that the validity of a divorce is a halakhic matter that is within

4 *Ibid*., at b164-67.

5 GRC 8894-21-1 (27.1.08), www.daat.ac.il/daat/psk/psk.asp?id=258. The *dayanim* were: R. Menaḥem Hashai, R. Avraham Sheinfeld, and R. Zion Boaron.

6 GRC 5951-21-1 (31.1.07), www.daat.ac.il/daat/psk/psk.asp?id=235. For more on this decision and the arguments that took place during the deliberations, see: S. Daikhovsky, "The Proper Way to Judge in Rabbinical Courts" (Heb.), *Teḥumin* 28 (2008), 19-27, at 25-26.

7 T.A. DRC 9322-21-1 (2006), http://www.daat.ac.il/daat/psk/psk.asp?id=195 (paragraph numeration added).

the jurisdiction of the court, and it is not related to the claims of the parties.

2. The woman's counsel [...] tried a clever ploy and maintained that the new claim [for additional child support] was filed on behalf of the child [...].
3. But we wondered how the child was able to time the claim so perfectly, waiting until the divorce was arranged, and filing her claim only eight days after the woman received the divorce.
4. Moreover, the child did not sign a power of attorney for the lawyer [...] and did not obligate herself to pay her a fee. Nor can she do so, being a minor, and without legal capacity.
5. It is the mother who filed the claim, that is, she initiated the claim and is the claimant in fact [...].
6. And now to the halakhic aspect. When a woman breaches the divorce settlement on the basis of which the divorce was granted, serious halakhic questions arise as to the validity of the divorce. This matter is elucidated in detail in the excellent article by R. Uriel Lavi, Head of the Safed Court, (see n. 1). It is explained in the article that, according to the decisors who ruled that a breach of the agreement invalidates the divorce, the husband's formal nullification of all conditions before granting the divorce is irrelevant.
7. This is the opinion of R. Meir ben Gedaliah of Lublin (Maharam of Lublin) and the *Mishkenot Ya'akov* who maintain that even if, as is customary, the husband formally nullified all conditions made prior to the divorce, in reality, he continues to expect all promises made to him by his wife to be kept. A breach of promise entitles him to say: Had I known that the promise would not be kept, I would not have divorced her. In such circumstances, the divorce is retroactively invalid.
8. Moreover, Maharam adds: "Even if the husband does not claim that there is a problem with the divorce, we will not keep silent, because of the stringency of the prohibition on permitting a married woman to another man, which cannot be obviated by means of the husband's formal nullification of all prior conditions." Therefore, it is for the court itself to raise the issue, and there is no need for the father to have raised the argument.
9. According to the author of *Resp. Ḥelkat Yo'av*, if, at the time the divorce was executed, the woman was already planning to breach her settlement, this is an erroneous divorce. The reason is that had the husband known of his wife's intention to breach her promise under the settlement at the time the divorce was granted, he would not have given her the *get* in the first place. "Thus, he was misled in relation to the very essence of the divorce, and in such a case, the husband's formal declaration that he divorces his wife unconditionally does not help, and the divorce is annulled."
10. Thus, the matter is immeasurably more severe when the agreement is

breached only a few days after the divorce has been granted.

11. And in the book *Ha'amek She'elah* [the author] ruled that if the husband is obligated to pay after the divorce (contrary to the agreement), it is obvious that the divorce is wrongful.
12. See also *Beit Meir*, *Even Ha'Ezer* 145:9, which states that the opinion of Maharam of Lublin must be taken into account, and seeks to arrange the divorce in a way that there would be no fear of a wrongful divorce, not even in the opinion of Maharam. And see also *Divrei Yosef*, by R. Yosef Cohen, *Even Ha'Ezer* 2:18.
13. If so, who will dare ease the prohibition of a wife [to be married to another] against the opinion of Maharam of Lublin, *Mishkenot Ya'akov*, *Beit Meir*, *Ḥelkat Yo'av*, and *Ha'amek She'elah*?
14. In light of the above, we decree:
    a. We do not allow the marriage of the respondent [i.e., the woman] until another ruling of the court. And she must be registered on the list of the unmarriageable. The husband is exempt from any payment to the woman.
    b. The woman is obligated to maintain and support the child and to pay any amount required for the needs of the girl, above the NIS 500 paid by the father.
    c. The woman is obligated to return to the father any amount she collected and/or will collect from him for child support above what he took upon himself in the divorce agreement that was approved by the court and received the validity of a decision. The amounts to be returned [are to be] linked to the Consumer Price Index from the day they were collected and until their return.
    d. After the woman obligates herself to honour the divorce agreement as written, and returns to the father the amounts she [improperly] collected from him, the court will discuss whether it is necessary to arrange an additional divorce between the parties [...]
    e. A copy of the decision is to be sent to the parties, and the court administration is to record the name of the woman on the list of the unmarriageable.

Are the rulings listed here so obvious as to justify the question, "who will dare ease the prohibition of a wife?" Below we discuss several problematic aspects of the court's decision.

1. *Nullification of notification and reliance on the opinion of Maharam of Lublin*

Two elements in the decision point to reliance on the opinion of Maharam of Lublin. First and foremost, we find such reliance in the ruling whereby the *bitul moda'ot* (literally: nullification of notification) undertaken by the husband before the granting of the divorce (using the phrase: "every condition is a statement that can result in the annulment of the divorce"[8]) is not efficacious in a case in which the divorce agreement, on the basis of which the divorce was granted, is breached (paragraphs 6, 7 of the decision). Secondly, such reliance can be found in the ruling that there is no need for the husband to claim that he has been misled, as the court itself can raise this claim (paragraphs 1, 8).

The decision of Maharam of Lublin was propounded in the "Vienna *Get*" case that arose in Poland in the second decade of the seventeenth century (involving a woman originally from Vienna).[9] The case concerned a husband who fell sick. His wife's family was afraid that he might die and the wife would then require *ḥalitsah* from his brother. They therefore persuaded the husband to grant his wife a divorce, promising that if he recovered, the woman would remarry him. The divorce was granted, and the man subsequently recovered, but the woman's family did not keep their promise, and the woman was matched with someone else. The deceived "husband" turned to his relative, Maharam of Lublin, who ruled that the divorce was not valid, because it was granted on condition that the woman would marry him again. In Maharam's words, this condition was clear to all, even if it was not stated explicitly at the time the divorce was granted, and even if a *bitul moda'ot* had been given.[10]

The problem is that the position of Maharam of Lublin remained a minority opinion, rejected by many great sages. Although Maharam received the support of R. Mordechai Yaffe (*Levush*), already at the time of the "Vienna *Get*", his opinion was opposed by R. Yehoshua b. Alexander HaCohen Falk (author of סמ"ע), who had arranged the divorce and who wrote two *responsa* rejecting the arguments of Maharam and justifying the validity of the divorce.[11] Sixteen sages, mostly from Poland, sided with R. Falk, as well as "three great courts in the holy community of Prague".[12] Among these sages were R. Samuel Eidels (Maharsha), R. Shlomo

8 *Shulḥan Arukh*, *Even Ha'ezer* 134:2. See S. Yacobi, "The *Get* and Financial Agreement – Which Is the First?" (Heb.), *Teḥumin* 22 (2002) 160-61.

9 On this *get* case, see S. Tal, "The Vienna *Get*" (Heb.), *Sinai* 78 (1976), 157-185; Y. Boxbaum, "Responsum of *Sefer Me'irat Enayim* concerning the Vienna *Get*" (Heb.), in D. Lau, ed., *Rabbi Y.Y. Frenkel Memorial Volume* (Jerusalem: Makhon Yerushalayim, 1992), 347-384.

10 *Resp. Maharam of Lublin* no.122.

11 Both *responsa* were reprinted (together with *Baḥ*'s *responsa*) in *Resp. Baḥ Haḥadashot* nos. 90-91.

12 Boxbaum, *supra* n.9, at 383-84

Ephraim b. Aaron Luntschits (the author of *Keli Yakar*), R. Binyamin Slonik (the author of *Masat Binyamin*), and R. Yoel Sirkis (*Baḥ*). In their view, the current divorce arrangements prevent the husband from claiming that the granting of the divorce was conditional upon some obligation to him that must be fulfilled, even if this is an explicit obligation that was doubtlessly crucial in the granting of the divorce. They therefore ruled that the divorce was entirely valid, and there was no need for a second divorce even if the law were to be interpreted in the strictest way. Whoever challenges the validity of the divorce, they said, "violates the ban of Rabbenu Tam against casting aspersions upon a divorce." Maharam was not convinced, and persisted in his opinion. In the course of the argument, the controversy was discussed at two meetings (in 1611-1612) of the Council of Four Lands (*Va'ad Arba Aratsot*), the supreme autonomous body of Eastern European Jewry, and at both meetings the rabbis of the Council supported the opinion of those who considered the divorce to be valid.

In later generations, Maharam's view continued to be perceived as a minority opinion, and many disagreed with it. For example, *Taz* (*Turei Zahav*, R. David haLevi Segal) wrote that Maharam's position was "rejected and is not on the side of truth, and that nearly all rabbis have already disagreed with it and forcefully rejected it."[13] Indeed, all the sages in his time disagreed with Maharam, and argued that because the husband stated explicitly that he divorces without any conditions, his later statements cancel the condition that originally existed. Sharp criticism was voiced also by R. Yeḥiel Michel Epstein in his *Arukh HaShulḥan*, who also addressed the argument put forth in *Resp*. *Mishkenot Ya'akov* supporting Maharam (*Mishkenot Ya'akov* is mentioned in the decision discussed *supra,* para. 7):[14]

> [...] And it is close to three hundred years that one of the great ones [Maharam of Lublin] claimed that if there was an obligation by the woman to her husband to marry him again after the divorce, and the obligation was not met, the *get* is cancelled because its validity hinges upon fulfilling the obligation. The sages of his time contradicted him and rejected his position, and ruled not to cast aspersions on it, and they were right in this [...] And I greatly wonder about the learned author of *Mishkenot Ya'akov* who, against all the great sages of the generation, dared support Maharam, whose every statement, as we said, was categorically rejected [...] and under no circumstances should we deviate from this.

The question, "who will dare ease the prohibition of a wife against the opinion of Maharam of Lublin" (paragraph 13 of our discussion) receives a clear answer here. We may also quote R. Avraham Danzig, who addressed a case in which a husband had been misled and granted a divorce based on his mistake. R. Danzig,

13 *Turei Zahav*, *Even Ha'ezer* 145:6.

14 *Arukh Hashulḥan*, *Even Ha'ezer* 145:30. See also *ibid*., 42:9.

too, began his argument with a reference to the "Vienna *Get*":[15]

> There has already been a case of this type, arranged by R. Joshua Falk in Vienna, as explained in the *Responsa* of Maharam of Lublin, and in this regard the sages of the time said that there is no problem in the divorce [...] In any case, because nowadays the husband nullifies the notification before granting the divorce, we cannot raise any questions about this *get*.

After conducting a long debate about the opinion whereby perhaps, according to the position of *Ran*, there is room to doubt the validity of the divorce, R. Danzig summed up:

> We saw that all the *Aḥaronim* were not afraid, and all the more so today, when the husband nullifies all that can hurt and nullify the divorce, who would disagree with them, and therefore there is no question that this woman is marriageable.

2. *Reliance on other Aḥaronim*

The decision at hand named five *Aḥaronim* who, it claimed, supported the position of Maharam and in light of whose opinion the validity of the divorce at hand should be questioned (paragraphs 7-13). But do all the decisors named by the panel indeed support its conclusions?

I begin with the latest of the five (chronologically), R. Yosef Cohen, who served as judge and president of the Jerusalem District Rabbinical Court and subsequently as a member of the Great Rabbinical Court. His decision dealt with a particularly difficult case from an halakhic point of view, and in terms of its tragic consequences:[16]

> On the 17th day of Elul, 5741 (1982), I was approached with a request to arrange a divorce document as soon as possible for a woman and her husband, in a matter that had an element of salvation of the soul because the husband was mentally ill and abusive of his wife, and was of late hospitalized, and he kept refusing to grant his wife a divorce, but now agreed to divorce her, and halakhically he was fit to grant the divorce [...]. The following day we arranged a panel of judges, the parties appeared in court, we examined the man and found that he was fit to grant a divorce, and we arranged the divorce papers.

15 *Binat Adam, Sha'ar Beit Hanashim* no.32. Here the husband claimed that he was misled before the *get* was granted, and that he granted it based on a mistaken picture of reality. In this case, the husband demanded that certain items be deposited for him, and after granting the *get* he found that he had been deceived and received items of lesser value. See supporting evidence for *Binat Adam* in a similar case in *Piṯḥei Teshuvah, Even Ha'ezer* 134:1.

16 Y. Cohen, *Divrei Yosef* (Jerusalem: The Harry Fischel Institute, 2004), vol. 2, no.18, p.174 (= Jer. DRC 5641/1982 (1983), http://www.daat.ac.il/daat/psk/psk.asp?id=54).

> Afterwards I learned that there was deception involved and that the divorce was wrongful, because the husband wanted to divorce his wife only if they found him a different wife. They deceived him and brought before him a married woman who promised to marry him and he betrothed her. And only after the betrothal did he agree to divorce his wife, and based on that belief he divorced.

Following a long discussion, R. Cohen ruled that this was indeed a wrongful divorce:

> In light of all this, our court did not make the woman marriageable by this divorce. And however much I sympathize with this poor *agunah*, the possibility of allowing the divorce was not available to me.

Note that the opinion of R. Moshe Feinstein (and others) in this case was that the divorce was valid.[17] But the ultimate question is whether such a difficult and unusual case can really serve as a source for the decision at hand, in which the woman breaches the divorce agreement by means of a child support claim filed for her daughter. This question becomes even sharper if we consider that the title of the preceding section in R. Cohen's book (*Divrei Yosef*, section no. 17) appears to be a more relevant than section 18 to the case at hand: "*Divorce arranged with a divorce agreement, and the woman does not honour the agreement.*" The opening statement further attests to the relevance of this section to our case, and to the fact that the phenomenon of filing for child support in civil court in defiance of the agreement was also common in the past and was well known to the rabbinical courts:

> It is common for a husband and wife to come to the rabbinical court for a divorce, with a divorce agreement in which the woman releases the man from paying child support after the divorce, and the court confers on the agreement the validity of a decision at the time the divorce is granted. Subsequently the woman files suit for child support in the civil courts, on behalf of the children. And the district civil court obligates the husband to pay child support. The question is whether this raises the possibility of a wrongful divorce, and whether the agreement before the divorce is a statement of notification that he divorces her based on this knowledge.

R. Cohen's conclusion is clear and unequivocal:

> Regarding the case at hand, there is no fear whatsoever of a wrongful divorce, even according to the opinion of those who say that the demands raised by the husband before the writing of the *get*, if not met, can affect the validity of the *get*.

R. Cohen reached this conclusion based on two main arguments, which also explain why the result in this section is different from that of section 18. I will discuss the first argument, which distinguishes between types of deception, in point

[17] See A. D. Hurvitz, *Resp. Kinyan Torah Behalakhah*, vol. 4 (Jerusalem, 1985), 260.

3, below. His second argument differentiates between deceiving the husband regarding the reality he assumes to exist at the time of the granting of the divorce (in section 18 the case involved a man who believed that at the time he was granting a divorce to his first wife, he was already legally married to another), and a breach that occurs after the divorce, when it was not at all clear to the husband that it would indeed occur, and in R. Cohen's words: "In our case, it is a matter for the future and it was not clear whether or not the woman would keep the agreement."[18] He even ventures a third argument which we can see as an appendix to the second: in the case of a future breach. It is clear, he rules, that one can rely on R. Avraham Danzig[19] and determine that the husband's statement that "he cancels at the time of granting of the divorce everything that could harm the divorce" is efficacious in preventing a claim of wrongful divorce.

So much for the court's reliance upon R. Cohen. What about the other four purportedly supporting sources? Our decision was correct in that R. Ya'akov Bruchin of Karlin, the author of *Mishkenot Ya'akov*, supported the position of Maharam, saying that the nullification of notification is not always efficacious. But it must be remembered that his statement was made in the context of a case similar to the "Vienna *Get*", and as we shall see below, it is not clear that that case is similar to the one at hand. Nevertheless, it appears that R. Ya'akov of Karlin is appropriately cited as a supporting source

Paragraph 11 of our decision argues that it is obvious that if the husband is forced to pay money after the divorce (contrary to the agreement), the divorce is wrongful. The reference is to the *Responsa Emek She'elah* (incorrectly cited as *Ha'amek She'elah*!) of R. Mordechai Twersky. R. Twersky had held that if the husband received a document that guarantees his protection against a monetary obligation in court, and he discovers that the document is not efficacious, there are grounds for concern about a wrongful divorce. Still, it appears that the panel that wrote the decision at hand is stricter in its ruling than the author of *Emek She'elah*, because the conclusion of this decisor is that if a claim had been filed in court contrary to this agreement, but the claim failed and the husband was not obligated to pay an additional sum, "by all opinions, including Maharam of Lublin, there is no fear whatsoever of a wrongful divorce," and the ruling of the author of *Emek She'elah* applies only in a case in which "the husband is forced to pay money after the divorce." Nevertheless, the panel is not deterred from relying on the writings of R. Twersky even in cases in which the woman filed a claim in court, and the

18 This also explains why the case discussed by R. Cohen in section 18 is even more serious than the case of the *Vienna Get* (as he himself argued, 178). Thus, the question whether section 18 can serve as the basis for cases such as those heard by the panel at hand – in which a breach occurred after the granting of the *get* – becomes even stronger.

19 *Supra* n.15.

husband has not yet been ordered to pay any amount.[20]

Nor is the matter obvious, as our decision suggests, even to R. Twersky. The final section, containing the conclusions of the author of *Emek She'elah*, ends with the words: "… and I write all this only theoretically, and not to be relied on." This statement appears to refer to the entire *responsum*, including the strict opinion that appears in it (and on which the panel at hand seems to rely), in view of the fact that the *responsum* begins with the following statement:

> I received your letter with the question. I have difficulty answering, because I am busy and because the facts are not clear to me. Moreover, it is best that I refrain from answering, because I see that in your opinion and in that of a large majority [of scholars] the *get* is valid, but out of respect I will answer briefly.

The next source cited as supporting the ruling in our case is *Beit Meir*, by R. Meir Posner, who, the decision notes, was "concerned with" (i.e. thought that it might be appropriate to accept) the position of Maharam of Lublin. But consideration of R. Posner's complete statement reveals that his position is more complex:

> Certainly, the statements of those who disagree with Maharam of Lublin are true, namely, that the intention of the *(bitul moda'ot*) enactment[21] was not to be understood in the way in which he *(*Maharam of Lublin) interpreted it, as clarified in their writings and in Maharsha (end of tractate *Gittin*). Nevertheless, I did not find in the writings of the opponents sufficiently convincing answers to the difficulties raised by Maharam of Lublin.

Consequently, *Beit Meir* later recommends some additional statement at the time the divorce is settled (I will refer to his proposal in the last chapter of this article). Nonetheless, he avoids stating explicitly that one must immediately adopt the strict stance of Maharam of Lublin if this formulation is not included. It is, therefore, quite unclear that he would agree with the ruling in our case.

The fifth source quoted in the decision (paragraph 9) is the *Ḥelkat Yo'av* responsum (of R. Yo'av Joshua Weingarten), which is presented as supportive of Maharam of Lublin and of *Mishkenot Ya'akov*. When we examine the responsum, though, we see that not only is the author's view different from that reflected in our decision, it also contains a most important distinction between a case similar to the "Vienna *Get*" and one such as the case at hand, a distinction that I discuss in the following point.

20 T.A. DRC 0428-21-1(2002) www.rbc.gov.il/judgements/docs/177.doc; DRC 7164, *supra* n.2.

21 He refers to R. Yeḥiel of Paris's enactment regarding a *Get Shekhiv Mera* (a *get* of a moribund husband), see R. Moshe Isserles to *Even Ha'ezer* 145:9.

3. *Substantive and Secondary Obligation*

Is the case of the "Vienna *Get*" similar to the present case and others like it? It is very likely that even those who would take a strict view of a case in which a dying man divorces his wife with the understanding that she would remarry him if he recovers (the situation in the "Vienna *Get*") would not presume that in the case of a claim for increased child support the validity of a divorce should be questioned.

This distinction is made, as we have seen by R. Yosef Cohen. One of his arguments for the validity of the divorce in section 17 of *Divrei Yosef* is based on R. Danzig, who wrote:[22]

> There is no assumption that he divorces his wife because of money paid to him, and who has ever seen such a thing! But he no doubt needed to divorce her in any case, for whatever reason. Only those who can extract money engage in all types of schemes, but we stand witness that this is not why he divorced, as he granted her the divorce. Therefore he went ahead and divorced her without hesitation.

By contrast, explained R. Cohen in section 18, in the case of a man who did not want to divorce his wife at all because he did not want to be without a wife, the deception that made it appear as if he had betrothed another woman is a deception concerning the *substantive element* in the granting of the divorce, and it is necessary to distinguish this case from a deception involving financial matters, which are not the reason for the divorce but a matter *associated* with it (and therefore, a secondary element).

Several decisors and *dayanim*, including the author of *Ḥelkat Yo'av*, make an explicit distinction between the breach of an obligation on the basis of which the divorce was granted (as in the case of the "Vienna *Get*") and a financial clause associated with the divorce that is not the reason for it being granted. Note that the facts of the present case, as they are described in the decision, indicate that this was not a case in which the husband was desirous of continuing to live with his wife and only the content of the divorce agreement made him grant the divorce. On the contrary, he wanted the divorce of his own free will, and even raised serious claims against the woman, with halakhic implications that apparently it would have been prohibited for them to continue living together (our decision even quoted his claim that "the woman had sexual relations with another man"). In any case, it is difficult to claim that the limited sum set by the agreement for child support was the substantive element in his decision to divorce.[23]

22 *Supra* n.15. This argument was raised by R. Cohen as "the principal basis for the permission" of *Binat Adam*. Note that, in R. Cohen's opinion, the case discussed in *Binat Adam* is more serious than the case at hand (see *supra* n.18), because there the husband was misled *before* the granting of the *get*.

23 Cf. the opinion of R. Daikhovsky ("Proportionality in Coercing *Get*" (Heb.), *Teḥumin* 27 (2007), 300-303), that a man who grants a *get* to his wife under slight monetary pressure in fact divorces her

What was the ruling of *Ḥelkat Yo'av*? According to paragraph 9 of our decision, he ruled simply that "if at the time the divorce is being arranged the woman already thought not to keep what she had promised him, the divorce is wrongful." But examination of the text reveals a different picture. In fact, the decisor ruled that a divorce is valid even in cases that are more serious than the present one: not only if the woman intended to breach her promises (and the breach indeed occurred *after the divorce was granted*), but even if she misrepresented matters to the husband so that in fact he had been misled *before the granting of the divorce*.[24] Indeed, his *responsum* is intended to distinguish between a case such as the "Vienna *Get*" (where the man issuing the divorce had a non-monetary goal of having a wife) and a deception involving money. It follows that it is entirely reasonable that this distinction would receive the support of Maharam of Lublin and the other *Aḥaronim* whom the panel at hand listed as its supporters (except, perhaps, *Emek She'elah*), and that they would not raise questions about the validity of the divorce in cases such as the present one.

R. Weingarten, the author of *Ḥelkat Yo'av* accepted Maharam's opinion that in cases such as the "Vienna *Get*", the *bitul moda'ot* issued by the husband is not efficacious. In cases such as those now occurring in Israel, however, his opinion is likely to have been different. A case similar to the present one (and, as mentioned, even more severe cases) is discussed in his responsum, which opens with the following statement:

> I clarify something very common, that the woman cheated her husband of objects and money, and the husband believed that things had been delivered and afterwards it turns out that they have not been delivered according to his wishes.

In his *Ḥelkat Yo'av* responsum, R. Weingarten ruled that the conditions for a wrongful divorce are met "only in the case of an error in the substance of the matter"; in other words, when the mistake affects the factor that made the husband

---

willingly, because "pressure is not an absolute thing but a relative one […] If the man is willing to divorce under light pressure, it is a sign that he is not interested in his wife." In our case also, a man's willingness to divorce his wife on condition that she renounce her monetary claim is an indication that he is willing to divorce, and the condition is ancillary and not substantive.

24 This is an important point because in our case, and in other cases discussed in this article, the breach occurred after the *get* was granted (even if circumstances indicate that the woman intended from the beginning to breach the agreement), and there is no doubt that this is a smaller "error" than the error in cases in which the husband was misled before the *get* was granted, and he granted it on the basis of this deception (as in the case described in *Divrei Yosef,* no.18). Indeed, one of the more strict decisors in matters of wrongful *get,* R. Yitsḥak Elḥanan Spektor, *Resp. Ein Yitsḥak*, vol. 2, *Even Ha'ezer* no.37:26, discusses this distinction at length. The case is one in which the man loved his wife and wanted to continue living with her, but the deception that was perpetrated on him made him divorce her. This case is even more serious than that of the *Vienna Get*, and R. Spektor discusses it at length. See also the opinion of R. Izirer in GRC7009-24-1, 22.1.2006, www.rbc.gov.il/judgements/docs/337.doc.

grant the divorce, as for example the deception that took place in the "Vienna *Get*". By contrast, a mistake involving secondary matters (such as money) would not invalidate the divorce, even if during the proceedings various concessions or promises were made by the woman (which serves to indicate the importance that the husband attaches to them):

> But in divorcing her because he assumed that she had already deposited the goods, he does not divorce her for the goods; he only delays the divorce as a guarantee that she gives him the goods. The divorce, in fact, is not wrongful: on the contrary, if she does not give him the goods he hates her even more and wants to divorce her. He holds back the divorce only as a guarantee for obtaining the goods, and this is only a condition. And like in the case of *ḥalitsah*, it will be valid. And so in a case of divorce, if before granting it the husband said that he divorces her unconditionally, the divorce is valid. A mistake would exist only if the matter should not have been started at all, but if it is his intention to perform the act only in this way, this is an incidental condition, not a mistake.

And again later:

> If she cheated him in objects, even if it was not according to the husband's intention at the time he granted the divorce, the divorce is valid for this case if he said he grants unconditionally, and it is not a mistaken case.

This distinction, offered by the author of *Ḥelkat Yo'av*, between a mistake in a factor that is central to the divorce and a mistake in one of the conditions associated with the granting of the divorce, is an important one that many others have pointed out, and it is therefore highly doubtful that one can base the decision at hand on this decisor (and it is even doubtful whether the other strict opinions in cases such as the "Vienna *Get*", on which the panel relies, would have been as strict as the panel in our case). On the contrary, it appears that according to the distinction of *Ḥelkat Yo'av*, it would be difficult to call the divorce in the present case a wrongful one.[25]

4. *Examining the 'Mistake' on the Factual Level*

In addition to the discussion of the halakhic sources regarding wrongful divorce

25 An interesting case was discussed by R. Herzog during the period of the British Mandate. The case was clearly more serious than the present one (*Resp. Heikhal Yitsḥak*, vol. 2, no.48). The question was whether it is permitted to mislead the husband from the outset, and it did not concern the validity of the *get* in retrospect, as in the present case. R. Herzog ruled that it is permissible to do so, but he made his ruling only after difficult and extensive deliberation, showing great concern for the stricter opinions. In the course of his deliberations he drew distinctions similar to those of the author of *Ḥelkat Yo'av* (but without citing that work) between the present case and the one discussed by R. Spektor, *supra* n.24. R. Herzog sent his answer to several rabbis, and their responses also appear in his book (*ibid., no.*49). In this answer (p. 193) R. Herzog quotes R. Shlomo Zalman Auerbach, who also permitted such a *get*.

and their applicability to the present case, there is good reason to doubt the factual findings of our decision, namely, that the husband in this case had been misled, even if a claim was filed in court and even if that happened shortly after the divorce had been granted. The *dayanim* regarded the filing of a support claim for the children and on their behalf as some type of legal fiction, because the claim was in fact filed by the mother (paragraphs 2-5). They therefore ruled that the woman breached her obligation to the husband, and even misled him at the time the divorce was granted, by having him believe that he was safe from future claims.

In my opinion, even if the woman's conduct is problematic, it is questionable whether it is possible to claim that a deception has been perpetrated here. Even halakhically, the assumption that the woman may waive the rights of her children by accepting a low figure for child support is not necessarily correct, as we shall see. Moreover, from the point of view of Israeli law, it is certain that such an obligation has no validity, and therefore it is difficult to claim that this is an ordinary case of contractual limitation in which a person obligates himself to refrain from doing something that the law allows him to do. In any case, the agreement to accept such a limited amount of child support is one that cannot be enforced in an absolute way, and the husband should have known that.

It is well established since the early years after the establishment of the state, that minors are not bound by the divorce agreement between their parents concerning claims for support payments, even if the claim is filed by the mother as a guardian.[26] In other words, we can criticize the mother for filing the claim for her minor, but it is very difficult to claim, as our decision does, that the father has been misled because he truly and innocently believed that the agreement completely protected him from any claim for an increase in support payments.

Our court's conclusion on this point is all the more surprising in view of the fact that the decision emphasizes that the husband consulted a lawyer before signing the agreement. Although the court emphasizes this fact in order to show how concerned the husband was with a possible breach of the agreement, it is difficult to assume that an attorney, who ought to be well aware of the legal situation in Israel, would have advised him that the agreement would protect him against any possibility of a support claim.[27] Furthermore, one must wonder about the court's statement that the husband was persuaded "that the agreement was closed [i.e., unchangeable]" and that it was with this knowledge that he granted the divorce.

26 See P. Shifman, *Family Law in Israel* (Heb.), vol. 2 (Jerusalem: Sacher Institute, Hebrew University, 1989), 257-59; M. Corinaldi, *Status, Family and Succession Law between State and Religion* (Heb.) (Serigim-Lion: Nevo, 2004), 141-46.

27 See R. Daikhovsky, *supra* n.6, where he addresses this point in the context of the decision at hand.

The court is well aware of the fact that the agreement cannot be "closed". Why then did it allow the husband to believe that this was the case, and thereby contribute indirectly to the issuing of what, in its opinion, is a wrongful divorce?[28]

I believe that it is difficult to argue that the husband has been misled in this case, especially if he received legal counsel. It was on just such a context as ours that R. Lavi wrote in an article basing himself on the opinions of a number of *Aḥaronim*: [29]

> Even among those who take a strict view on whether the husband had been misled, it is necessary to take a lenient approach in two cases. If the husband could have checked whether he was being misled but did not do so, we say that he misled himself. And some say that whenever it is possible to infer that he would have divorced in any case, the divorce should not be invalidated because of the deception.

An important source for this statement is a responsum by R. Moshe Feinstein[30] concerning a Jewish couple, citizens of Canada, who were divorced in rabbinical court. The financial matters were also arranged in rabbinical court with the understanding that, subsequently, a civil divorce procedure would also be conducted. Indeed, they underwent a civil divorce in Mexico, according to the agreement. The man then married another woman. The first wife subsequently filed an alimony claim against him in court, and also filed a complaint against him for bigamy (in an attempt to force a divorce in a Canadian court), claiming that they were still married by Canadian law, which did not recognize Mexican divorce. The husband claimed that had he known that the civil divorce would not be efficacious and that his wife would file suit against him in court for alimony, and that he could even be sent to jail, he would not have granted the divorce. R. Feinstein wrote that it is entirely clear that the husband would not have granted the divorce under these circumstances. In other words, in this case the man makes a *substantive argument* that is fundamental to his willingness to divorce and not an argument relating to *a condition associated with the divorce* (in light of the distinction in the previous section): why choose to divorce halakhically, if he were not to be considered divorced according to the laws of the state, but married to his

28 When R. Daikhovsky stated that the panel issuing the decision had clarified to the husband "thoroughly the meaning of the divorce agreement, which is not closed, and that there is the possibility of an additional suit in civil court," and therefore this is not a case of wrongful *get*, the panel answered that there had been no such clarification. On the contrary, according to the panel, the husband was convinced that he would not be sued in the future. See: GRC 5951, *supra* n.6; RC 5951-64-1, 26.2.2007, *Hadin Vehadayan* 16 (2007), 7-8.

29 *Supra* n.1, 182 and 187. In the expanded version published in his book, *supra* n.1, at 607, R. Lavi cites, together with these opinions, *Maharsham*'s answer, which presents a somewhat different approach, but adds that from the writings of the other decisors it transpires that they did not agree with this answer.

30 *Resp. Iggrot Moshe*, vol. 3, *Even Ha'ezer*, no.37.

"halakhic" former wife, and even end up being tried for bigamy?

Nevertheless, R. Feinstein ruled that only if the husband had *explicitly* made the halakhic divorce conditional upon a civil divorce could an argument be made on his behalf, but this is not what happened in this case (nor in the case at hand, nor similar ones):

> But for another reason we must rule that he will not be able to argue for cancelling the divorce, for the laws of the state were certainly known to him, and he should have made it conditional that if she files suit based on the laws of the state, whether she files a financial or a criminal suit, there will be no divorce [...] But because he did not make it a condition of the divorce, we see that he was not concerned about it, perhaps thinking he will remain in Israel, or for other reasons. In any case, given that he certainly knew about this but was not concerned to make it a condition, he obviously made up his mind to grant the divorce despite this concern, and we cannot cancel the divorce, even if she sues for something that he does not owe, and even if she files suit to punish him. And if the truth is that he did not know that she can sue him by the laws of the state, there is great concern about the divorce in my humble opinion, *but apparently we can infer that he knew the laws of the state and cannot cancel the divorce.*

In light of all this, it is reasonable to assume that a man who divorces in Israel, especially if he receives legal counsel, is aware of the legal situation in the country and ought not be able to claim a mistake or to argue against the validity of the divorce if he is sued to increase support payments to his children. This is all the more true here given the fact that in this case the argument is about an associated condition, not a matter that is at the basis of the willingness to grant the divorce, as in the case discussed by R. Feinstein.

R. Feinstein wrote the responsum to R. Gedaliah Felder of Toronto. R. Felder himself discussed this case and reached a conclusion similar to that of R. Feinstein, and added a few sources from important decisors from the past.[31]

In sum, both legal logic and halakhic rulings indicate that serious questions must be asked about the claim of the panel that this is a case of wrongful divorce, in which the woman is declared unmarriageable.

A final comment on this point concerns the possibility of a mistake on the part of the husband: when an agreement is reached fixing child support at an unusually low level, as in the present case, and the husband understands that the woman "agreed" to it because she had no choice, it is entirely reasonable for him to assume that there is a good chance that he will be sued to increase the amount in the future.[32]

31 Gedaliah Felder, *Nahalat Tsvi*, vol. 2 (New York, 1972), 459-63.

32 See Daikhovsky, *supra* n.6, at 26, who says the following about the case discussed in the decision at hand: "The rabbinical court should not countenance an agreement of starvation support

5. *Are children bound by the monetary terms for child support set out in their parents' divorce agreement?*

As I noted, according to Israeli law, a claim for child support, even if filed on behalf of the children by their guardian mother, is not subject to the divorce agreement between the parents. The panel in our case regarded the claim on behalf of the child to be a fiction (paragraphs 2-5), considered the mother to be the real claimant, and considered the agreement she signed as preventing a claim on her part for an increase in the child support paid by the father.

In the hearing of the appeal to the decision,[33] the *dayan*, R. Zion Buaron, suggested that this case illustrates how the judges of the family courts, which operate "with the aim of falsifying the truth and with it the law and the *halakhah*, in order to undermine the authority of the rabbinical courts," have "in recent years created a tendentious ruling whereby the minors are not a party to the agreement signed by their parents, and that in fact, the minors, who are not legal entities at all, are the ones filing the claim."

In fact, it is far from clear that the halakhah precludes this sort of claim by a minor aggrieved by divorce decree. Various *dayanim* over the years have ruled that children can sue for support contrary to their mother's obligation in the divorce agreement, especially when it is clear that the mother was forced to agree to a small amount of support because she was eager to obtain the divorce. It is possible to cite many sources from rabbinical jurisprudence that espouse this opinion. Some of them were adduced recently by the judge R. Maimon Nahari, in a decision issued by the Haifa regional rabbinical court. R. Nahari summarized their opinions on this issue:[34]

> The halakhic validity of exempting the defendant [in the divorce agreement] is highly questionable regarding the very essence of the exemption. But even if we assume that it is valid, the defendant has no right or authority to waive her children's support payments, because this is a direct responsibility of the father toward his children, which follows from his obligation and responsibility toward them.

R. Nahari noted the "instructive" statements of the judge, R. Eliezer

---

payments in order to obtain a *get*. If proper support payment had been ruled, the civil court would not have intervened." See also: *Ateret Devorah*, *supra* n.1, at 695; Tib. DRC 7083-21-1 (19.5.2004), *Hadin Vehadayan* 7 (2004), 7. In that case, the *dayanim* ruled not to approve a divorce agreement in which the support payment was lower than what is customary (the agreed payment was only NIS 700), despite the fact that the husband made this a condition for granting the *get,* because it would encourage the woman to file suit, contrary to the agreement.

33 GRC 5951, *supra* n.6.

34 Haifa District Rabbinical Court, Case 9965-64-1, 1.7.2004, www.rbc.gov.il/judgements/docs/43.doc.

Goldschmidt, who indeed voiced an exceedingly clear opinion on the matter (regarding the question of the children's status in the debate on their support): [35]

> [...] Finally, regarding the separation of the litigants, as at one time the dispute is in the name of the parents and they are the litigants, and at another time, as part of the same conflict, the dispute is on behalf of the child, and he is the litigant – it depends on the language of the claim filed in court. I want to say that, in my opinion, there is no doubt that, according to law, the litigant is always the child himself, and his parents are only the guardians who represent him in court and speak on his behalf [...] This principle that the dispute about the child is exclusively his dispute and that he is the litigant, whereas his parents are merely his guardians who speak for him, is valid not only when the question is the custody of the child, but also when the issue [involves] support payments [...]
>
> It follows that the child is always the litigant, and he is the claimant, and the mother is merely a guardian who represents him in his claim and makes the claim on his behalf. And it makes no difference for this purpose whose name appears on the claim submitted to the court. The formulation of the claim is not what determines this matter, because the name that appears in the claim cannot negate the status of the litigant, and it does not have the power to make someone who is not a litigant into a litigant.

Many decisions took this approach, some of which R. Nahari listed – and the list could be expanded. For example, R. Shaul Yisraeli of the Great Rabbinical Court wrote the following in a case in which the mother renounced the children's support payments in the divorce agreement in order to obtain the divorce:[36]

> The first question before us is whether the mother's signature on the divorce agreement on behalf of her children as their guardian is efficacious in absolving the father of support payments for his children.
>
> Indeed, even if we regard the mother as the guardian, although the court did not designate her as such for the purpose of state regulations, based on the essence of Jewish law, a guardian is not entitled to litigate claims for the children, and if he litigated and lost, the decision is cancelled. The same is true for a claim on behalf of orphans. But in the present case there was no claim for them, and the agreement was between the father and the mother, as part of the agreement between them regarding the divorce. But this clause in the agreement, that the mother, as the guardian of the children, renounces their right to support payments from the father, was – as far as the children are concerned – only a concession, without any compensatory benefit. And it was done only for the benefit of the mother, because of the husband's stubborn refusal to grant the divorce. But the children had nothing to do with this,

35 BDM 1/60 *Winter v. Beeri,* [1961] PD 15, 1457, 1484-1486. See also the opinion of R. Goldschmidt in T.A. DRC 226/1954, PDR 1, 157.

36 S. Yisraeli, *Mishpetei Shaul* (Jerusalem: Erets-Ḥemdah, 1997), 178. See also the opinion of R. Kafiḥ in this judgment.

> and thus the father did not pay a penny for their support. It follows that for the children this was a release without any return, something that the guardian is certainly not entitled to do, and the release and concession are not efficacious, especially based on what has been noted [above] concerning a guardian who litigated for the children and lost the litigation.
>
> And therefore, the support payments that the father owes his children remain in effect, and the release and concession on their behalf in order to collect from the mother has no validity [...]

This idea, whereby the child is not subject to the divorce agreement of his parents, and it is possible to claim on his behalf higher maintenance than that specified in the agreement, is repeated in one form or other in a series of decisions,[37] as for example in Rabbis Yosef Kafiḥ,[38] Ovadia Yosef,[39] and Shlomo Daikhovsky.[40] It is therefore difficult to maintain (as our decision does) that the family court's acknowledgement of a child support claim filed by the mother (wearing her guardian's hat) as a claim that stands on its own right and is not subject to the mother's obligation in the divorce agreement is *necessarily* a legal fiction, contrary to the *halakhah*, and that its sole purpose is to deprive the rabbinical court of its authority.

6. *An Attempted Explanation*

It is clear that lately there has been an increasing number of cases of this type, and a tendency to invalidate divorces that in the past would not have been invalidated. What is the explanation for this phenomenon? Furthermore, why did the present panel act as it did? Why did it raise on its own initiative the issue of the validity of the divorce? Why does it appear to be making a special effort to justify the invalidation of the divorce, relying on highly problematic sources? Moreover, it should be mentioned that in some of the cases, an issue of *mamzerut* may arise.

The immediate answer is that this is a simple case of strict application of the

37 Besides the decisions listed by R. Nahari, *supra* n.34, we can add other rabbinical rulings to the effect that there is no connection between the divorce agreement and the obligation of child support. See Radzyner, *supra* n.3, 208-11.

38 Y. Kafiḥ, *Edut Biyehosef*, ed. I. Wahrhaftig (Jerusalem: Yad Harav Kafiḥ, 2004), 141-43. See also *ibid*., 92-93.

39 In the first decision mentioned in the previous note.

40 R. Daikhovsky emphasized that the mother's obligation, especially such that was undertaken for her own needs and not out of consideration for her children's welfare, does not prevent obligating the father to higher support payments than what is specified in the agreement, published in "Support Payments in Advance" (Heb.), *Teḥumin* 13 (1992), 313, 316. See also his article: "A Husband Who Makes the Granting of Divorce Contingent upon Cancellation of his Previous Obligations" (Heb.), *Teḥumin* 26 (2006), 156-159, at 157.

law. Some may call it יראת הוראה or יראת הדין ("fear of the divine law") which might create a motivation to conform with all opinions, even the most strict ones, because the validity of a divorce is perhaps the most sensitive issue of the *halakhah*. We have many such examples, especially with regard to fear of a coerced divorce. However, this is not a convincing explanation because the court is stricter than even the strictest sources it relies upon. It seems that even Maharam of Lublin himself would not have been as strict as the present panel, had he been judging a similar case.

It therefore appears that the key to the decision of the present panel, as well as of that of the Great Rabbinical Court, which has of late adopted this strict approach, must be found elsewhere. The explanation is quite simple, and is related to a new stage in the struggle for authority between rabbinical and civil courts in Israel.[41] There is no doubt that the feeling of the *dayanim* regarding the erosion of the authority of rabbinical courts in matters of divorce has a basis in reality.[42] We have also seen that their sense that the divorce agreements they approve are effectively cancelled by the legal practice (not a new phenomenon to be sure) of allowing suits to be filed on behalf of the children in civil court is also well founded. The erosion of the authority of the rabbinical courts has accelerated in recent years and reached its zenith with the High Court of Justice (hereinafter: HCJ) ruling in the *Amir* case,[43] which removed the authority of rabbinical courts to adjudicate financial matters (both in cases that are related to the divorce process and those that are not). Indeed, the HCJ ruling sparked a public protest on the part of *dayanim*, who claimed (or should we say warned), *inter alia*, that this ruling would result in many instances of wrongful divorce.[44] All the private legislative initiatives in the Knesset that were designed to restore to rabbinical courts the

41 See P. Shifman, "Jewish *Halakhah* in a Changing Reality: What Delays the Women whose Get is Delayed?" (Heb.), *Alei Mishpat* 6 (2007) 27-46, at 40-41, 44-45.

42 For more about this matter and the attitude of the rabbinical judges to it, see, e.g., S. Daikhovsky, "Rabbinical and Civil Courts: Insights on the Friction between Them in Family Law Matters" (Heb.), *Mozney Mishpat* 4 (2005), 261-302; Shifman, *supra* n.41, at 42-45.

43 HCJ 8638/03 *Amir v. Great Rabbinical Court* (2006), http://elyon2.court.gov.il/files/03/380/086/R08/03086380.R08.htm. I am not arguing that the panel in this case was influenced by the HCJ ruling, for most of the decisions under discussion were issued before, but it seems that the Great Rabbinical Court was influenced by it in the present ruling, as we shall see below.

44 See, e.g., N. Sela, "The Rabbis vs. the High Court of Justice: 'It Will Result in an Increase in the Number of Women Who Are Denied a *Get,*'" *Ynet* 20.04.06 www.ynet.co.il/articles/1,7340,L-3241838,00.html. See also the ruling of the Great Rabbinical Court in an arbitration case, issued about one month after the HCJ ruling (R. Daikhovsky headed the panel): GRC 5305-24-1 (14.5.2006), www.rbc.gov.il/judgements/docs/250.doc. This ruling states, regarding the HCJ ruling in the *Amir* case: "This ruling is liable to create a halakhic problem regarding the validity of the *get*. Although we are not eager to invalidate a *get* that has been granted, and we make every effort to separate between the arrangement of the *get* and other controversies, the very fact that a question arises, when matters are often interrelated, indicates that the debate cannot be split."

authority removed by the *Amir* ruling included the statement that "the narrowing of jurisdiction according to the HCJ ruling is liable to result in an increase in cases seeking to invalidate divorce documents by claiming wrongful divorce, and, God forbid, an increase in the number of *mamzerim*".[45] It is not surprising, therefore, that the Great Rabbinical Court should also be influenced by these developments, and in the present case, to approve for the first time a ruling of wrongful divorce. Indeed, the assumption that at the bottom of this new judicial direction is the desire to protect the jurisdiction of the rabbinical courts (especially after the *Amir* ruling) is reinforced by the closing comments of the Great Rabbinical Court in our case, which specify the factors that contributed to the wrongful divorce ruling:[46]

> [...] We strongly disagree with the legal practice that has developed with the opening of the doors of civil courts to the possibility of annulment of peremptory rulings issued by rabbinical courts which underlie the divorce arrangements . Furthermore, following the ruling of the HCJ, there is a problem with the jurisdiction of the rabbinical court dealing with breaches of the divorce agreement following the divorce. This raises a serious issue of "wrongful divorce":
>
> > [...] The court is not eager to invalidate a divorce, and indeed, this is one of the rarest of occurrences. In the new reality, in which they try to tie the hands of the rabbinical court, so that they cannot continue deliberating on the agreement they approve, and when civil courts are eager to annul with great ease agreements reached in the rabbinical court, they are liable to cause severe damage, and then who knows what will happen. Serious thought should be given to a reconstruction of the jurisdiction of the rabbinical and family courts so as to eliminate the overlapping jurisdictions, so that each [court] will operate within its own jurisdiction [...]

Against the background of this intensifying and continuing struggle over jurisdiction, the rabbinical court appears to be attempting to respond by decreeing that filing a claim in civil court that is contrary to the clauses of the divorce agreement that was approved in the rabbinical court, is liable to have repercussions regarding the validity of the divorce.[47] In other words, according to the present panel, suing for child support in family court is not always only a financial matter

45 *The Rabbinical Court Jurisdiction (Marriage and Divorce)* Bill (Amendment – Jurisdiction by Agreement in Civil Matters and Ancillary Jurisdiction) 2006, www.knesset.gov.il/privatelaw/data/17/488.rtf. Similar bills have been introduced by several Members of Knesset from the various religious parties, and all of them contain the sentence quoted above.

46 Great Rabbinical Court File 5951-21-1, 15.1.2008, *Hadin Vehadayan* 17 (2008), 9.

47 At the Fifth Annual Conference on Women, Family, and the Law, held at Bar-Ilan University's Rackman Center on 1.1.2008, Adv. Asher Roth, who had served as Legal Advisor to the Administration of Rabbinical Courts until a few years before that date, confirmed the idea presented here. According to him (and he does not approve of this move by the rabbinical court), withholding the *get* is the last weapon left to the rabbinical court in the struggle over jurisdiction with the civil courts, and its objective is to force the woman to return to the rabbinical court to obtain an additional *get*, which makes it possible to restore the situation to what it was before she turned to the civil court.

associated with the parents' divorce, but can definitely affect the woman's marital status (whether she is divorced or married), and as such, according to Israeli law, it is a matter under the exclusive jurisdiction of the rabbinical court. Moreover, not only does the decision force the woman to return to the rabbinical court and renounce her gains in family court in order to regain marriageable status,[48] but a clear threat has been issued here against women who consider filing suit in family court for an increase in maintenance or in similar matters.

Dayanim who invalidate a divorce are well aware of the limitations faced by the HCJ. Although the HCJ interfered broadly in matters having to do with the jurisdiction of rabbinical courts, and reduced it significantly over the years, for obvious reasons the HCJ has avoided until recently interfering in questions surrounding the validity of divorce.[49] The attempt of rabbinical courts to regain lost jurisdiction by means of threatening the validity of divorce appears to cause a severe problem for the HCJ, even in cases in which there is a simple and time-honoured legal ruling in Israel, such as the one that decrees that children are not bound by the divorce agreement between their parents, who can file on their behalf a claim in civil court. Indeed, the only case in which a petition was filed with the HCJ in a case of wrongful divorce was rejected on jurisdictional grounds because the appeal submitted to the Great Rabbinical Court had not been exhausted, but the ruling contained a clear hint as to the authority that ought to deal with this matter:[50] "As to the concern expressed by the appellant regarding the consequences of a wrongful divorce, it makes sense that the rabbinical courts, headed by the Great Rabbinical Court, deliberate on the matter as soon as possible and rule in these matters." This ruling confirmed another decision of the present panel, which even before the appeal to the HCJ (and possibly being aware of the woman's intention to appeal) had already decreed that only the rabbinical court is authorized to adjudicate matters concerning the validity of divorce.[51]

The issue of wrongful divorce is not the only one in which we can discern a tendency on the part of *dayanim* to rely on minority opinions in the *halakhah* or on

48 In other decisions issued by this panel as well, the woman was obligated to return to the husband everything she received or will receive from him based on the decision of the civil court. This possibility was also raised in the Great Rabbinical Court by R. Algarbali in File 9225, *supra* n.2. The other members of the panel did not raise the issue, and it was rejected on appeal: File 5951, *supra* n.46.

49 See, e.g., HCJ 8872/06 *Ploni v. Great Rabbinical Court* (2006), http://elyon1.court.gov.il/files/06/720/ 088/T03/06088720.t03.htm, in which Justice Rubinstein wrote as a general rule: "Matters of *get* and their validity are a central foundation in the jurisdiction of rabbinical courts that rule according to Torah law, and this Court will not assume the role of ruling according to *halakhah*." See his reference there to an earlier ruling on this matter.

50 HCJ 9820/06 *Plonit v. Tel-Aviv District Rabbinical Court* (2006), http://elyon1.court.gov.il/files/06/200/098/Z01/06098200.z01.htm.

51 T.A. District Rabbinical Court File 8369-29-1, 29.5.2006 and 19.6.2006, *Hadin Vehadayan* 15 (2007), 5.

esoteric halakhic sources and interpretations, contrary to the custom and practice of rabbinical courts in preceding years. In other cases as well, the simple explanation (stated at times by the *dayanim* themselves) is the desire to protect the jurisdiction of the rabbinical courts or to reclaim it after it was taken away by the civil courts – but this topic is beyond the scope of the present article.[52]

7. *A proposed Solution and Conclusion*

Even if these last statements have exhausted our topic, the many difficulties raised by the present case and by similar ones indicate that rulings of wrongful divorce are not at all simple. It is difficult to avoid the feeling that the use of the threat to the validity of divorce is not readily consistent with halakhic sources and that it derives from the rabbinical court's desire to protect its jurisdiction as mentioned above.

However, the actual decision under discussion (in paragraph 12) offers a simple solution which would avoid any need to consider voiding the divorce, even according to the strict approach. Indeed, *Beit Meir* was concerned about the opinion of Maharam of Lublin in the case of a divorce granted by a man on his death bed; and in order to avoid a doubt as to whether a deception was involved, in a situation such as that of the "Vienna *Get*", recommended clarifying matters to the husband unequivocally:

> [...] that even if the woman is unfaithful and will want to act fraudulently and break the promise not to marry another man, even despite this the divorce will be valid, without any relation to the breach of the obligation.

In other words, so long as it is made clear to the husband that the validity of the divorce is not dependent in any way on the woman keeping the obligation that she undertook in order to obtain the divorce, the husband will not be able to claim that he was deceived because he had intended to grant the divorce only with the understanding that the obligation would be met. We must reiterate that the statements of *Beit Meir* are aimed at a much more significant breach (as in the case of the "Vienna *Get*") than the violation of an associated agreement discussed by the present panel, a distinction I discussed above.

R. Uriel Lavi (in his article mentioned in paragraph 6 of our decision[53]) reported these statements by *Beit Meir* and showed that they have been cited by other decisors. He therefore recommended that at the time of the granting of the divorce, the judges explain them to the husband:

52 I discuss this in my article: "Problematic *Halakhah*: Creative Halakhic Rulings in Israeli Rabbinical Courts", *Jewish Law Annual* 20 (forthcoming).

53 *Supra* n.1, at 182-83 and 190.

> So that even if after the granting of the divorce it turns out that he had been misled, the divorce is final and does not depend on some other matter. And it is worth telling him as far as honouring the agreement in the future, that even if the woman does not honour the agreement, the divorce does not depend on it.

Indeed, *dayanim* in the past and in the present have made sure to mention explicitly at the time of the granting of the divorce that its validity is not dependent on honouring the divorce agreement. R. Daikhovsky attested to this, and proposed reinstating this practice:[54]

> I have reached a ripe old age and I remember divorce settlements in the past [...] In every divorce settlement, before the divorce was granted, they used to say the following to the parties: "The divorce is final and cannot be annulled in any way." In any case, this practice ought to be reinstated to avoid complications.

In light of the legal situation in Israel, the importance of a clarification of this type is obvious. *Dayanim* are well aware that under no circumstances can the divorce agreement protect the husband against a future claim that the woman may file on behalf of the children. This is how the rabbinical court in Netanya, for example, appears to have understood matters when it clarified to the husband that a breach of the wife's promise not to claim an increase in support payments in the future could not affect the validity of the divorce[55] (needless to say, the *dayanim* in our case did not suggest making such a clarification, although they surely were aware of the recommendations of *Beit Meir* and R. Lavi, indicating apparently that their real intention was to wield the threat of wrongful divorce). Furthermore, this clarification should be added, if possible, to the divorce agreement itself.[56]

Whatever the meaning may be of the increase in the number of wrongful divorce rulings in Israel in recent years, the difficulties this trend poses seem obvious. These difficulties, and the criticisms voiced here with regard to the decision under discussion, are mostly parallel, and are not dependent one on the other, which makes it possible to accept some of these criticisms, even if rejecting

54 GRC 5951, *supra* n.28. See also Daikhovsky, *supra* n.6, at 26; Yacobi, *supra* n.8, at 160.

55 Net. DRC 0408-21-1 (14.11.2007), *Hadin Vehadayan* 17 (2008), 8. In some rabbinical courts, as a matter of routine, the *dayanim* who arrange the *get* utter a formulaic sentence in front of the husband, to the effect that "even if the divorce agreement is breached by one of the parties, the *get* will not be invalidated." Some courts demand that the husband make the statement himself, as part of the nullification of notification. See, e.g., M.B. Ralbag, *Avnei Mishpat* (Jerusalem, 2004), 82.

56 Adv. Prof. Dov Frimer told me that already in the 1970s, the well-known decisor R. Eliezer Waldenberg recommended including the following clause in divorce agreements: "The parties agree and declare here that the validity or invalidity of this agreement, its breach, or the modification of any of its clauses shall not affect in any way the validity of the *get*." According to Prof. Frimer, it would thus not be necessary to rely on the rabbinical court to explain to the husband that the agreement is not related to the *get*. He added that Chief Rabbi Amar approved of this recommendation and suggested that lawyers adopt it.

others. In any case, the picture that emerges from the analysis offered here is a grim one, both in terms of the outcome of the decision and from the perspective of its halakhic foundation.

It is important to note that each case must be examined on its own merit. The level of criticism and the issues raised here can definitely change according to the particulars of the case, the contents of the divorce agreement, and the manner of its breach. Nevertheless, I have stressed the fact that the panel that wrote the present decision used the same type of argument and the same sources in other decisions as well, without making such distinctions. As we have seen, the approach has recently been adopted by the Great Rabbinical Court as well.

In light of all this, it seems that the leaders of the rabbinical judicial system should encourage all rabbinical courts that adjudicate divorces to employ the cautionary note recommended by Beit Meir. A clarification of this type by the *dayanim* adjudicating the divorce would make it very difficult to claim that the husband has been misled.

A last word: in many cases, a breach of the contract, especially very close to the time when the divorce is granted, causes uneasiness, and perhaps there are instances in which it deserves censure and requires a response. My central argument is that withholding or voiding the divorce is not the solution to the phenomenon, and certainly not as a simple and necessary consequence, as it is presented in the decision under discussion and in similar ones.