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חרות ואחריות

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ARE ALL INVALIDLY COERCED GITTIN INVALID? (PART 7- each can be read independently)

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Mishnah Ketubot 7:9 records a dispute as to whether a man can be coerced to divorce his wife owing to **מומים גדולים** = great blemishes that developed in him after their marriage. Mishnah 7:10 opens

(ו)אלו שכופין אותו להוציא

These are the ones whom we coerce to divorce

The consensus halakhah understands Mishnah 7:10 as accepted law according to all position. This establishes that at least a beit din has the capacity in at least some circumstances (where the husband has a defect even more severe than a **מום גדול**) to obtain a valid get by coercing the husband.

Since Mishnah Yebamot 14:1 states

והאיש אינו מוציא אלא לרצונו

but a man does not divorce except willingly

and this rule is also universally accepted, it follows that coercion must produce legally valid consent. This is also the clear implication of Mishnah Arakhin 5:6

וכן אתה אומר בגטי נשים –

כופין אותו עד שיאמר 'רוצה אני'

And say similarly with regard to divorce –

we coerce him until the husband says 'I am willing'.

Talmud Bava Batra 47b indicates that the validity of coerced divorces is an application of Rav Huna's position that coercion can create valid consent for sales. The point of Rav Huna's statement is that the sales are valid even though the coercion itself is illegal. This implies that in gittin as well, the legality of the coercion should be irrelevant.

Rav Huna is generally understood to define a "sale" as an exchange in which the seller receives fair value. What provides the "fair value" for the husband in the case of divorce? Ramban suggests that it is his fulfillment of an obligation. This implies that a coerced get is valid only where the husband has a halakhic obligation to divorce the wife.

This may seem hard to square with Rav Nachman bar Shmuel's statement on Gittin 88b that gittin coerced by Jews *shelo kedin* (not-in-accordance-with-law) are *pasul uposel*, meaning that they do not free the wife but nonetheless leave her permanently unable to marry a kohen, even if her current husband dies. If fulfillment of an obligation is the "fair value" that validates coercion, why would a get coerced *shelo kedin* have any effect at all? But there is a simple resolution. *Shelo kedin* refers to the get itself rather than to the coercion. It means that there was no *din* mandating the husband to divorce. The legality of the coercion is irrelevant.

Nonetheless, Rambam Hilcot Geirushin 2:20 seems to be clear that *shelo kedin* refers to the coercion.

מי שהדין נותן שכופין אותו לגרש את אשתו ולא רצה לגרש –

בית דין של ישראל בכל מקום ובכל זמן מכין אותו עד שיאמר 'רוצה אני'

ויכתוב הגט, והוא גט כשר . . .

לא היה הדין נותן שכופין אותו לגרש . . .

One whom the din yields that he may be coerced to

divorce his wife, but he did not wish to divorce her –

a Jewish beit din of whatever place or time may beat him

until he says "I am willing"

and he writes the get, and it is a kosher get . . .

but if the din did not yield that he may be coerced to

divorce . . .

This seems to demonstrate that Rambam disagrees with what I called "the simple resolution" above. However, elsewhere in the very same paragraph, Rambam plainly understands *shelo kedin* as referring to the divorce rather than to the coercion.

ואם הגוים מעצמן אנסוהו עד שכתב –

הואיל והדין נותן שיכתוב - הרי זה גט פסול . . .

אף על פי שאמר בגוים 'רוצה אני' ואמר לישראל 'כתבו וחתמו',

הואיל ואין הדין מחייבו להוציא והגוים אנסוהו –

אינו גט.

If nonJews of their own volition coerced him until he wrote (the get) –

since the din yields that he must write it – this is an invalid get . . .

even though he told the nonJews "I am willing", and said to Jews "Write and sign (the get)",

since the din does not obligate him to divorce, and nonJews coerced him –

it is no get.

This apparent contradiction also has a simple solution. Rambam believes that whenever the *din* obligates the husband to divorce, it also authorizes coercing him to divorce. WHENEVER AN OBLIGATION TO DIVORCE EXISTS, THE HUSBAND MAY BE COERCED BY A JEWISH BEIT DIN. Therefore Rambam uses 'obligated to divorce' and 'may be coerced to divorce' interchangeably.

Whether the obligation to divorce and the legitimacy of coercion are separable issues is debated in TOSAFOT Ketubot 70a s.v. yotzi. The jumping off point is that the opening mishnayot of Ketubot Chapter 7 rule in a series of cases that the husband

יוציא ויתן כתובה

must divorce and pay the ketubah

We noted at the outset of this essay that the end of that chapter of Mishnah provides a list of cases in which

כופין אותו להוציא

We compel him to divorce

The question at hand is whether the two phrases are

- equivalent = every statement of obligation to divorce implicitly authorizes coercion and obligates payment of the ketubah
- mutually exclusive = coercion is legitimate only where a text explicitly authorizes it
- complementary – every statement of obligation to divorce implicitly authorizes coercion, but not necessarily with payment of the ketubah, and perhaps only after the ketubah is waived

The position I am attributing to Rambam is stated by RI.

נראה לר"י

דבבל הנך דקתני במתני' "יוציא" –

היינו שכופין אותו,

דכיון דשלא כדיון עביד –

כופין אותו להוציא.

וא"ת

א"כ, אמאי לא תני להו בהדי הנך שכופין להוציא (עז.)?!

וי"ל

דלא תני במתני' אלא כגון מוכה שחין ובעל פולפוס,

דאיתין ממילא,

אבל הנך דאתיא כפייה דידהו ע"י פשיעת הבעל –

לא קתני . . .

It seemed to Rabbi Isaac of Dampierre (RI)

that (in) all those (cases) where the Mishnah teaches “he must divorce” –

that is the same thing as saying that we coerce him

meaning that since he acted *shelo kedin*

we compel him to divorce . . .

If you were to say:

“If so, why aren’t these taught together with those

“whom they compel to divorce”?!

One could respond

that the Mishnah only included (in its list) cases such as

someone afflicted by boils, or foul-smelling,

that occur spontaneously,

but those who are compelled (to divorce) because the

husband has done something wrong

are not included in that list . . .

Tosafot attribute a contrary position to Rabbeinu Chananel.

ורבינו חננאל הביא מירושלמי

דכל הנך 'יוציא' דמתניתין –

אין כופין . . .

ופסק ר"ח משם

ש"מ שאין כופין אלא היכא שמפרש בהדיא כופין,

אבל היכא דאמור רבנן 'יוציא' –

אומרים לו

'כבר חייבך חכמים להוציא;

ואם לא תוציא - מותר לקרותך עברינא,'

אבל לכפותו – לא.

But Rabbeinu Chananel brought from the Yerushalmi

that all those regarding whom the Mishnah teaches “he must divorce” –

we do not compel (to divorce) . . .

and Rabbeinu Chananel ruled on that basis:

“we derive from it that we do not compel (to divorce)

except where it says explicitly “we compel”,

but wherever the Rabbis say “he must divorce” –

we say to him:

'the Sages have already obligated you to divorce,

and if you do not divorce – it will be permissible to call

you a transgressor',

but compel him? No.

Both sides bring an array of prooftexts. Without taking sides, I think that RI's endorsement justifies using this interpretation to resolve the apparent contradiction in Rambam regarding the referent of *shelo kedin*. Furthermore, the substance of this position seems to flow directly from Rambam's rhetoric in *Hilkhot Ishut* 14:8:

אם אמרה:

'מאסתיהו, ואיני יכולה להבעל לו מדעת' –

כופין אותו להוציא לשעתו,

לפי שאינה כשבויה שתבעל לשנוי לה . . .

If (his wife) says:

“I revile him, and I am incapable of having sex with him willingly” –

we compel him to divorce her immediately,

because she is not like a captive that must have sex with

someone whom she finds hateful . . .

The bottom line is that Rambam holds that *beit din* may compel any obligatory divorce. Therefore, Rambam cannot understand *shelo kedin* as referring to cases in which divorce is obligatory but coercion is forbidden. Rather, *shelo kedin* must refer to cases in which the divorce itself is not obligatory.

Moreover, we have seen no reason to believe that Rabbeinu Chananel disagrees. Even if the issues of the obligation to divorce and the legitimacy of coercion are separable, that just returns us to Rav Huna's ruling that consent generated by illegitimate coercion is nonetheless valid. We have therefore seen no evidence that a *beit din* must worry that using coercion will lead to adultery or *mamzerut* if the coercion is *shelo kedin*, so long as the get itself is obligatory, i.e. *keidin*.

The obvious problem with this conclusion is that Mishnah *Gittin* 88b invalidates *gittin* coerced by non-Jews, as opposed to *gittin* coerced by Jews. If coercion generates valid consent wherever an obligation to divorce exists, why does the identity of the coercers make any difference? The simplest explanation seems to be that coercion by Gentiles is inherently *shelo kedin*, and therefore that the referent of *shelo kedin* is the coercion and not the get.

This problem is resolved by Rav Mesharashya's explanation (*Gittin* 88b, *Bava Batra* 48a) that *gittin* coerced by Gentiles are Biblically valid, but were invalidated by the Rabbis for policy reasons. Precisely **because** coercion produces valid consent, the Rabbis feared an epidemic of unjustified coercion. This means that there is nothing inherently *shelo kedin* about non-Jewish compulsion in the realm of *gittin*.

However, Rav Mesharashya is rejected on *Gittin* 88b. The Talmud provides no alternate explanation for the Mishnah's invalidation of *gittin* coerced by non-Jews. Sustaining our thesis that the phrase *shelo kedin* does not relate to the coercion requires us to develop alternate explanations. I'll try to provide at least one such explanation next week.

Shabbat Shalom!