

THE YESHIVA PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Hilchos Gittin Lesson 3

Mareh Makomos for this Shiur

Tur and Shulchan Aruch, section Even Ha'ezer, chapter 119, paragraphs 4 – 6.

The Commentary of the Rama (ibid.).

Rambam. Laws Pertaining to Geirushin (Divorce) chapter 10, Halacha 23.

Rashba's Responsa, (part two, Siman 382).

Bris Avraham (Siman 109).

Smak (Siman 184)

The Noda Bi Yehuda Responsa (Siman 75).

Maharam Padua (Siman 13).

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Some Details of the Ban Enacted by Rabeinu Gershom Against Divorcing a Woman Against Her Will.

Siman 119 Seif 6

6 One can divorce her [one's wife] without her consent.

Rama: And even if he has no [money] to pay for her kesubah and her dowry, she cannot prevent the divorce because of this [reason]. Rather, she shall be divorced and [afterwards] she will claim from him all [the money] that he is obligated to [pay her]. (Responsa of the Rosh and the Rivash). All this is le-dina (required by official law). However, Rabbeinu Gershom issued a ban against divorcing a woman against her will, unless she transgresses Torah-law, as clarified above, in Chapter 115. Nowadays, she is not to be divorced against her will even if he is willing to give her (i. e. to pay) the kesubah, (Smak [Sefer Mitzvos Katan], Siman 184). Nowadays, if he divorces her against her will in defiance of the ban, and she marries [another man], he (i. e. her former husband) is no longer defined as a transgressor. (Kol Bo). If he divorces her with her consent, and the get (bill of divorce) is discovered to be invalid (pasul), he can afterwards divorce her against her will. (ibid.). See above, end of chapter 117 on whether he can divorce her against her will if she develops (physical) defects. There are those who say that be-makom mitzvah (i. e. in a situation where divorce will result in the performance of a mitzvah, see explanation below), he may divorce her against her will, or beis din [then] grants him permission to marry two women. (Maharam Padua, Siman 13), (as was explained above, in chapter 1).

Shulchan Aruch: Therefore, a ketanah (minor, underage) can be divorced even if she has not reached full intellectual maturity, and even if her father has received her Kiddushin that is mi-de-oraissah, or a deaf woman who was betrothed when she had the faculty of hearing and became deaf afterwards. However, he cannot divorce a woman who becomes insane, and [as a result

becomes] unable to take care of herself, until she recovers from her mental illness, so that she should not become an object of public abuse. Therefore, he must keep her [in his house], [and he can] marry another woman, but must provide her (his insane wife) with food and drink from the money that she owns or earns. He is not obligated to supply her with clothes and have intimate relations with her, and he is not obligated to provide her with medical care....

(Rama :) However, there are those who maintain that he is obligated to provide her with food and medical care) (Beis Yosef in the name of the Rashba, and the Tur in the name of the Rema [R. Meir Halevi] and the Ra'avad), and that is how he ruled above, in chapter 70, paragraph 4, and this is the prevalent Halacha.

Shulchan Aruch: ...nor is he obligated to [pay ransom money to] redeem her [from captivity]. If he divorces her, she is considered megureshes (divorced) provided that she knows how to preserve her get....

(Rama :) However, there are those who say that she is not considered megureshes even bedi'avad. (and this is what is inferred from the Mahari'o, Siman 52). However, a woman who is sometimes insane and sometimes sane, and her husband divorces her when she is sane, the divorce is not to be revoked if it looks that she is going to remain sane (The Rulings of the Maharai, Siman 215). See also chapter 121, paragraph 3.

Shulchan Aruch: ... he [then] releases her from his house, and becomes absolved from the obligation to take care of her again.

Divorcing the Wife Against Her Will

SIMAN 119:6

Some of the sources if this *din* were presented in the previous lesson. In the present lesson, we shall mention some more sources and discuss the rulings of the Shulchan Aruch, the Rama and some *Acharonim*.

The Husband's Responsibilities to His Insane Wife

We have already learned that the husband cannot divorce his wife if she loses her sanity. Such a woman is unable to take care of herself, and her husband must continue to keep her in his house. The question is what his responsibilities are to his insane wife as long as he continues living with her. **What is he obligated to do for her, and what is he not obligated to do for her?**

Regarding this question, the Rambam writes the following,

In the Laws Pertaining to *Geirushin* (Divorce) chapter 10, *Halacha* 23:

"Therefore, he must keep her [in his house], [and he can] marry another woman, but he must provide her (his insane wife) with food and drink from the money that she owns (i. e. at her own expense). He is not obligated to supply her with clothes and have intimate relations with her; because a sane man is unable to dwell with insane people. He is not obligated to [pay ransom money to] redeem her [from captivity], nor provide her with medical care. If he divorces her, she is considered megureshes (divorced), [whereupon] he releases her from his house, and becomes absolved from the obligation to take care of her again".

As we see, the **Rambam** is of the opinion that the husband is not obligated to sustain his insane wife at his own expense.

The Rambam also holds,

The husband is not obligated to provide his insane wife with medical care. This would suggest that he is neither obligated to spend money on psychiatric treatment in order to cure her of insanity. However, the **Beis Shmuel** (*Seif Katan* 10) thinks differently, and we shall discuss it in the next *Shiur*.

However, the **Tur** infers from the **Rema** [**R' Meir Halevi**] that the husband is obligated to provide his insane wife with food and drink.

As far as medical care is concerned,

The **Tur** is inclined to support the opinion of the **Ra'avad** who disagrees with the **Rambam** who rules that the husband is not obligated to provide her with medical care.

This is what the Ra'avad writes:

"IF SHE CAN BE CURED, WHY SHOULD HE NOT BE OBLIGATED TO PROVIDE HER WITH MEDICAL CARE? THERE ARE MANY WOMEN WHO BECOME INSANE DUE TO DISEASE, BUT THEY RECOVER [FROM THEIR MENTAL ILLNESS]".

In other words,

The **Ra'avad** holds that an insane woman can recover with the help of adequate medical treatment, and, contrary to the **Rambam**, the **Ra'avad** holds it is the husband's obligation to provide it at his own expense.

The **Beis Yosef** writes in his **Bedek ha-Bayis** that the **Rashba** (Responsa, part two, *Siman* 382) agrees with the **Rema** and the **Ra'avad** (contrary to the **Rambam**).

The **Shulchan Aruch** rules according to the *Genara's* conclusion, i. e. that a person can divorce his wife without her consent.

The **Pischei Teshuvah** (*Seif Katan* 4) quotes the **Bris Avraham** (*Siman* 109),

Describing a case when the husband cannot divorce his wife against her will. It is the case when the divorce entails a certain condition, for instance, that the divorce will take effect only after the condition has been fulfilled.

In such a case,

She is prohibited to have *yichud* (i. e. to conceal herself) with him as soon as she receives the bill of divorce, even prior to the fulfillment of the condition. This causes him to deprive her of the *mitzvah de-oraissah* of *onah* (to have intimate relations with her), to which she has a legitimate right to disagree:

Prior to the fulfillment of the condition of the *get*,

She is still considered his wife, and, because she is still his wife, he is obligated *mi-de-oraissah* to fulfill the *mitzvah* of *onah*, and he cannot deprive her of it against her will if she is not willing to forego her claim to it.

Therefore,

He has no other choice but to continue living with her. However, if she consents to the divorce, the *mitzvah* of *onah* does not present a problem, because she can always be *mochel* (forego) her *onah*, and she does not mind doing it.

Therefore,

If the husband wants to divorce his wife against her will, he has a choice, either to divorce her right away unconditionally, or continue living with her in marital union.

Can the Husband Divorce his Wife Without Paying Her the Kesubah Immediately?

The **Rama** quotes the *Rishonim* (the **Rosh** and the **Rivash**) who hold the opinion,

Even if he has no money to pay for her *kesubah* and her dowry (i. e. the property she brings along with her from her father's house, for which the husband assumes responsibility, and it his obligation to return it to her in case of divorce), she still cannot prevent the divorce for this reason.

Rather,

She shall be divorced, and afterwards, she will claim from him all the property and money that he is obligated to pay her.

The question is,

Whether the **Rama** actually disagrees with the **Rashba** whom we quoted in the last *Shiur* as stating in his Responsa, (part one, *Siman* 1254) that he heard in the name of a *Gaon* that one is not allowed to divorce one's wife if one does not have money to pay for her *kesubah*

The Beis Shmuel (in *Seif Katan* 6) discusses this question. He quotes the **Chelkas Mechokek** as stating that the **Rama** actually disagrees with the **Rashba**. The **Beis Shmuel** himself, however, is of the opinion that there is no disagreement between them.

The Rama discusses a special case when,

According to *Halacha*, the husband is permitted to divorce his wife. For instance, in the case when it is a *zivug sheini* (second marriage), and he hates her because she overcooked his food (*hikdicha tavshilo*).

In such a case,

He can divorce her even if he does not pay her the *kesubah* immediately. On the other hand, the **Rashba** discusses a case when it is improper to divorce her, such as when it is a *zivug sheini* (second marriage) and the husband does not hate her. Therefore, he rules that the husband is not permitted to divorce his wife without paying her the *Kesubah*.

Cherem De-Rabeinu Gershom (Rabeinu Gershom's Ban)

Rabbeinu Gershom enacted a few *charamos* (bans) in his time. The following two are the most famous among them: the ban against bigamy (marrying more than one woman), and the ban against divorcing a woman without her consent (*bal korchah* – against her will).

Who Was Rabeinu Gershom?

Rabbeinu Gershom bar Yehuda (also known as *Rabbeinu Gershom Meor Ha-Golah* – Our Master and Teacher Gershom, the Light of the Diaspora) was the spiritual leader of Ashkenazi (European) Jewry during the time of formation of its communities. He was born approximately in the year 4960 most probably in Metz, and lived most of his life in Mainz (Mayence), Germany. His Yeshiva in Mayence was the main center of Torah learning in Ashkenaz at that time. Many of his disciples and disciples of their disciples wrote commentaries on the Talmud. The most famous among them was **Rabbi Shlomo Yitzchaki (Rashi)** who studied under the tutelage of **Rabbi Yaakov bar Yakar** and **Rabbi Yitzchak ben Yehuda**, both of whom were **Rabbeinu Gershom's** disciples.

The title *Meor Ha-Golah* (the Light of the Diaspora) testifies to the great reverence his generation and the later generations had for him. He enacted bans against bigamy and forced divorce, which remain in effect in our times among Ashkenazi Jews in Eretz Israel and throughout the Diaspora.

Rabbeinu Gershom's Responsa have been accepted as undisputed practical law for Ashkenazi Jewry throughout generations. He also authored many *piyutim* (hymns, poems) known for their religious fervor and profundity. **Rabbeinu Gershom** passed away in 4788 (1028) in Mainz (Mayence).

A Woman Is Not to Be Divorced Against Her Will

The **Rama** comments on the ruling of the **Shulchan Aruch** according to which one can divorce one's wife without her consent, saying that all this is *le-dina* (required by official law).

However, **Rabbeinu Gershom** enacted a ban,

Against divorcing a woman against her will, unless she transgresses Torah-law, as clarified above, in Chapter 115.

The **Rama** proceeds to quote the **Smak**, *Siman* 184 as writing that nowadays, she is not to be divorced against her will even if he is willing to pay the *kesubah*.

Regarding this, the **Beis Shmuel** writes (*Seif Katan* 7),

Although it is indeed to be inferred from the **Smak** and the **Rosh** that nowadays, the wife is not to be divorced against her will even if her husband is willing to pay the *kesubah*, the **Mordechai** seems to be of a different opinion.

The **Mordechai's** opinion is,

Rabbeinu Gershom did not ban forced divorced in the case when the husband pays her *kesubah*.

Law Pertaining to a Man Who, In Defiance of the Ban, Divorces His Wife Against Her Will

What is the *din* pertaining to a man whom, in defiance in of the **Cherem De-Rabbeinu Gershom**, divorces his wife against her will?

In connection with this question the **Rama** quotes the **Kol Bo** as ruling that nowadays, if he divorces her against her will in defiance of the ban, and she marries another man, her former husband is no longer defined as a transgressor.

It is to be inferred from his ruling,

If she has not yet married another man, her ex-husband, who had divorced her against her will, is defined as a transgressor. See **Pischei Teshuvah** (*Seif Katan* 7) who says so.

However, what about the *get* itself? Does it take effect if the husband divorces his wife against her will?

It seems obvious from the above ruling of the **Rama** that the *get* takes effect even when the husband divorces his wife against her will, and the only question is whether or not he is termed a transgressor if he divorces her against her will, depending on whether she marries another man or not.

However, the **Beis Shmuel** writes (*Seif Katan* 12),

If the nature of **Rabbeinu Gershom's** ban is similar to that of the decrees and regulations enacted by our Sages, we are obliged to say that *bi-zman ha-zeh* (nowadays), when there is a *cherem* against forced divorce, she is not considered *mequreshes* even *ex post facto* (*bedi'avad*), if he divorces her in defiance of the *cherem*. We infer from this that the **Beis Shmuel** disagrees with the **Rama**.

It is noteworthy,

The **Get Pashut** (*Seif Katan* 24) also writes that if the husband divorces her against her will, the *get* does not take effect even *bedi'avad*. (See **Pischei Teshuvah**, *Seif Katan* 7).

However, the Pischei Teshuvah himself (*ibid.*) proves,

Even if the husband divorces his wife against her will, the *get*, nevertheless, takes effect: Doesn't the **Beis Shmuel** himself compare **Rabbeinu Gershom's Ban** to the prohibition against divorcing one's first wife (*zivug rishon*)? (See chapter 77, paragraph 6). However, in *zivug rishon*, the **Genara** says that if, in defiance of the prohibition, he divorces her against her will, she is considered *mequreshes*.

Therefore,

The comparison itself proves the fact that if the husband divorces his wife in defiance of the ban, she is also considered divorced.

Divorcing One's Wife Against Her Will Through a Shaliach (Messenger)

The **Pischei Teshuvah** quotes the **Noda Bi'Yehuda** Responsa (*Siman 75*) who tackles the case of a man who divorced his wife against her will through a *shaliach*.

The question under discussion,

Was whether or not the *get* took effect. He writes that, since divorcing one's wife against her will is considered a grave transgression, we are obliged to rule that in such a case, *ein shaliach li-dvar aveirah*. (Talmudic principle: one cannot attribute the perpetration of a transgression to one's messenger).

Therefore,

The *shaliach's* mission to deliver the *get* to the wife was considered null and void, the *get* never took effect, and the wife was not considered *mequreshes*.

The Pischei Teshuvah states,

There were those who disagreed with the **Noda Bi' Yehuda's** ruling, claiming that the principle of *ein shaliach li-dvar aveirah* does not lay down that the act performed by the *shaliach* does not take effect, and it is considered as if the *shaliach* never existed.

Rather,

It lays down that the act performed by the *shaliach* is not annulled, but it does not obligate the *meshaleach* in any way. Therefore, the *get* must be considered valid. However, the **Noda Bi'Yehuda** (*ibid.*) disproves their theory and rejects their viewpoint.

The Rama quotes another ruling of the Kol Bo,

According to which if he divorces her with her consent, and the *get* (bill of divorce) is discovered to be invalid (*pasul*), which means that he has to divorce her all over again; he can then divorce her even against her will. The reason is simple: she had originally agreed to the divorce, so the second divorce constitutes a mere amendment to the first one.

The Validity of the Ban As Against the Performance of a Mitzvah

The Rama quotes Maharam Padua, *Siman 13* as saying,

There are those who say that *be-makom mitzvah* (i. e. in a situation where divorce will result in a possibility to fulfill a *mitzvah*, for instance, to marry another woman with the hope to father children with her in the case when the present wife has not given birth to children after ten years of marriage) the husband may divorce his wife against her will, or *beis din* then grants him permission to marry two women. (The Rama discusses this issue in chapter one, where he says that the *poskim* differ on it).

The Beis Shmuel (*Seif Katan 8*) mentions Maharam Padua's Response, remarking that although Maharam Padua permitted divorce against the wife's will *be-makom mitzvah*, he never permitted to marry two women.

Has the Term of Rabeinu Gershom's Cherem Expired?

The Shulchan Aruch writes (*Even Ha-Ezer*, chapter one),

About the second Ban of Rabbeinu Gershom, directed against marrying two wives, that Rabbeinu Gershom intended it to remain in effect only until the end of the fifth millennium. We are in the sixth millennium now, which means that, according to the Shulchan Aruch, whose rulings Sephardi Jews follow, this ban expired about 760 years ago, and it is no longer valid.

However, the Rama (*ibid.*) makes the following remark in the name of Mahari Mintz:

"Nevertheless, in all these (i. e. nearby) countries, this decree and this custom are still valid, and no one marries two wives, and whoever transgresses [it] and marries two wives, is compelled to divorce one of them [at the threat of being] banished and excommunicated". Thus, for Ashkenazi Jews, *Cherem De-Rabbeinu Gershom* remains in effect until today.

On the other hand,

The **Rama** (ibid.) also quotes the **Beis Yosef** who states in the name of the **Maharik** that nowadays, since the fifth millennium has already ended, a person who transgresses ***Cherem De-Rabbeinu Gershom*** is not compelled to divorce one of them, etc. The **Rama** himself, though, disagrees with him, stating that we do not follow such a custom (i. e. not to compel, etc.).

Thus far, we have discussed the validity of **Rabbeinu Gershom's** Ban directed against marrying two wives. How about the validity of **Rabbeinu Gershom's** Ban against divorcing one's wife against her will? Did **Rabbeinu Gershom** also limit the duration of this Ban to a certain time, or he meant it to remain in effect forever?

The **Pischei Teshuvah** discusses this question at the end of *Seif Katan* 8. The **Acharonim** differ on this issue:

1. The **Pischei Teshuvah** quotes the **Noda Bi' Yehuda** as ruling that as far as the prohibition to divorce one's wife against her will, the term of the ***Cherem*** has not expired and it remains in effect.
2. However, the **Pischei Teshuvah** says that it is not so clear, because the **Get Pashut** (*Seif Katan* 22) is in doubt about it. The **Beis Shmuel** (in chapter 115) holds that the **Get Pashut** is of the opinion that the ***Cherem*** against divorcing one's wife against her will is no longer in effect nowadays.

Questions and Answers

1. **What are the husband's responsibilities to his insane wife as long as he continues living with her? What is he obligated to do for her and what is he not obligated to do for her?**

Regarding this question, the **Rambam** writes: "Therefore, he must keep her [in his house], [and he can] marry another woman, but he must provide her (his insane wife) with food and drink from the money that she owns (i. e. at her own expense). He is not obligated to supply her with clothes and have intimate relations with her, because a sane man is unable to dwell with insane people. He is not obligated to [pay ransom money to] redeem her [from captivity], nor provide her with medical care. If he divorces her, she is considered *me'ureshes* (divorced), [whereupon] he releases her from his house, and becomes absolved from the obligation to take care of her again". The **Rambam** is of the opinion that the husband is not obligated to sustain his insane wife at his own expense. The **Rambam** also holds that the husband is not obligated to provide his insane wife with medical care.

2. **Does everybody agree with the Rambam?**

No. The **Tur** infers from the **Rema** that the husband is obligated to provide his insane wife with food and drink. As far as medical care is concerned, the **Tur** is inclined to support the opinion of the **Ra'avad** who disagrees with the **Rambam** who rules that the husband is not obligated to provide her with medical care. The **Ra'avad** holds that an insane woman can recover with the help of adequate medical treatment, and, contrary to the **Rambam**, the **Ra'avad** holds it is the husband's obligation to provide it at his own expense.

3. **Can one divorce one's wife against her will?**

The **Pischei Teshuvah** quotes the **Bris Avraham** as describing a case when the husband cannot divorce his wife against her will. It is the case when the divorce entails a certain condition, for instance, that the divorce will take effect only after the condition has been fulfilled. In such a case, she is prohibited to have *yichud* (i. e. to conceal herself) with him as soon as she receives the bill of divorce, even prior to the fulfillment of the condition. This causes him to deprive her of the *mitzvah de-oraissah* of *onah* (to have intimate relations with her), to which she has a legitimate right to disagree: Prior to the fulfillment of the condition of the *get*, she is still considered his wife, and, because she is still his wife, he is obligated *mi-de-oraissah* to fulfill the *mitzvah* of *onah*, and he cannot deprive her of it against her will

if she is not willing to forego her claim to it. Therefore, he has no other choice but to continue living with her. However, if she consents to the divorce, the *mitzvah* of *onah* does not present a problem, because she can always be *mocheh* (forego) her *onah*, and she does not mind doing it. Therefore, if the husband wants to divorce his wife against her will, he has a choice, either to divorce her right away unconditionally, or continue living with her in marital union.

4. Can the husband divorce his wife against her will without paying her the *kesubah*?

The **Rama** quotes the *Rishonim* (the **Rosh** and the **Rivash**) who hold the opinion that even if he has no money to pay for her *kesubah* and her dowry (i. e. the property she brings along with her from her father's house, for which the husband assumes responsibility, and it his obligation to return it to her in case of divorce), she still cannot prevent the divorce for this reason. Rather, she shall be divorced, and afterwards, she will claim from him all the property and money that he is obligated to pay her.

5. Does everybody agree with this?

No. In the last *Shiur*, we quoted the **Rashba** as ruling that one cannot divorce one's wife without paying her the *kesubah* immediately.

6. Does the Rama disagree with the Rashba?

The **Beis Shmuel** quotes the **Chelkas Mechokek** as stating that the **Rama** actually disagrees with the **Rashba**. The **Beis Shmuel** himself, however, is of the opinion that there is no disagreement between them. The **Rama** discusses a special case when, according to *Halacha*, the husband is permitted to divorce his wife. For instance, in the case when it is a *zivug sheini* (second marriage), and he hates her because she overcooked his food (*hikdicha tavshilo*). In such a case, he can divorce her even if he does not pay her the *kesubah* immediately. On the other hand, the **Rashba** discusses a case when it is improper to divorce her, such as when it is a *zivug sheini* and the husband does not hate her. Therefore, he rules that the husband is not permitted to divorce his wife without paying her the *kesubah*.

7. Name the two most popular bans enacted by **Rabbeinu Gershom**.

The **Shulchan Aruch** states in even *Ha-Ezer*, chapter one, that **Rabbeinu Gershom** enacted the ban against bigamy (marrying more than one woman), and the ban against divorcing a woman without her consent (*bal korchah* – against her will).

8. What is the *din* pertaining to a person who, in defiance of the Decree of the Sages divorces his wife against her will?

In connection with this question the **Rama** quotes the **Kol Bo** as ruling that nowadays, if he divorces her against her will in defiance of the ban, and she marries another man, her former husband is no longer defined as a transgressor. It is to be inferred from his ruling that if she has not yet married another man, her ex-husband, who had divorced her against her will, is defined as a transgressor.

9. However, what about the *get* itself? Does it take effect if the husband divorces his wife against her will?

It seems obvious from the above ruling of the **Rama** that the *get* takes effect even when the husband divorces his wife against her will, and the only question is whether or not he is termed a transgressor if he divorces her against her will, depending on whether she marries another man or not. However, the **Beis Shmuel** writes that if the nature of **Rabbeinu Gershom's** ban is similar to that of the decrees and regulations enacted by our Sages, we are obliged to say that *bi-zman ha-zeh* (nowadays), when there is a *cherem* against forced divorce, she is not considered *mequreshes* even *ex post facto (bedi'avad)*, if he divorces her in defiance of the *cherem*. We infer from this that the **Beis Shmuel** disagrees with the **Rama**.

10. How about the validity of **Rabbeinu Gershom's** Ban against divorcing one's wife against her will? Did **Rabbeinu Gershom** also limit the duration of this Ban to a certain period, or he meant it to remain in effect forever?

The **Pischei Teshuvah** discusses this question saying that the *Acharonim* differ on this issue:

1. The **Noda Bi'Yehuda** holds that as far as the prohibition to divorce one's wife against her will, the term of the *Cherem* has not expired and it remains in effect.
2. However, the **Pischei Teshuvah** says that it is not so clear, because the **Get Pashut** is in doubt about it. The **Beis Shmuel** holds that the **Get Pashut** is of the opinion that the *Cherem* against divorcing one's wife against her will is no longer in effect nowadays.