GENDER , MULTICULTURALISM AND DIALOGUE: THE CASE OF JEWISH DIVORCE

Immigration, Minorities and Multiculturalism
In Democracies Conference
Ethnicity and Democratic Governance MCRI project
October 25-27, 2007
Montreal, QC, Canada

Dr. Lisa Fishbayn
Director, Project on Gender, Culture, Religion and the Law
Hadassah-Brandeis Institute

GENDER , MULTICULTURALISM AND DIALOGUE:

cultural dialogue may be necessary to resolving disputes over women's rights and cultural rights,

> … it is unlikely to take us far in the abstract and contextless form proposed by its advocates. Unlike philosophical deliberation about politics, a political dialogue occurs within a particular society with a particular moral structure, history and traditions, and its participants are not abstract moral beings but constituted in a certain way. [1]

To this end, this article examines the role of dialogue in the concrete context of state intervention to alleviate women's disadvantage under Jewish religious divorce practices in Canada. After locating the position of women in debates over the rights of individuals and minority cultural communities, the article outlines the role envisioned for transformative, dialogic remedies in theories of multicultural accommodation. It then describes the particular problem women face under the Jewish laws of divorce.[2] It identifies some of the pitfalls for agunah legislation which emerged in New York State's landmark legislation in 1983. It continues by discussing the role Canadian civil legislation to aid *agunot*[3] has played in fostering a lively and ongoing local, national and

---

[1] B. Parekh, *Rethinking Multiculturalism: Cultural Diversity In Political Theory* 267 (London: MacMillan Press, 2000) at 267.

[2] *Halakha* or Jewish Law is not recognized or enforced *as law* by the Canadian state. Rather, it binds adherents who choose to be subject to its strictures and to submit to the jurisdiction of *Batei Din* (Jewish Rabbinical Courts). It may be possible, however, for parties to use rabbinical courts and religious law in order to arbitrate their private disputes. The different movements within Judaism hold diverse views about the binding nature of *halakha* and its interpretation. The issues discussed in this paper largely impact upon the adherents to Orthodoxy.

[3] In Hebrew, literally "anchored women" -- women denied a divorce by their husbands. Traditionally, the term *agunah* referred only to a woman whose husband had disappeared through abandonment or misadventure. The popular use of the term has now expanded to include women who are unable to remarry because their husbands refuse to divorce them. Some authorities refer to these women as *mesurevet get*, women who have been refused a *get*. While Talmudic law has developed a range of lenient remedial strategies to deal with women whose husbands have disappeared, these leniencies do not apply to women

international debate over how to find a Jewish law solution to this problem. It concludes that this law reform strategy was effective in fostering the transformation of a discriminatory minority norm and identifies certain distinctive features that may serve as a model for other similar efforts. Key among these were the fact that the reform responded to a need identified by diverse and influential members of the community, the reform was carefully drafted to respond to the nuances of the relevant minority cultural norms through a process of dialogue with women and religious authorities, and the reform was drafted in legislative terms flexible enough to be used in creative ways by cultural insiders.

II: Gender in faith based communities as a key conflict in multiculturalism

Women's rights are often at issue in legal struggles over multiculturalism and equality. The reasons for the centrality of women in these controversies are historical, pragmatic and symbolic.[4] Historically, a key strategy for accommodating cultural

allowing tribal and religious leaders to continue to retain power over family law. [5]

> Women are represented as the atavistic and authentic body of national tradition (inert, backward-looking and natural), embodying nationalism's conservative principle of continuity. Men, by contrast, represent the progressive agent of national modernity (forward-thrusting, potent and historic), embodying nationalism's progressive or revolutionary principle of discontinuity"[9]

Attempts by women to repudiate the task of embodying the traditional in this symbolic equation by seeking to transform their roles may therefore be perceived as a particularly worrisome threat to the identity and continuity of the group.

III. The place of dialogue in multicultural theory

Theoretical responses to the problem of gender equality and multicultural accommodation vary. Some urge the abolition of discriminatory cultural practices, giving priority to equality and short shrift to the claims of culture. For example, Susan Okin argued that:

> In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed, they *might* be much better off if the culture in which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women – at least to the degree to which this value is upheld in the majority culture. [10]

[9] Anne McClintock, *Imperial Leather: Race, Gender And Sexuality In The Colonial*

except in the case of “gross and systemic violation of human rights such as slavery, genocide, or mass torture and expulsions”.

Both the interventionist and immunization approaches have shortcomings. State intervention may not work if authoritative members of the community reject its innovations as illegitimate and women fail to take advantage of these changes. On the other hand, the immunization of cultural practices, even where accompanied by a formal right to exit for victimized women,[15] may allow conditions of injustice to be perpetuated.

[15] The recommendation to immunize minority communities from state intervention to redress discrimination against female co

Some political theorists of multiculturalism have sought to identify a third way. These approaches seek to engage cultural communities in the processes of re-evaluating their discriminatory practices and identifying egalitarian solutions that will be both legitimate and enforceable. A key strategy in these approaches is the fostering of intra-cultural and cross-cultural dialogues about gender, equality and law reform.[16]

What does this dialogue look like and how effective is it at redefining contested norms? Before setting out to look for examples of dialogue that has been fostered by legal interventions, the notion of dialogue at play here needs to be clarified. The model of dialogue I consider has grown out of a critique and revision of John Rawls' notion of public reason in *Political Liberalism*. Rawls' conception suggests that people with diverse values and cultural commitments can reach meaningful agreements on the political principles and policies by which to govern themselves if they adhere to certain procedural rules.

---

[16] See, J. Tully, *Strange Multiplicity: Constitutionalism In The Age Of Diversity* (Cambridge: Cambridge University Press,1995); I. M. Young, "Communication and the Other: Beyond Deliberative Democracy" in S. Benhabib ed., *Democracy And Difference: Contesting The Boundaries Of The Political* (Princeton: Princeton University Press,1995); M. Nussbaum, *Women And Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) at 217, A. An-Na'im, "State Responsibility Under International Human Rights Law To Change Religious And

Rawls' notion of dialogue follows from his conception of liberalism as a political value rather than a comprehensive system. In comprehensive (or sometimes, perfectionist) liberalis

the context of gender and multicultural accommodation, political liberalism thus requires that women be treated as equals with regard to access to public goods distributed or regulated by the state, but is consistent with women being viewed and treated unequally in private cultural and religious life. [18]

However, the significance of this public/private distinction becomes less clear where the cultural and religious groups play a mediating role in distributing basic political goods such as access to education, freedom from illegitimate violence and, in the context of Jewish divorce, equality before and under the law. The political state may see an issue of political equality where representatives of the cultural or religious minority see a private moral practice. Members of the cultural community may disagree among themselves about the applicability of political equality norms. Dialogue is a strategy for working through these conflicts.

Dialogue in political liberalism has five key features:

1) It focuses on a narrow range of topics, ideally on the elaboration of political and legal norms which govern the elements of social life in which all groups must participate and co-operate.
2) The venue envisioned for this dialogue are the forums of official political life – electoral politics, civil administration and the judicial and legislative processes.

[18] Idanna Goldberg described the dynamic as it applies to women grappling with their position under Jewish law this way: "In 1866, when Eastern European Jews were first experiencing their own encounter with modernity, the poet Judah Leib Gordon suggested that Jews should be men in the streets and Jews in their home. For these Orthodox women this dictum now reads: "Be feminist in the streets and Jews at home." "Is Jewish Orthodox Life Threatened by Changing Gender Roles", *Choosing Limits, Limits Choices: Women's Status And Religious Life, supra,* note 15.

3) Agreements reached through this process should be durable Rawls cautions that dialogue aimed at finding consensus about norms across differences which does not adhere to these criteria might reach the appearance of agreement, but it would not be rooted in deep conviction. It would only be a *modus vivendi* , a temporary fix, liable to be abandoned by some of the parties when the balance of power between them shifts.[19]

4) It is carried out through certain forms of argument – Political liberalism tries to find bases for consensus about rules for interaction in the political sphere, not consensus on the moral values which underlie these rules. Thus people should not appeal to arguments which are only persuasive to others who share their moral beliefs in a religious or ideological system (a "comprehensive doctrine" in Rawls' jargon). They cannot, for example, invoke divine revelation or religious dogma to back up their arguments. Rather public reasons must be consistent with a shared commitment to the dominant conception of justice in the society and expressed through standard forms of inference and evidence

[19] Rawls worries that democracy which operates by simply allowing diverse parties to have their voices heard but which then decides based on majority opinion rather than on some unified set of reasons will not be stable. The instability will manifest itself in a lack of commitment to the political compromise because it is too dissonant with the comprehensive doctrines to which individuals are committed in their private lives. As a result of this limited commitment to and understanding of the political conception, people may lack the facility with public reason to be able to resolve conflicts as they arise in the future. *Political Liberalism* (New York: Columbia University Press, 1993) at 143-48. Amy Gutmann and Dennis Thompson would take the limits on public reason even farther, excluding arguments which are based on self-interested, strategic perspectives rather than perspectives rooted in moral argument. A. Gutmann and D. Thompson, *Democracy And Disagreement* (Cambridge, MA: Harvard University Press, 1996) at 192-205.

5) Discussants should be able to affirm the political agreement because it is in accordance with values internal to their own comprehensive doctrines. This means they are able to do the work of translating neutral public reasons into private ones which can be justified in terms of their religious or cultural moral values. This results in what Rawls calls an overlapping consensus where a legal strategy, for example, is accepted by different parties for different reasons. Some may agree to it because it reflects liberal values they hold dear. Others may be indifferent to such values, but accept it because it also happens to be consistent with their religious moral norms. Later in this paper, I suggest that the Canadian *get* legislation was able to achieve this overlapping consensus, acceptable to liberal lawyers, government and constitutional scholars because it addressed an injustice in ways that did not commingle church and state and was acceptable to rabbinic authorities because it addressed this harm in a way consistent with Jewish law.

Ideally, in the context of dialogue over how to reconcile women's rights to equality and cultural or religious claims to preserve practices which violate these rights, observance of these strictures on dialogue would encourage proponents of discriminatory practices to reflect critically upon them. They might revise their defenses of these ms [illegible]

However, as Monique Deveaux has pointed out, these formal limits may stop these important conversations before they start.[21] Rawlsian discussants must enter into dialogue already committed to a minimal set of liberal procedural and political values, and must be capable of translating their moral values into the language of liberal norms. How can members of orthodox religious groups or traditional cultural groups who have little experience with or facility with these ideals participate? How are they to develop these capabilities? Many critics have noted that this model does not give enough emphasis to the role that engagement in liberal dialogue may play in *building* a commitment to liberal values. As an alternative, Seyla Benhabib -0.000Tj10.D141.5 0 T8urg ths to wsisw(tr

4) Finally, Rawls' preference for durable solutions rather than short term accommodations may be misguided. A temporary fix may be all that is possible at a given point in time, but it may lay the foundation for future developments in terms both of establishing useful precedents and of creating competence in self-reflective moral argument. Tentative, revisable consensus about particular legal strategies should be seen as a resource, not a hindrance, to ongoing processes of law reform.[26]

So the political theory of multiculturalism prescribes a strategy of pragmatic, multi-local dialogue among discussants with potentially diverse interests, objectives and styles of argumentation. Can the state play a role in fostering such dialogue? Theorists such as Martha Nussbaum and Abdullah An'Na'im suggest that the law reform process be used as an occasion for dialogue between state and religious communities about the revision of discriminatory norms.[27] Ayelet Shachar has suggested that regulatory engagement with conflicts over gender equality and culture constitutes a terrain upon which transformative renegotiation of traditional norms may occur.[28] In the rest of this paper, I will test this approach by looking at Canadian legislation aimed at alleviating the plight of women under Jewish divorce law with a view to identifying the ways in which this legal intervention may have grown out of or may have fostered transformative dialogue about patriarchal norms in Jewish law.

---

[26] Deveaux, *supra* note 21 at 351.
[27] Nussbaum, s*upra* note 16 at 8 ; A. An-Na'im, *Toward An Islamic Reformation; Civil Liberties, Human Rights And International Law* (Syracuse: Syracuse University Press, 1990) at 162.
[28] Shachar, *supra* note 15.

IV. The Problem in Jewish Law

When one marries in a Jewish ceremony in the Anglo-American legal world, two legal relationships are being created. [29] In his capacity as clergy person, the rabbi is assisting in the contracting of a Jewish marriage contract.[30] In his capacity as a marriage officer licensed by the state, he is also solemnizing a civil marriage. If the relationship should break down, the religious and civil marriages must be dissolved through two distinct processes.[31] The civil marriage may be terminated through a civil divorce in state courts. The Jewish marriage, however, can only be dissolved through termination of the contract before a Jewish religious court (a *beit din*).

---

[29] *Lord Hardwicke's Marriage Act* of 1753 established that English marriages could only be contracted through participation in a sacrament of the Anglican Church. However, Jews and Quakers were exempted from this requirement and were entitled to solemnize marriages under their own religious norms. C. Hamilton, *Family, Law And Religion*, (London: Sweet and Maxwell, 1995) at 43. The British *Marriage Act of 1836* extended this right to adherents of other Christian denominations. S. 20 of the *Ontario Marriage Act* is to the same effect. When dissolution by divorce became possible in 1857, the civil aspect could be terminated and resolved in accordance with civil law. The Jewish marriage, however, can only be dissolved by a religious court. The parties are free to resolve questions of ancillary relief in accordance with civil law procedures, religious law norms or any other criteria they might elect in settlement negotiations.

[30] A purely religious marriage will not be recognized as valid in civil law, unless the parties entered into it in good faith, believing that they were thereby creating a valid civil marriage. See, *Friedman v. Smookler*, 43 DLR (2d) 219 (1963) (Ont. H. C.). The wife sued for a declaration that her *halakhic* marriage to her late husband had created a valid marriage which entitled her to inherit his estate. A recent immigrant, she had relied on her rabbi husband's assurances that religious marriages were recognized by the state in Canada.

[31] This formally applies only to members of the Orthodox and Conservative movements within Judaism. The Reform movement abolished the *get* requirement in 1869 and views the religious marriage as coterminous with the civil one. However, Reform clergy may urge their congregants to secure a *get* so that their divorce will be recognized by the other branches of Judaism. Reitman, *supra* note 15 at 7. The New York Supreme Court has held that withholding a *get* to dissolve a marriage solemnized by clergy of the reform movement constitutes refusal to remove an impermissible barrier to remarriage and may be taken into account in determining property redistribution and maintenance awards. *Megibow v. Megibow*, New York L.J. May 17, 1994

Marriage at Jewish law differs from Anglo-American civil marriage and the model of Christian religious marriage upon whic

Finally, the wife cannot end the marriage through a parallel process of renunciation. She may initiate proceedings that invite the husband to come before a *Beit Din* to discuss delivery of the *get*, but cannot compel him to deliver it. Again, rabbinical judges (*dayanim*) are present at the delivery of the *get* to ensure that formalities are complied with, but the court has no power itself to issue a divorce. [37]

Only the husband can give a *get* and rabbinic law states that it will be invalid (*meuseh*) if given under most forms of coercion from third parties, including coercion by civil authorities. The only permissible coercion is that aimed at enforcing a pre-existing rabbinical court ruling to deliver the *get*. A civil court may then be seen as acting to enforce a rabbinical court ruling if it essentially tells the husband "do what the Jews are telling you to do". [38] There are a strictly limited number of situations in which a rabbinical court will make such an order instructing the husband to give a *get* by issuing a

[37] The *get* procedure entails that the husband instruct a scribe to prepare the bill of divorcement in the presence of two legitimate witnesses. In theory, this is all that is required, but in practice, this is always done in the presence of a rabbinical court which will attest to his having followed all requisite procedures. Such attestation may be necessary to the *get* being considered valid in the future for the remarriage of the parties. The scribe writes out a boilerplate statement that the *get* is given and received freely. It is signed by the witnesses and delivered in their presence. The husband drops it into the wife's cupped hands and states that "This is your *get* and you are divorced from me and permitted to marry any other man". The wife 0.001 T0man".6Tcicaivil cwife's3 Treely.7.79ich

chiyuv get (compulsory order)[39] but *batei din* are reluctant to make these orders and find

In situations where a compulsory order would not be appropriate, the withdrawal of favors from the husband in order to encourage delivery of a *get* is permissible .[43] These permissible strategies include *cherem,* a decree of the *beit din* that all Jews must shun the recalcitrant spouse, refrain from engaging in business with him, refuse to circumcise his sons or bury his dead relatives.[44] However, the effectiveness of such

to permit him to remarry without divorce. In Sephardic communities, the consent of only a single rabbi may be sufficient.[47] For example, in a recent incident in Los Angeles, the

identified as a women's issue? The difference lies in the impact which this marital limbo has on the future of the chained spouse.

A man whose wife refuses to receive a *get* generally cannot remarry in Jewish law except under the extraordinary circumstances noted above, but if they are divorced under civil law, he can remarry under civil law. This marriage will not be recognized under Jewish law, but he and his descendents will not suffer any lasting legal disability as a result. If and when his first wife accepts the *get*, he can undergo a Jewish marriage ceremony with his new wife to secure recognition for it.

For a woman, however, refusal by her husband to deliver the *get* may have implications that last for generations. Should she remarry under civil law and have children, any children she has will be viewed as illegitimate, the products of adultery. These children, *mamzerim*, suffer a permanent legal disability, and are not eligible to have their marriages sanctioned under Jewish law unless they marry other *mamzerim* or converts.[51] This status impacts all of the woman's descendents for all generations to come.[52] Moreover, if she cohabits, or in some communities, merely dates, with a view to later marrying her new partner when the *get* comes through, she will be prohibited from marrying him because the relationship with him is deemed adulterous. [53]

---

because she retains her entitlement to receive maintenance from the husband so long as the Jewish marriage subsists. John Syrtash, personal communication, December 16, 2006.

[51] *Babylonian Talmud Kiddushin,* chapter 4.

[52] "No one misbegotten shall be admitted into the congregation of the LORD, none of his descendents , even in the tenth generation, shall be admitted into the congregation of the LORD'. *Devarim* 23:3.

[53] Wegner, *supra* note 33 at 65, citing *Baylonian Talmud* Gittin 8:5. "[The wife who remarried on the strength of the invalid *get]* must leave both men. ***[Her first husband must divorce her for her technical adultery, and her second "husband" now recognized as her paramour, must likewise send her away].*** [Italics and bold in the original].

All this is awful, but why is this a concern of the civil law? It is problematic because the power men enjoy under Jewish law to withhold a *get* becomes an effective bargaining endowment in the resolution of civil family law disputes. [54] In many Anglo-American regimes, including Canada, the last decades have seen the adoption of doctrines that give women an equal share of the family property and an equal right to custody of children on divorce. In most cases, divorce law does not operate through having judges impose rulings in particular cases. Rather, expected outcomes under the law provide a framework of bargaining chips that the parties themselves deploy in negotiating their post-divorce rights and responsibilities regarding property, custody and maintenance. When the *get* is an issue, it is not unusual for husbands to offer a *quid pro quo* in these negotiations, asking the wife to renounce her rights under civil law in exchange for his agreement to give the *get*. These sorts of distorted negotiations may leave women and children in poverty after divorce, transferring the burden of their support on to the taxpayer. They also subvert the public interest in ensuring that decisions about custody are based on the best interests of the children, not on any extraneous factors. Such extortion makes a mockery of the civic public policy of ensuring equality between spouses and the provision for dependents upon divorce.

IV. The New York State Experience

In order to understand how the Canadian legislation was drafted and why it works effectively, it is useful to set it against the backdrop of the controversial legislative

[54] On the concept of bargaining endowment

regime aimed at removing barriers to remarriage that was created in New York State in the early 1980s.

There are two moments in this legislative history. Legislation first passed in New York in 1983[55] allows a court to withhold a civil divorce decree from a petitioning husband unless and until he removes barriers to his wife's religious remarriage. It was developed through an effort led by the Orthodox group, Agudath Israel to develop remedies that were both constitutionally and halachically valid and was lobbied for by the Orthodox community.[56] It was opposed by the American Jewish Congress, Reform Jewish groups and civil liberties organizations as an unconstitutional entanglement of church and state.[57] This clause provides an incentive to provide the *get* only to those husbands who are anxious to be divorced civilly, perhaps because they wish to remarry. A husband who is not the petitioner or who does not file a counter-claim to his wife's petition, does not fall within the ambit of the clause. Apparently, this is not a large group. This legislation, and a similar provision passed in the United Kingdom in 2000, have thus had limited effect on *get* refusal.[58] Indeed, it sometimes has the paradoxical effect of

---

[55] *New York Domestic Relations Law* s.253 (McKinney 1986 & Supp. 1997).
[56] L. Zornberg, "Beyond The Constitution: Is The New York Get Legislation Good Law*?*" (1995) 15 Pace L. R. 703, 728-30.
[57] *Ibid* at 730.
[58] After first being introduced as part of an ill-fated broader divorce reform in 1996, the *Divorce (Religious Marriages) Act* 2001 came into effect in July 2002. It amends the divorce provisions of the *Matrimonial Causes Act*

leaving a woman who is the respondent in the divorce petition doubly anchored, to a dead civil marriage as well as to a dead Jewish marriage.

New York addressed the problem of *get* refusal again in 1992.[59] However, opponents of the law argue that rabbinic authorities were not directly involved in the drafting of this legislation.[60] Rather, it was the codification of a principle developed in the New York Supreme Court in *Schwartz v. Schwartz*. The court there held that it could take *get* refusal into account under its power to consider all relevant factors in distributing marital property.[61] New York State then amended the Equitable Distribution Law to add the factor of "failure to remove barriers to religious remarriage" to the list of factors a court must take into account in determining appropriate property and alimony orders. In

---

Proops, one of the leaders of the Agunot Campaign in the United Kingdom. She cautioned that the legislation allowed the British Rabbinate to persist in their refusal to find a solution to the agunah problem. HANSARD, (House of Lords, June 30 , 2000) The British Rabbinate takes the position that it cannot innovate without consensus among rabbinic authorities around the globe. Such a conference is proving difficult to organize.

many cases, the court will award the wife only an additional 5% of the family property in recognition of this factor, but in some particularly egregious case, the court has given the wife of a *get* refuser all of the marital assets.[62]

While the 1992 law has the potential to be more effective, women in the Orthodox communities it aimed to help may not be taking advantage of it because its validity under Jewish law has been called into doubt. While a civil court may withdraw a privilege, order appearance before a *beit din* or order financial support in order to encourage delivery of a *get*, the imposition of a fine is considered coercion.[63] The imposition of a financial penalty through property distribution or maintenance may be understood as a fine.

There are three key concerns about the law. Firstly, some rabbinical authorities object that nothing in the law limits its effects to those situations where a rabbinic authority has found grounds for a compulsory order, and thus that in some cases, its operation might be impermissibly coercive. The actions of a civil court in those situations would provide no benefit to the chained wife because any *get* that might be issued in response to its actions would be invalid.[64] Secondly, some have taken the position that the 1992 law renders the *get* invalid even where the civil court only makes its order after a compulsory order has been issued by a rabbinical court. They argue that all *gittin*

the law. Finally, some orthodox rabbis argue that observant Jews are obliged to bring their marital disputes before rabbinic courts and are prohibited from resorting to secular courts at all.[65]

Indeed, in proposing to use the equitable distribution law to help *agunot* , a leading Jewish law scholar, Rabbi J. David Bleich, warned that a higher award that was linked to non-compliance might be seen as a penalty which invalidated the *get*. [66] Rabbi Bleich urged instead that New York follow the example of the United Kingdom in

V Dialogue and Canadian *Get* Legislation

The legislative intervention by the state in Canada sought to break this nexus between patriarchal power under Jewish law and abusive negotiation tactics in civil divorce. [72] This concluding section will evaluate the effectiveness of this approach along two axes:

1) has it diminished the incidence of the use of the get as a tool for extortion in civil divorce?
2) Has it contributed to fostering transformative dialogue about the underlying norms of Jewish law which leave women vulnerable to get abuse?

The process of developing and drafting Canadian *get* legislation emerged from and ormative dialog

movement was seeking to redefine itself. For example, when the male led organization,

The Canadian legislation has been drafted to avoid many of these orthodox objections to its *halachic* validity. Canadian civil courts do not have the power to order the delivery of a *get*.[76] Nor does the Canadian approach give the civil court an opportunity to link any particular financial or punitive order to failure to deliver the *get*. Rather, it merely allows the court to exercise its equitable jurisdiction to withdraw the privilege of even being heard to a party who comes to court with unclean hands. [77] A civil judge makes no judgment on the merits regarding refusal to deliver the *get*. The Canadian rabbinate is also not concerned that awards made

members of other religious groups as well. The legislation has, for example, been successfully invoked by Shi'ite women seeking a Khul divorce under Islamic law.[81]

Under the protocol set out in the Act, one spouse sends a letter to the other asking them to remove all barriers to religious marriage within 15 days of receipt and warns that if he fails to do so, she will make an application under the Act. An application allows her to file a statement with the civil family court saying that she has removed all barriers within her control that would prevent the other spouse's remarriage within that spouse's faith but that the other party has not done, so despite a request. The other spouse then has 10 days to file a similar statement saying he has removed all barriers to remarriage within his control. If he fails to comply, the court has the discretion to strike out any pleadings he may have filed. [82] This means that if the chained spouse brings a claim for property or maintenance, the court may simply grant her application without considering her spouse's arguments in reply. She could be granted everything she requests. However, the bar is a temporary one. Upon remedying his misconduct, the recalcitrant spouse may be permitted to refile his pleadings and have his claims adjudicated. [83]

Note that the duty to provide a statement and the sanctions for failure to provide it do not apply to those who have made no claim for costs or other relief. [84]This is to avoid the *halakhic* prohibition on allowing civil law to withdraw a benefit in order to persuade a

81

The legislative protocol was not ideal from a religious law perspective, but it was one the rabbis believed they could work with to free women within the constraints of orthodox conceptions of Jewish law. [90]John Syrtash quotes Rabbi Ochs, Rosh of the Toronto Beit Din, stating that the legislation did not, in the end, conform to their ideal conception of *halachic* validity. When it came back from the legislative drafting committee,

> Certain changes had been made which made the law coercive from the perspective of *halacha*. We were then faced with the prospect of either salvaging the law and losing our window of opportunity or letting it stand and *operating within its parameters* in such a way as not to conflict with *Halacha*. We chose the latter course. [91]

The Canadian religious authorities use the legislation as a tool to achieve resolution of the dispute in accordance with their conception of the requirements of Talmudic law. Recall that legitimate coercion can only be predicated on a rabbinical court ruling finding that the husband has an obligation to give a *get.* Accordingly, the religious authorities are wary

The legislation is a tool which enforces dialogue between the recalcitrant spouse and the religious authorities over delivery of the *get* . Once the legislation "gets them through the door", the rabbis begin a process which commingles their judicial and pastoral roles. They hear the husband out on the motivations which underlie his refusal and they acquaint him with negative view which religious moral norms cast on using his veto power to make his wife an *agunah*.[92] It may take months, but "on account of the having established a good relationship with the *Beis Din* ", eventually the recalcitrant spouse agrees to give the *get*.

It is only at this point that the Canadian *dayanim* turn their attention to the legislation. In order to avoid the *get* being declared invalid because of coercion, a husband must declare that he is giving the *get* of his own free will and not because he has been coerced to do so by the legislation or any other factor. Similarly, a wife must waive any remedies she might be entitled to under the Act if the husband does not deliver the *get*. At this point, a small number of husbands do say they have felt coerced by the legislation. In this case, the *Beit Din* refuses to proceed with supervising the *get.* In practice, this happens very rarely. [93] The religious courts have also become a more congenial place for

[92] Rav Y. E. Henkin held in *Eidut Leyisrael* 46 that "one who withholds a get because of unjust monetary demands is a thief" and compared such behavior to murder. See, C. Jachter, *Gray Matter: Discourses in Contemporary Halacha* Vol. 1 (Noble Book Press, 2001).

[93] N. Baumel Joseph, personal communication, March 9, 2006. Contrast this with the position taken by Agudah Israel, an American Orthodox group, in their amicus brief in the unsuccessful challenge to the constitutionality of the 1992 New York law in *Becher v. Becher*. They argued that the operation of the law made it impossible to accept a husband's word that he gave a *get* voluntarily:
"Having announced that he perceives a gun pointed at his head, Mr. Becher would have a hard time persuarding any *Beth din* that the gun has nothing to do with his decision to give a *get"*. Amicus Brief of Agundath Israel of America in *Mina Becher v. Yehuda*

women during this time. Proceedings are translated into English or French, rather than

1991. This coalition has appropriated Ta"Anit Esther, the fast day which preceeds the holiday of Purim, as a day of fasting and prayer on behalf of *agunot.* [98] Members of the coalition also maintain Jewish Divorce Helplines in Ontario, Quebec, Manitoba and Alberta to advise women and put them in touch with resources. [99]

The *durability* of this consensus is the subject of controversy. *Agunah* activists see the Act as now offering rabbinic authorities a means of avoiding community pressure to do something further about the state of Jewish law. The success of the legislation may have become a pretext for religious inaction on the remnant of cases that remain unresolved by the Act. Thus dialogue among rabbinical authorities may be stagnating on some fronts. While rabbinic commentators in other countries have been debating theoretically innovative strategies within Jewish law to solve the *agunah* problem, like expanding the power to grant annulments, encouraging pre-nuptial contracts[100] and reviving traditional remedies like excommunication, the Jewish authorities in Canada

the operation of the Act tend to more horrendous than the cases which gave rise to calls for action on the *agunah* issue in the 1980's. [101]

The negotiated settlements suggested by rabbinical authorities are not always ideal either. Norma Baumel Joseph suggests that rabbis are not always aware of the practical economic and social realities of their proposals[102] The closed door nature and lack of published reasons in rabbinical courts impair the possibilities for constructive, informed dialogue. *Agunah* activists in Israel have begun their own informal reporting services[103] and participated in the making of a film, *Mekudeshet: Sentenced to Marriage*, which used hidden cameras to follow women and their advocates through the rabbinical courts. [104] The Jewish Orthodox Feminist Alliance in the US has published a survey comparing the practices of American *batei din*.[105] Baumel Joseph has called for improved record keeping in Canada as well.[106]

Dialogue about reforming Jewish law to end the plight of agunot employs a range of *forms of argument.* Agunah activists justify their claims in terms of in terms of moral

---

[101] E. Brook, personal communication March 9, 2006.

[102] She describes a case in which the rabbis negotiated that the husband would deliver the *get* if the wife surrendered her share in the matrimonial home. The wife, however, needed the home to provide to care for the daughter of the marriage who was battling Leukemia and had been abandoned by her father upon receiving the diagnosis. Baumel Joseph, *supra* note 15 at 29.

[103] See, for example, the series, *Jewish Law Watch*, published bi-annually by the Center for Women in Jewish Law of the Schecter Institute of Jewish Studies, from 2000 onward. The goal of the project is "to encourage rabbinical courts to sue the halakhic tools which are at their disposal to free modern day-agunot."See also *The Law and its Decisors,* selected cases published by Yad L'Isha in collaboration with the Rackman Centre for the Advancement of the Status of Women at Bar Ilan University.

[104] A. Zuria, *Mekudeshet: Sentenced to Marriage* (Israel: 2005),. The film followed the work of female rabbinical court advocates working on behalf of women through the Max Morrison Legal Aid Center of Ohr Torah Stone.

[105] *Supra*, note 33.

[106] Baumel Joseph, *supra*, note 15.

equality rights, the subversion of civil policies of legal equality and the translation of get abuse as a form of distinctively Jewish domestic violence. They also, however, make arguments which fall entirely within the framework of Jewish jurisprudence and appeal to Jewish moral norms, such as the notion that this injustice brings shame upon the