Refuge

By Rabbi ELIYAHU SAFRAN

"It is not your responsibility to finish the work [of perfecting the world], but you are not free to desist from it either." — Rabbi Tarfon, Pirkei Avot 2:16

"You can never feel another person's pain. You can never understand the inner turmoil that turns another person's mind, body and soul inside out, 24 hours a day. There are many things you can say to comfort someone, but never think you truly understand their pain. You don't. — Malky K

What is our obligation to create sanctuary – refuge – for those whose pain is unimaginable to us?

"Then Moshe set aside three cities on the bank of the Jordan, on the east…" (*Devarim* 4:41). When it comes to Torah, we pay attention not just to the words but to the grammar as well. There is no aspect of Torah that is "accidental" and therefore every word, every letter, every *pasuk* and its structure holds lessons for us.

So when we read this *pasuk* we are, at first, troubled. It stands out as being grammatically inconsistent. *Az yavdil* translates as, "*then* Moshe will divide three cities…" That is, in the future tense. We must ask, did he set them aside at that time or were these cities – cities we come to understand as cities of refuge – separated later?

Rashi's teaching straddles the challenge of the grammar. He suggests that Moshe did indeed set aside the cities then and there – but they would not be *officially* designated as *arei miklat*, cities of refuge, until the entire Land of Israel was conquered. *Az* and *yavdil* – present and future. The cities Moshe separated *now* would only come into existence *in the future*, when the other cities of refuge were to be designated. And, it should be noted, *after* Moshe would no longer be alive.

This raises an interesting question. Why would Moshe begin a project *a priori* knowing he could not complete it? Moshe *knew* he would not enter the Promised Land and so would not be able to set up the *arei miklat*. We often embark on projects that don't get finished for all sorts of reasons but actually *beginning* a project knowing in advance we will not be able to complete it? Why would we do that?

The answer is that it must speak to something we believe to be transcendent to our own interests and use, something important enough to bequeath to others even though we will never share in their experience.

The common argument – why bother undertaking a task if you can't complete it, or if your contribution to its solution seems small? – is the argument of the *yetzer hara*. It is an argument that accepts – no, *embraces* – defeat.

It is not the right way. Nor does it speak to the fundamental power of what the task represents. Moshe's cities were cities of refuge, places for people in need of finding sanctuary. Certainly, even more than the lesson of attending to tasks that we cannot complete, there is a powerful lesson here in the importance of refuge, of sanctuary.

The Chofetz Chaim gave a *mashal*. Imagine walking along a beach. As the waves roll in, they deposit jewels and precious stones along the sand. Up and down the shoreline you see glimmering jewels, piling higher and higher, too many to imagine.

What will you do? Will you say there are too many jewels here for me to pick up all of them; that it is pointless to even start? Or will you begin grabbing as many of the precious stones as you can, knowing each and every one is precious?

So it is with Torah and *mitzvot*. We can never "mine" all their treasures, but we gain unimaginable riches by collecting as much as we can.

So it is with the last lesson Moshe bequeathed

Continued on p.17

Rabbi Dr. Eliyahu Safran is an educator, author, and lecturer. He can be reached at e1948s@aol.com.

Despite Recent Ruling, 'Second Get Law' Is Constitutional

By MARTIN E. FRIEDLANDER, Esq.

Confronted with a request to apply the colloquially dubbed "Second Get Law" (DRL 236B6(o)) in a matrimonial matter, Judge Bartlett, an Orange County, New York judge, reviewed the statute and declared that she found it unconstitutional as applied to the case at hand, and possibly unconstitutional on its face. Judge Bartlett is the first judge to do so since the law was passed in 1992.

The case, *Masri v. Masri*, is an Orange County matrimonial action wherein the husband refused to grant an Orthodox Jewish divorce to his wife, thus failing to fulfill New York State's legal requirement to "remove barriers to remarriage."

Due to the husband's refusal, the wife, who was the plaintiff in the action, requested that the court apply New York State law DRL §236B(6)(o) in awarding non-durational maintenance. Pursuant to that section of the Domestic Relations Law, a court may consider a party's failure to remove barriers to remarriage as a factor in making an economic determination for the purposes of equitable distribution, and awarding non-durational maintenance.

In *Masri*, the plaintiff-wife showed that her husband's refusal to grant her a *Get* would preclude her from dating or remarrying within her Orthodox Jewish community. Due to Jewish law's proscription against remarrying without a *Get*, a husband's refusal to grant a religious divorce detrimentally affects the economic status of a woman in the Orthodox community, as marriage is an economic partnership and she is precluded from engaging in such a partnership.

Despite the clear economic impact of the husband's refusal to give a *Get* in *Masri*, the court found that constitutional concerns prevented it from applying the Second Get Law. In its decision, the court stated:

> This court holds that in the circumstances presented here, increasing the amount or the duration of Defendant's post-divorce spousal maintenance obligation pursuant to DRL §236B(6)(o) by reason of his refusal to give Plaintiff a Jewish religious divorce or "Get" would violate the First and Fourteenth Amendments to the United States Constitution. There is no evidence that the Defendant has withheld a Get to extract concessions from Plaintiff in matrimonial litigation or for other wrongful purposes. The religious and social consequences of which Plaintiff complains flow not from any impropriety in Defendant's withholding a "Get" but from religious beliefs to which Plaintiff no less than Defendant subscribes. To apply coercive financial pressure because of the perceived unfairness of Jewish religious divorce doctrines to induce Defendant to perform a religious act would plainly interfere with the free exercise of his (and her) religion and violate the First Amendment.

It is unclear whether there was an application before the court with regard to the constitutionality of the plaintiff's request to apply the Second Get Law or whether the court addressed the issue of constitutionality *sua sponte*.

Statutes are passed by the legislature, and the process of passing a bill into law includes a consideration of the proposed law's constitutionality. In order to maintain a system of checks and balances, the founding fathers empowered the legislature with the power to pass laws and the judiciary with the power to interpret the laws enacted by the legislature. The democratic and practical success of our government system depends on the judiciary and the legislature exercising, but not exceeding, their powers.

The Second Get Law is one of a system of laws that Judge Bartlett swore to uphold upon becoming a member of the judiciary. Therefore, she is just as obligated to apply the Second Get Law as she is to apply the basic equitable distribution, child support, and maintenance laws. In other words, the judge is tasked and empowered with the ability to apply and interpret laws. A Supreme Court judge may decide the constitutionality of a law but in this case that law has been around for fifteen years and has been upheld by appellate courts.

Two cases in particular provided through analyses of the Second Get Law in their applications. First, the case of *S.A. vs. K.F 88-NYS2226* (2nd Dept. 2009), in which the wife was required to pay maintenance to the husband, states "it would be unjust and inappropriate to have a Wife pay spousal support for the Husband's benefit while she is still "chained" to him."

In the case of *Pinto v. Pinto* 260 AD 2nd, before the Appellate Division (the court that hears appeals from the Supreme Court cases), the husband appealed a Supreme Court decision granting the wife 100 person of the marital property in the event the husband failed to provide a *Get*. The Appellate Division stated that doing so was not an improvident use of the Supreme Court and judges' discretion. Appellate Courts within the jurisdiction of Orange County have enforced the Second Get Law, clearly having no question about the law's constitutionality.

The Court in *Masri* took on a legislative role. DRL 236(b)(6)(o) has not been repealed, nor has it been held unconstitutional by any Appellate Court in the state. It has been applied in numerous cases in the Second Department of New York State and beyond. On the same point, the Appellate Division held in

Continued on p.20

Martin E. Friedlander, Esq., is the principal of Martin Friedlander, PC, a boutique New York City law firm specializing in matrimonial and family law with offices in Midtown Manhattan and Brooklyn. A member of the New York State Bar Association, he has lectured on matrimonial matters and been consulted by practitioners throughout the world as well as by rabbinical courts. He has appeared before rabbinical courts throughout New York as well as provided CLE lectures on this topic. He is also the founder of the Yashar Coalition and can be contacted at mef@mflawyer.com.

The Mount Was Empty!

Although I anticipated that Netanyahu would remove the metal detectors from the Temple Mount, and although I very much hoped that I would be proven wrong, things developed in such an amazing and fascinating manner that I couldn't help but think that perhaps we were on the threshold of an historic change.

Everything that happened on the Temple Mount is the opposite of what you would have expected. After Israel liberated the Temple Mount in the Six-Day War, then Defense Minister Moshe Dayan returned the keys to the Temple Mount to the Muslim *wakf*. The *wakf* was in shock. Fifty years later, Netanyahu begged the *wakf* to take the Mount back, but they were simply unwilling to do so, deciding instead to boycott the site.

This was inexplicable. Israel had already removed the metal detectors and even took down the security cameras. Just as Jordan's King Hussein forced Israel to liberate Jerusalem in 1967, so too the Muslim *wakf* was forcing Netanyahu to apply Israeli sovereignty to the Temple Mount. This historic change could only happen to the Nation of Israel. It was simply amazing.

The Temple Mount was empty. After 50 years, it was in our hands! The Arabs were not there. Only Jews were on the Temple Mount. This was absolutely astounding! The problem is that *Am Yisrael* did not have the leadership capable of understanding this historic moment and translating it into practical strategy.

The Muslim *wakf* was completely right about the metal detectors. For years, Israel had been saying that the Temple Mount belongs to the Arabs. So if it is theirs, why were we putting metal detectors at the gates of their home? The Arabs understood very well that the metal detectors are a flag that symbolize sovereignty.

The entire situation on the Temple Mount revolves around sovereignty – not prayer. When Netanyahu folded and agreed to remove the metal detectors, he cut the rope that ties us to this land precisely at that stake to which everything else is tied. All of rights on this land, all of our connection to it, to Zionism, to Mount Zion – everything from which we draw our identity – revolves around the Temple Mount. From the moment that Netanyahu folded and indicated that the Mount is theirs, not ours, he opened the door, G-d forbid, to ever-increasing pressure on Israel.

We have just missed an extraordinary opportunity. In my estimation, Israel's weakness on the Temple Mount will bring a very serious conflict upon us with much more difficult starting conditions because, with our capitulation, we have lost our sense of the justice. And a nation that has lost its sense of justice cannot win – even if it has the most sophisticated army, the smartest submarines, the F-15, the F-16 and the F-35. A young Arab girl with a pair of scissors who knows what she is doing here will defeat an Israeli soldier with the most sophisticated weapon. Ultimately, justice is the best weapon of all.

Second Get Law

Continued from p.6

Avitzur v. Avitzur that it is not unconstitutional for a court to direct that parties exit their marriage in the same way they voluntarily entered into it, even if that includes religious ceremony.

The idea that the judiciary may not legislate is entrenched in legal precedent. In *Kupferman v. Katz*, 41 misc. 2d 124 (1963), the court cited *Herlands v. Surpless* 258 App. Div. 275, on this issue: "it seems clear from the authorities that the courts will not interfere with legislative action…" Later on, the court in *Kupferman* cited the Court of Appeals decision in *Matter of the City of New York* (*Ely Ave.*) 217 N.Y. 45: "the presumption that the legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied…" It is well settled that neither the wisdom nor the basic constitutionality of legislation is intended to be the subject of judiciary inquiries.

The court in *Masri* seems to have taken upon itself to address the constitutionality of DRL 236B(6)(o) and to use this as a basis on which to refuse to apply law that it is mandated to apply by the state of New York. Exceeding the jurisdiction of the judiciary is unlawful and flies in the face of legal precedent. Doing so goes against the deeply entrenched legal tradition that disallows courts from acting as renegade legislatures. The issue of the constitutionality of the statue was addressed during its passage through New York's Assembly and Senate.

This author recently represented a woman in a case in which the husband refused to give a *Get*. In the unpublished decision, the court took into consideration the fact that in the Orthodox community withholding a *Get* places an economic burden on the aggrieved party. The ability to remarry has adverse economic effects on the party that remains chained and the court issued an order with a different economic component if the person did not grant a *Get* within ninety days. Thus, one questions why the judge in Orange County took a position that the Second Get Law is unconstitutional. After fifteen years and many cases, this statute has been applied and appointed and found to be in compliance with the law.