

An offprint from

POLIN
STUDIES IN POLISH JEWRY
VOLUME TEN

Jews in Early Modern Poland

Edited by
GERSHON DAVID HUNDERT

Published for
The Institute for Polish-Jewish Studies

London · Portland, Oregon
The Littman Library of Jewish Civilization
1997

The Ban on Polygamy in Polish Rabbinic Thought

ELIMELECH WESTREICH

INTRODUCTION

THE Ban of Rabbenu Gershom (R. Gershom ben Judah of Mayence, 960–1028) has been seen by historians as a key determinant of the singularity of Ashkenazi Jewish culture.¹ Hence, analysis of its fate in Poland is a most appropriate means of examining how far Polish rabbis adhered to the Ashkenazi legal tradition.

In sixteenth-century Poland there were two approaches among halakhic scholars: one, represented by R. Solomon Luria (1510–73, known as Maharshal), was closed to other Jewish legal traditions; the second, represented by R. Shalom Shakhna (d. 1558) and his great disciple R. Moses Isserles (c. 1522–72, known as Rema), was, conversely, characterized by openness to other legal traditions. At the turn of the sixteenth century, R. Joel Sirkes (1561–1640) developed a position that harmonized these two approaches.

The Ban of R. Gershom (who was often known also as Me'or Hagolah, 'Light of the Exile') forbade both polygamy and divorcing a woman against her will.² Its promulgation brought about a revolutionary change in Ashkenazi Jewish family life and in the body of law that regulated it. R. Asher ben R. Jehiel (known as Rosh), an Ashkenazi rabbi who emigrated to Spain in the early fourteenth century,³ drew, for the Sefardi Jewish community, a comparison between the Ban and the geonic *takanah* on the rebellious wife, noting that the Ban was of higher status and was considered by Ashkenazi Jews to be on a par with Mosaic Law.⁴

In medieval Ashkenazi tradition, conduct unbefitting a wife, such as rebel-

¹ On the Ban of R. Gershom, see H. H. Ben-Sasson (ed.), *History of the Jews in the Middle Ages* (Heb.) (Jerusalem, 1963), 61; M. Elon, *Jewish Law: History, Sources, Principles*, trans. B. Auerbach and M. J. Sykes (Philadelphia, 1994), 783–6; A. Grossman, *Hakhmei Ashkenaz harishonim* (The Early Stages of Ashkenaz), 2nd edn. (Jerusalem, 1989), 127ff.

² On the different formulations of the Ban of R. Gershom, see the *Encyclopedia talmudit*, xvii. 757–72; L. Finkelstein, *Jewish Self-Government in the Middle Ages*, 2nd edn. (New York, 1964), 139–47.

³ A. H. Freimann, *HaRosh: Rabbenu Asher b. Jehiel and his Descendants, their Life and Work* (Heb.) (Jerusalem, 1986), 20–6, 32–41. For a biography of Rosh, cf. Alfred Freimann, 'Ascher ben Yechiel, Sein Leben und Wirken', *JJLG* 12 (1918), 236–317.

⁴ *Resp. HaRosh*, 43. 8.

liousness or immodest behaviour, constituted just cause for waiving the Ban. However, in divorce suits based not on the wife's behaviour, but on barrenness, levirate marriage, madness, or the proscription of cohabitation through no fault of the wife ('abandonment of the man'), the Ban was upheld.⁵ Even in those cases where cause was found for waiving the Ban, the preference was to waive the enactment forbidding a man to divorce his wife against her will rather than the enactment prohibiting polygamy.⁶

The Ban did not spread to Spain and Provence, except that from the late thirteenth century on, beginning with R. Solomon ben Aderet (known as Rashba), rabbis there acknowledged its authority over Ashkenazi Jews who had moved into the region.⁷ However, Rashba considered the Ban an ordinary enactment of the times designed to prevent husbands from arbitrarily hurting their wives.⁸ He did not accept its revolutionary impact on the structure of family life, instituting monogamy exclusively and creating halakhic conditions for almost complete equality between spouses. Hence, in all cases in which the husband had halakhic cause, such as levirate marriage, the precept of procreation, or an insane or physically deformed or even insufficiently pious wife, Rashba did not hesitate to maintain that the Ban did not apply.⁹ He even declared that the Ban was of limited duration and had expired at the end of the fifth millennium (as reckoned by Jews, i.e. from the creation of the world), that is, in 1240.¹⁰

Sefardi rulings, especially the time limit set on the Ban, did not penetrate into Ashkenaz in the Middle Ages. Even if the Ashkenazi rabbis knew of such a ruling, they presumably rejected it or ignored it altogether. The first encounter between Ashkenazi rulings and Sefardi legal tradition occurred beyond the borders of Ashkenaz, in fifteenth- and sixteenth-century Italy. The Ashkenazi community formed the majority in the northern part of the country and controlled the yeshivot and the rabbinate throughout the fifteenth century and later. The Sefardi Jews had a marked presence in the south of Italy, and after the expulsion from

⁵ With respect to all of these causes, except for levirate marriage, the halakhah was determined in the 12th century and was mentioned in the responsum cited by Maharshah, discussed below in the text to n. 58. On levirate marriage in Ashkenaz, see J. Katz, in his *Halakhah vekabbalah* (Jerusalem, 1984), 136–55. But in the early 14th century Rosh determined unequivocally that in Ashkenaz a married man must be forced to perform *halitsah*, no matter what. E. E. Urbach, 'Responso of the Rosh in Manuscripts and Printed Editions' (Heb.), *Shenaton hamishpat ha'ivri*, 2 (1975), 17.

⁶ *Resp. Maharam* (Prague), 946.

⁷ S. Z. Havlin, 'The Takanot of Rabbenu Gershom Me'or Hagolah in Matters of Family Law in Spain and Provence' (Heb.), *Shenaton hamishpat ha'ivri*, 2 (1975), 231ff.; Y. T. Assis, 'The Ban of Rabbenu Gershom and Polygamy in Spain' (Heb.), *Zion*, 46 (1981), 251.

⁸ The responsum by Rashba to his disciple R. Jacob Ha'ashkenazi is quoted in full in Havlin, 'The Takanot of Rabbenu Gershom', 230–1.

⁹ *Ibid.* For a comparison of the approaches of the Ashkenazi and Sefardi legal traditions, see my article 'Causes for Waiving the Ban of Rabbenu Gershom in the Late Middle Ages' (Heb.), *Dinei Yisrael*, 16 (1991–2), 91–5.

¹⁰ *Resp. Maharik*, 101. For further discussion, see Havlin, 'The Takanot of Rabbenu Gershom', 230–1 n. 7.

Spain in 1492 began arriving in large numbers. The Italian Jews, who had arrived in the country many generations before and had their own special traditions, formed the majority in the central part of the country; in addition, Italy had smaller Romaniote (Greek-speaking) and Levantine communities.¹¹ Here for the first time, Ashkenazi tradition had to cope with other traditions, defending its unique legal institutions, especially the Ban, against criticism and challenge. Rashba's view that the Ban was of limited duration was first mentioned in Italy in the work of the French-born R. Joseph Colon (c. 1420–80, known as Maharik), who thus brought it to the attention of the halakhic authorities of various countries.¹² Rashba's tradition was enthusiastically adopted by R. Joseph Caro (1488–1575), the greatest halakhic authority in the East, who was active in the Ottoman Empire in the time of Maharshah and R. Shalom Shakhna. R. Caro accepted Rashba's tradition and essentially ruled that the Ban had expired and that Ashkenazi Jews may marry two women, save in Ashkenaz itself, where the restriction still held, but only on the strength of custom and not as a ban or *takanah*.¹³

Polish Jewry viewed itself as part of the Ashkenazi tradition, continuing its spiritual and cultural heritage, and therefore of its legal tradition. At the same time, the Polish Jewish community maintained close ties with two other Jewish centres—Italy and the Ottoman Empire¹⁴—that did not adhere to the Ashkenazi halakhic tradition. In Italy, as has been mentioned, the Ashkenazi halakhic tradition was quite prominent, but other legal traditions also thrived. In the Ottoman Empire the Sefardi halakhic tradition was gradually taking over, displacing the Romaniote tradition on one side and the Musta'rab (Arabic-speaking) on the other, as well as the Ashkenazi, which had a certain presence there.¹⁵ While disciples of eminent rabbis migrated back and forth between Italy and Poland, the latter also had solid ties with the Ottoman Empire, facilitated by their common border. Thus, the teachings of rabbis from the Ottoman Empire reached Poland either directly or via Italy, where their works were published.¹⁶

The following analysis examines the response of the early rabbis of Poland to these new traditions, which came into conflict with and contradicted Ashkenazi traditions.

¹¹ Cf. M. A. Shulvass, *Jewish Life in Italy during the Renaissance* (Heb.) (New York, 1955), 5–13; S. Simonson, *Toledot hayehudim bedukasut Mantoba* (Tel Aviv, 1963), vol. i, pp. v and 3–4. On the existence of various ethnic subgroups, Ashkenazi, Sefardi, and Levantine, in Venice in the 16th century, see D. Karpi, *Betarbut harenaissans uvein homot hageto: Mehkarim betoledot hayehudim be'Italiah bame'ah ha-14–17* (Tel Aviv, 1989), 168, 233.

¹² See n. 10 above. ¹³ *Shulhan arukh*, 'Even ha'ezer', 1. 9; *Resp. Beit yosef*, 14.

¹⁴ J. Elbaum, *Petihut vehistagerut: Hayetsirah haruhमित-sifrutit bePolin uve'artsot Ashkenaz beshalhei hame'ah hashesh-esreh* (Jerusalem, 1990), 33–63.

¹⁵ J. Hacker, 'Sephardic Jews in the Ottoman Empire in the Sixteenth Century—Community and Society' (Heb.), in H. Beinart (ed.), *Moresheet Sefarad* (Jerusalem, 1992), 465.

¹⁶ R. Joseph Caro's great works—*Beit yosef* on the *Tur* (1550–9) and the *Shulhan arukh* (1565–6)—were printed in Italy and from there reached Poland.

THE VALIDITY OF THE BAN IN POLAND

Maharshal addressed Rashba's assertion that the Ban had expired in 1240 in a responsum. The details of the case were as follows: A married Polish Jew left Poland for the city of Palivna, in the Ottoman Empire. There he sought to marry another woman, but the rabbis of the city demanded that he first divorce the wife he had left in Poland. The man sent his wife a writ of divorce, but because of financial claims which she had against her husband, she refused to accept the divorce. In time it became known that the man had married another woman in Palivna. It turned out that he had presented the rabbis of Palivna with written certification from the rabbis of his wife's city, including Maharshal, attesting that he was indeed divorced and therefore nothing precluded him from marrying another woman. The document, however, was discovered to have been forged, although it was not known whether the man had been party to the forgery or had married the second woman in good faith.¹⁷

The query put to Maharshal was whether the Ban could be invoked to coerce him to divorce his second wife as long as he was still married to his former wife in Poland. The discussion centred on the validity of the Ban and the legal status of the prohibition against marrying two wives. Maharshal rejected the view that the Ban had lapsed, stating, 'With regard to Rashba, writing that he understood the decree of R. Gershom to be valid only until the end of the fifth millennium as cited by Maharik in section [*shoresh*] 101, these words are unfounded, and are as a fleeting rumour; therefore it [this argument] is rejected.'

Maharshal presented several arguments for rejecting Rashba's view. First, the conditions justifying the Ban in the fifth millennium pertained equally well in the sixth millennium. Second, eminent Ashkenazi rabbis—such as R. Isaac Or Zaru'a, the author of *Sefer mordekhai*, the author of *Sefer mitsvot katan*, and others living in the sixth millennium—had upheld the full validity and the legal weight of the Ban. In a more formal argument Maharshal stated that

Most of the *takanot* of R. Gershom Me'or Hagolah were formulated with no mention of time; moreover, with respect to the *takanah* on bigamy, he wrote that this can only be permitted with the consent of one hundred sages . . . and even then, they shall not permit it unless they see good reason for doing so . . . How can there be good reason, changing for the better, when, on the contrary, due to our many sins each succeeding generation is more lowly and worsens from day to day?¹⁸

A great distance separated Maharshal from his contemporary in the East, R. Joseph Caro, who believed that permitting a man to marry two women was fully justified.¹⁹ Maharshal's was a very far-reaching decision, even in comparison to those of rabbis in the Ottoman Empire who held that the validity of the Ban had

¹⁷ *Resp. Maharshal* (Jerusalem, 1969), 14.

¹⁸ *Ibid.*

¹⁹ See n. 13 above.

not yet expired but, in the case of a man marrying a second woman in good faith, would not force him to divorce.²⁰

In Poland R. Shalom Shakhna did not refer to the question of the expiration of the Ban, but his disciple R. Moses Isserles (known as Rema) did address the subject. Rema was a central figure in the world of Polish halakhic scholars in the sixteenth century and his influence shaped the development of the halakhah in Poland for many generations.²¹ In complete contrast to Maharshal, Rema accepted the tradition of Rashba, cited by Maharik, regarding the expiration of the Ban. In his work *Darkhei moshe*, Rema wrote: 'In any event, it seems to me that at the present time one does not need the approval of a hundred rabbis to waive [the Ban], since *the period of the edict has already elapsed* and no waiver is necessary at all' (emphasis added).²² Note that Rema did not claim that the prohibition against polygamy was no longer valid; quite the contrary, it was valid, but the legal basis for it was no longer the Ban of R. Gershom itself, but rather the prevailing custom: 'Therefore, even though in practice the edicts of the Gaon [R. Gershom] are still followed, nevertheless the edict itself has expired and henceforth only has the custom in which the practice is to be strict, and one is not entitled to relax it for them.'²³ Changing the legal basis for prohibiting polygamy resulted in doing away with the need to obtain consent from one hundred rabbis in those cases in which, for any of a number of reasons, a man was granted leave to marry a second wife. Presumably this meant a considerable relief for those men whose reasons were recognized by the courts, saving them from the burden of seeking the signatures of one hundred rabbis—far from an easy task given the conditions of the times. Save for this, it seems that in practice the position of Rema did not differ substantially from that of the medieval Ashkenazi rabbis and Maharshal, who followed in their footsteps.

Basing the proscription of polygamy on custom essentially transferred the proscription from the realm of public law to that of private law,²⁴ since the theoretical argument justifying the legal force of custom is that it is an implied term, or *umdana demukhah* in the language of halakhic sources—a concept taken from the law of contracts. As R. Yom Tov Al-Ashbili (Ritba), one of the great scholars in fourteenth-century Spain, wrote:

Where the customary practice is only to marry one woman, [a man] is not entitled to marry another woman in addition to his wife, since it is an implied term that she married him with the understanding that he not marry another woman.²⁵

²⁰ *Resp. Mabit*, 2. 15.

²¹ A. Ziv, *Rabbi Moses Isserles* (Heb.) (New York, 1972), 21.

²² *Darkhei moshe, Tur*, 'Even ha'ezer', 1. 10.

²³ *Ibid.*

²⁴ In modern legal systems public law includes branches like criminal, constitutional, and administrative law. Private law includes areas such as contracts, torts, family law, and inheritance. In modern western law bigamy comes under criminal law, whereas in Muslim law it comes under private, i.e. contract, law.

²⁵ Cited in R. Caro, *Beit yosef, Tur*, 'Even ha'ezer', 1. 8.

In response to this Rema wrote:

It seems to me that this refers to a place where the Ban of R. Gershom never spread, but its sources are only the custom. But in a place where the Ban spread, and the Ban is the origin of the proscription by reason of the Ban, even if [a man's] first wife did not object; and never have I encountered polygamy in a place where the Ban was practised even if [a man's] first wife agreed.²⁶

According to Ritba, there was no obstacle to a man marrying a second wife after his first had given her consent, since in his view the legal foundation here rested on the law of contracts. Rema, on the other hand, continued to view the prohibition against marrying two women as governed by public law; hence the consent of the first wife permitting her husband to marry a second wife was of no avail.

Ascribing the prohibition against polygamy to the realm of public law has additional implications in the Rema's rulings, namely the sanctions applied to those men who violate the prohibition. In response to R. Caro's assertion in the *Beit yosef* that 'R. Gershom only legislated his decree until the end of the fifth millennium,'²⁷ Rema wrote, 'This is not done; rather, a man who has married two women is forced to divorce one of them.' He responded in like fashion to R. Caro's statement in the *Shulhan arukh* that R. Gershom 'only declared the ban until the end of the fifth millennium', writing that

In any case, in these lands the *takanah* and the custom stand and bigamy is not allowed; whoever violates this and marries two women is coerced by bans and ostracism to divorce one of them. Some say that in this era one should not coerce those who violate the Ban of R. Gershom, since the fifth millennium has already passed; but this is not the practice.²⁸

R. Mordecai Jaffe (c. 1530–1612, known as the Ba'al Halevushim), a disciple of Rema, continued this approach. In *Levush mordekhai* he cited Rema's new interpretation, asserting that since the Ban expired at the end of the fifth millennium, the legal basis for prohibiting polygamy in his day was the force of custom.²⁹ Like his teacher, Rema, Jaffe held that this change did not have significant implications in terms of actual practice; a bigamist is to be coerced by bans and excommunication to divorce his second wife.³⁰ The position taken by Rema and R. Mordecai opposes that of the rabbis in the Ottoman Empire during this period, who held that a man who has violated the Ban by marrying a second wife should not be forced to divorce.³¹

²⁶ Ibid. 8.

²⁷ *Darkhei moshe, Tur*, 'Even ha'ezer', 1. 8.

²⁸ Glosses of Rema, *Shulhan arukh*, 'Even ha'ezer', 1. 10.

²⁹ *Levush mordekhai*, 1. 3.

³⁰ Ibid. 11.

³¹ It surely contradicts the position taken by R. Caro, who permitted Ashkenazi men to marry additional wives without showing any cause (text to n. 13 above), but it also contradicts the position taken by Mabit, who repudiated polygamy without just cause but at the same time was opposed to using coercion against those who violated the Ban (*Resp. Mabit*, 2. 15).

THE PRECEPT 'TO BE FRUITFUL AND MULTIPLY'

Changing the legal foundation for the prohibition against polygamy was likely to have legal repercussions in those cases in which the man had just cause against his wife, especially in the case of non-feasance of the precept of procreation. As I mentioned in the Introduction, the striking difference between the Ashkenazi and the Sefardi legal tradition in the Middle Ages was manifest in those instances in which the man had a case against his wife. In such instances, the Sefardi tradition readily released the man from the Ban, whereas the Ashkenazi tradition made a waiver of the Ban difficult, granting it only when the cause stemmed directly from the woman's behaviour. In *Darkhei moshe*, Rema presented two approaches to waiving the Ban in cases concerning the commandment of levirate marriage, the precept of procreation, insanity, and women who were only betrothed. In conclusion he wrote:

It seems to me that he who is lenient and bases his judgement on those who waive the Ban has lost nothing; for I have noted above that the decree was not made for fear of a proscription in the Torah itself but is only a plain *takanah*; and if in the case of a scribal *takanah* one can be lenient, then certainly in the case of a plain *takanah* [one can be lenient].³²

The *takanah*, according to Rashba, was intended simply to 'impose limits on licentious men who abuse their wives'.³³ Since there is no fear of a Torah injunction here, according to the principles of halakhic legislation there is no reason to insist on strictness, and whoever wishes to rule leniently may do so and loses nothing by it. This is a very different approach from that of the Ashkenazi rabbis.

How was this approach reflected in Rema's glosses to the *Shulhan arukh*, and to what extent did his position reflect a practical trend in halakhic ruling in Poland? The responsa of Polish rabbis discuss the precept of procreation along with insanity as just causes for releasing a man from the Ban; but Rema treated procreation separately and autonomously in his works on legal codification. In *Darkhei moshe*³⁴ two views are presented on the matter. R. Judah Minz, on the one hand, ruled unequivocally that the Ban is not to be waived by reason of the precept to procreate, while R. Meir of Padua (known as Maharam of Padua) maintained the contrary.³⁵ Both of these rabbis were Ashkenazim who found their way to northern Italy and headed the Padua yeshiva. The difference, however, was that R. Minz came at a more advanced age and staunchly defended the Ashkenazi tradition against the legal traditions of other Jewish groups, especially the Romanians.³⁶ He

³² *Darkhei moshe*, *Tur*, 'Even ha'ezer', 1. 10. ³³ See n. 8 above ³⁴ *Tur*, 'Even ha'ezer', 1. 10.

³⁵ *Resp. R. J. Minz*, 10. See also my analysis of the position taken by R. Minz: 'Causes for Waiving the Ban of Rabbenu Gershom in Fifteenth- and Sixteenth-Century Italy' (Heb.), *Mehkarei mishpat*, 9 (1992), 231-8. *Resp. Maharam of Padua*, 14. 19. The approach of Maharam of Padua is discussed in my article mentioned above in this note, 238-43.

³⁶ 'Causes for Waiving the Ban of Rabbenu Gershom in Fifteenth- and Sixteenth-Century Italy', 240.

had no qualms about opposing R. Eliyahu Mizrachi,³⁷ the leading rabbi in the Ottoman Empire, and the latter was eventually forced to accept the stand taken by R. Minz.³⁸ Maharam of Padua came to Italy as a young man, having studied under R. Jacob Polak (c. 1460–c. 1532), the founder of Torah studies in Poland and a scholar known for his independence. Even though he inherited the office held by R. Minz, whose granddaughter he married, he took a completely different approach from that of his predecessor and ruled that the Ban should be waived in order to enable a man to fulfil the precept of procreation. His view was apparently influenced by other legal traditions which he encountered in Italy in the first half of the sixteenth century.

The responsa of these two rabbis, published in 1553 in Venice, came to the attention of Rema. He cited them in *Darkhei moshe* and wrote that ‘he who decides leniently has lost nothing’.³⁹ In his glosses to the *Shulhan arukh* he presented both approaches again, but refrained from favouring one over the other, nor this time did he note that nothing is lost by a lenient ruling.⁴⁰ With respect to the position taken by R. Joseph Caro in the *Shulhan arukh* that the Ban of R. Gershom did not apply to levirate marriage, Rema added:

The same rule applies in every case where fulfilment of a precept is held in abeyance, as in the case of a man who has lived with his wife for ten years and she has not given birth . . . but there are some who disagree and hold that the Ban of R. Gershom is to be enforced even in the case of a precept and even in the case of levirate marriage.⁴¹

In his introduction to *Darkhei moshe*, Rema stated that as a matter of principle his discussion, even in those places where he writes ‘it seems to me’, was not to be taken as a definite ruling, settling a difference of opinion; quite the contrary, his basic principle was: ‘one must judge only as one personally sees fit’. Hence when he presented two opinions, his intention was to permit the rabbi adjudicating the specific case to rule according to his own judgement.⁴² Perhaps, however, he personally preferred the lenient approach, since he presented it first; and even if he considered the different opinions equally valid, this deviated from the Ashkenazi position of definitely preferring the Ban over fulfilment of the precept to procreate.

To obtain a better understanding of the way Rema arrived at this position, two theoretical arguments used by the Ashkenazi rabbis to substantiate their giving priority to the Ban should be noted. The first argument was that the sin of living outside Israel was the cause of barrenness and made waiving the Ban purposeless. The second was based on an interpretation of a paragraph in the Babylonian Talmud which took it to mean that in their era the precept to procreate should be abrogated.

³⁷ R. Eliyahu Mizrachi’s position was published in *Resp. Re’em*, 14.

³⁸ This is attested by R. Yehiel Kasteliash, in a responsum published by S. Assaf, *Mekorot umehkarim betoledot Yisra’el* (Jerusalem, 1946), 209.

³⁹ *Darkhei moshe, Tur*, ‘Even ha’ezer’, 1. 10. It is clear from the context that he was referring to all the cases mentioned previously, including non-feasance of the precept to procreate, and not only to the case of a betrothed woman, which he discusses before this remark.

⁴⁰ ‘Even ha’ezer’, 1. 10.

⁴¹ Ibid.

⁴² Cf. Elon, *Jewish Law*, 1355–6.

Therefore, in opposition to the talmudic ruling,⁴³ rabbinical courts outside Israel refrained from forcing a man to fulfil the precept to procreate. These arguments also found expression in a responsum of R. Minz⁴⁴ with which Rema was quite familiar, but Rema attributed the decisions of rabbinical courts outside Israel to the decline in their strength, which resulted in their not wishing to intervene in family controversies.⁴⁵ He did not subscribe to the two justifications given above (and perhaps even opposed them), but the fact that other eminent rabbis adhered to these arguments sufficed to make him feel it necessary to note their position.

A WIFE'S INSANITY AND ABANDONMENT OF THE HUSBAND

The precept of procreation as cause for waiving the Ban is discussed in Jewish legal sources from Poland only in codexes and theoretical works, but no record exists of any actual case. However, there are responsa from Poland discussing cases where the man used the precept of procreation as an argument, but the true reason for the man's petition was the insanity of his wife or his own abandonment.

A wife's insanity was one of the more common factors in suits for divorce and for permission to marry a second wife. The main argument that a husband proffered in those circumstances was that life with an insane woman was intolerable, or, as the halakhic authorities put it, 'a man and a snake can not live together under the same roof'. Such a condition implied that a wife did not know how to observe properly the laws of menstrual purity and this further justified the husband's petition. If the man had not yet fulfilled the precept of procreation, forced abstinence from cohabiting gave him further legal cause, namely non-feasance of the precept of procreation. The first cause—the intolerable quality of life together—was unique to situations of insanity. The second cause, called 'abandonment of the man', could also exist in the case of gynaecological disorders that prevented the woman from observing the laws of menstrual purity, so that cohabitation would be forbidden by halakhah. The third cause—failure to fulfil the precept of procreation—was more comprehensive and was the commonest, since it pertained whenever there was any deficiency in the fertility of either spouse. Two responsa of early Polish rabbis discuss cases of insanity, and another responsum discusses the man's abandonment due to gynaecological disorders in his wife. Interestingly, however, the only legal argument given in these cases was non-feasance of the precept of procreation, and not the other causes which pertained particularly to these circumstances.

⁴³ See my article 'Polygamy and Forcing the Wife to Accept a Divorce in the Rulings of Eleventh- and Twelfth-Century Ashkenazi Rabbis' (Heb.), *Mehkarei mishpat*, 6 (1988), 148–50.

⁴⁴ See n. 35 above, esp. my article cited there.

⁴⁵ Glosses of Rema, *Shulhan arukh*, 'Even ha'ezer', I. 3. He based his gloss here on the writings of the Spanish rabbi R. Isaac Sheshet in *Resp. Ribash*, 15.

The Open Approach

We begin with a discussion of one of the few responsa by R. Shalom Shakhna, whose work was rarely preserved since he refused to commit his rulings to writing.⁴⁶ R. Shalom Shakhna was called upon to adjudicate the case of a man who could not cohabit with his wife on account of her insanity and consequently had not yet fulfilled the precept of procreation. Here the only legal argument given in support of the man's petition was non-feasance of the precept to procreate. R. Shalom Shakhna ruled conclusively that the precept of procreation takes precedence over the Ban, and, as attested by R. Joel Sirkes,⁴⁷ this position was accepted in actual practice by the rabbis of Frankfurt, Ashkenaz, and Russia.⁴⁸ It was a position diametrically opposed to that of the rabbis of medieval Ashkenaz, who refused to accept the argument of non-feasance of the precept to procreate as legal cause for waiving the Ban in cases where the wife was insane.⁴⁹ R. Yaakov Molin (known as Maharil), one of the more prominent rabbis of fifteenth-century Ashkenaz, did actually advocate a similar stand in the case of a woman who at times was insane, at times sane, holding that the precept of procreation took precedence over the Ban. But this view remained purely theoretical; in practice he gave precedence to the Ban, since the legal tradition, he said, was opposed to and takes priority over theoretical considerations.⁵⁰ R. Shalom Shakhna, in contrast, ruled this way in practice and even went so far as to state that R. Gershom did not enact the Ban in the case of an insane wife, therefore one did not need to obtain consent from one hundred rabbis. It should be noted that R. Shalom Shakhna did not appeal to the other two available arguments—abandonment of the husband and the intolerable situation of living with an insane person. It is quite possible that from his point of view the argument based on procreation was the most convincing since it is based on a Torah precept. The Ashkenazi halakhic tradition was no longer a compelling force in itself, and without theoretical considerations in support of a certain legal outcome, a decision was reached which opposed it. This accords with R. Shalom Shakhna's bias against creating a binding tradition of halakhic rulings. As his son and deputy, R. Israel, attested, R. Shalom Shakhna declined his students' request to commit to writing and publish his rulings and responsa because this would deter other rabbis from deviating from them and make them into binding precepts, inhibiting the judgement of later generations.⁵¹

R. Shalom Shakhna's approach stands in bold contrast to that of R. Judah

⁴⁶ See text to n. 51 below.

⁴⁷ R. Joel Sirkes, *Bayit hadash, Tur*, 'Even ha'ezer', 119, s.v. 'vekatav ha'Rambam'.

⁴⁸ Meaning the area of Red Russia, also called Reisin, whose capital was Lwów.

⁴⁹ Their responsa are cited by Maharshah and are discussed below, in the text to n. 59.

⁵⁰ *Resp. Maharil haḥadashot*, 202; see also my article 'Causes for Waiving the Ban in the Late Middle Ages', 82–3.

⁵¹ *Resp. Rema*, 25; also see the testimony of his disciple R. Hayyim ben R. Betsalel, *Vikuaḥ mayim ḥayim* (Amsterdam, 1912), intro., sect. 2; and A. Zimmer, *R. Ḥayim b. R. Betsalel of Friedburg* (Jerusalem, 1987), 24. For further elaboration, see Elon, *Jewish Law*, 1346–8.

Minz, who was, as mentioned above, a rabbi of Ashkenazi origin active in northern Italy two generations earlier. R. Minz staunchly defended the Ashkenazi tradition against other judicial traditions, even re-interpreting legal sources in order to uphold the Ashkenazi ruling.⁵²

Rema accepted the approach of his teacher, R. Shalom Shakhna, deviating from Ashkenazi tradition, and, as noted above, leaving it in the hands of individual judges to decide whether or not to waive the Ban on account of the precept. In the case of an insane wife, Rema's ruling was diametrically opposed to Ashkenazi tradition. Here, he did not advocate giving the judge the option of choosing between the two possibilities; rather, he wrote unequivocally: 'In those cases where the first wife cannot be divorced, such as if she has gone mad or if she may legitimately be divorced but refuses to accept a writ of divorce from her husband, one should rule leniently and permit the husband to marry another woman.'⁵³ Note that he mentions only insanity as cause for waiving the Ban and does not mention abandonment of the husband or the precept of procreation. That life with an insane wife is intolerable is considered sufficient justification for waiving the Ban and it follows that there is also no need to obtain the consent of one hundred rabbis.

The Closed Approach

Exactly the opposite stand was taken by Maharshal, who, as some scholars claim,⁵⁴ was a great adversary of R. Shalom Shakhna and an older colleague of Rema.⁵⁵ A query was directed to Maharshal with regard to waiving the Ban on account of the wife's insanity or abandonment of the husband. His response essentially comprised four rulings pertaining to four separate cases:⁵⁶ (1) the direct question addressed to him regarding the man's abandonment; (2) a previous case in which he had been involved concerning a wife's insanity; (3) the response by R. Eliezer ben Joel Halevi of Bonn (known as Ravyah) in a case concerning a wife's insanity; (4) the response of the rabbis of Speyer, Worms, and Mainz (known collectively by the Hebrew acronym 'Shum') in a case concerning a wife's insanity, cited as a precedent by Ravyah.

The explicit question directed to Maharshal concerned a woman who had a discharge of blood as a result of intercourse and could not become ritually clean for her husband, as a result of which her husband was forbidden intercourse with

⁵² *Resp. R. J. Minz*, 10; for further elaboration, see my article 'Causes for Waiving the Ban of Rabbenu Gershom in Fifteenth- and Sixteenth-Century Italy', 236-8.

⁵³ Glosses of Rema, 'Even ha'ezer', I. 10.

⁵⁴ H. Graetz, *Geschichte der Juden*, ix (Leipzig, 1866), n. 1 identifies the person alluded to in *Resp. Maharshal*, 16, as R. Shalom Shakhna. See the discussion of E. Reiner, 'The Yeshivas of Poland and Ashkenaz during the Sixteenth and Seventeenth Centuries: Historical Developments' (Heb.), in I. Bartal, E. Mendelsohn, and C. Turniansky (eds.), *Studies in Jewish Culture in Honour of Chone Shmeruk* (Jerusalem, 1993), 54 n. 72.

⁵⁵ Ziv, R. Moses Isserles, 57.

⁵⁶ *Resp. Maharshal*, 65.

her for ever. The husband's question was as follows: was it permissible for him to expel her with her *ketubah* against her will, even though R. Gershom decreed that a woman not be divorced against her will; since in this particular instance R. Gershom did not intend his decree to abrogate the precept of procreation? In other words, R. Gershom did indeed decree that a woman may not be divorced against her will, but one can surely not suppose that he would preclude the man from fulfilling the precept of procreation. Note that here, too, as in the case adjudicated by R. Shalom Shakhna, the only argument mentioned is that of failure to procreate. In support of his petition, the husband addressing the query cited a ruling that had been issued near where he lived concerning an insane woman: 'He did not prevent the husband whose wife had become insane from divorcing her by sending a messenger and returning her *ketubah*, with the proviso that if she become sane she receive her writ of divorce, on the grounds of precluding procreation.' Here too, the cause for waiving the Ban is that the precept of procreation could not be kept; other possible causes are not cited.

In his response to the query sent him, Maharshal primarily discussed the precedent on which the husband relied, regarding the insane wife, and only towards the end, in his summation, did he return to the specific issue of the woman who had a discharge of blood and hence was forbidden to her husband. His remarks on the insane woman are very instructive, and therefore are presented here in detail, but first some background on the case itself.

A talmudic scholar who moved to Poland, apparently from Italy, had left his wife, who had become insane, in his country of origin. In Poland a match was proposed for him, but the father and other relatives of the bride-to-be would not consent 'until he bring a waiver from the rabbis permitting him to marry another woman'. The man set to work with verve to obtain the waiver, 'and was heroic as a lion and swift as a gazelle to do their bidding and his own, and prostrated himself before our rabbis that they give him leave to divorce his wife and marry another woman'.

Maharshal, whose opinion was also asked in this case, took the view that he could do nothing: 'I did not feel I could agree with them, nor could I take a stand against them, since I had no way of challenging them halakhically, for their entire view was that R. Gershom Me'or Hagolah did not issue his decree *to supersede the precept of procreation*' (emphasis added).

Those who waived the Ban based their position on the argument that the precept of procreation takes precedence over the Ban and permitted the man to marry another woman. Maharshal did not accept their position, but he could not impose his own view in practice because he lacked concrete justification for his stand. The result was: that the man 'was granted permission to give a writ of divorce, to be entrusted in someone's hands, with the proviso that if she become sane she would receive her writ of divorce and her *ketubah*; and the deed having been done, is done; but I feel pangs of conscience'. This clearly indicates that Maharshal

sensed, perhaps intuitively, perhaps because he knew of an inexplicit tradition, that this ruling was a departure from the traditional way followed by the rabbis of Ashkenaz.

Lacking any precedent on which to rely,⁵⁷ R. Minz arrived by means of theoretical analysis at a similar outcome to the rabbis of twelfth-century Ashkenaz. Maharshal, however, did not proceed in this way, since the theoretical basis for R. Minz's approach was founded on the two contentions mentioned earlier: the first, that the sin of living outside Israel is what causes barrenness, and therefore divorcing one's first wife or marrying a second wife is of no avail; and the second, based on a paragraph cited in the Talmud,⁵⁸ that after the destruction of the Temple one must strive to curtail the prescript of procreation. In his *Yam shel shelomoh*,⁵⁹ Maharshal argued explicitly against seeing the sin of living outside Israel as the cause of barrenness. Furthermore, he did not refer to the relevant paragraph from the Talmud in any of his halakhic works and without this basis, he could not develop a body of theory to substantiate his intuition that the Ban should supersede the precept of procreation; hence only an explicit precedent could provide the solid legal foundation needed to back up his judgement. In time he did find a precedent, and in its wake asserted his strongly held view. In his words: 'Several years later, searching in the great book of Ravyah,⁶⁰ I found that great rabbis had already ruled against [waiving the Ban] in practice. This is the main point and sums up my response.'⁶¹ Maharshal then cited the responsum of Ravyah, which itself includes the response of the rabbis of Speyer, Worms, and Mainz. Both these responsa discuss similar cases concerning an insane woman whose husband was forbidden to cohabit with her, so that the man had not yet fulfilled the precept of procreation. In both cases it was ruled unequivocally that the Ban was not to be waived in deference to the precept of procreation.⁶² The remedy sought in these cases was permission to marry another woman; but Maharshal viewed the Ban's proscription of polygamy and of divorcing a woman against her will as analogous and concluded that just as the rabbis forbade marrying another woman in such circumstances, so too one should forbid divorcing an insane woman against her will. Given these two precedents, there was no longer room for the questioner to suppose that Maharshal might be in favour of waiving the Ban in the case of insanity, although he had not specifically objected to waiving the Ban in the case of the Italian talmudic scholar. Indeed, this is what he wrote: 'It may seem clear to you that leave is given to divorce a woman who has become insane, as you may have concluded from the permission granted to the young talmudic

⁵⁷ See my article 'Causes for Waiving the Ban of Rabbenu Gershom in Fifteenth- and Sixteenth-Century Italy', 236–8.

⁵⁸ Ibid.

⁵⁹ *Yev.* ch. 6, sect. 32.

⁶⁰ *Sefer Ravyah: Teshuvot* (Bnei-Berak, 1989), 21.

⁶¹ See n. 56, above.

⁶² The responsum of the rabbis of Speyer, Worms, and Mainz, which was earlier than that of Ravyah, was unanimous. However, in Ravyah's case, he represented the majority view, but one authority, R. Simḥah of Speyer, held a dissenting view.

scholar, because I remained silent at that time; but henceforth I hold that it is forbidden.⁶³

After establishing his position regarding the insane woman, Maharshal proceeded to address the specific question that had been posed to him: can a woman whose husband is precluded for ever from cohabitating with her be divorced against her will? He responded: 'Also regarding your query, I cannot waive the Ban of R. Gershom and [allow you to] divorce her against her will; for one could say, [it is as if] his field was swept away by a flood.' In other words, Maharshal viewed this case as the decree of fate, and was not prepared to make the wife pay the price by being divorced against her will. He could only propose that: 'The rabbis of that city ought to take the matter in hand and try to find a way of luring her to accept a writ of divorce willingly, using any possible justification or trick.'

It is clear that Maharshal viewed himself as completely bound by the Ashkenazi tradition. Unlike R. Shalom Shakhna, he viewed the rulings of the rabbis of Ashkenaz as binding precedents, and felt that under no circumstances could he rule differently. But what would R. Shalom Shakhna have done had he been aware of these precedents? Presumably this would not have changed his opinion, although it is hard to say definitively. The fact is that rabbis who studied under him followed his approach and were not overly concerned by these two precedents.

This decision fitted Maharshal's high esteem for his Ashkenazi roots and his general tendency to defend the Ashkenazi tradition in other matters, such as the halakhah on phylacteries,⁶⁴ flatly refusing to accept the kabbalistic practices that were beginning to penetrate Poland. But this attitude seems, on the surface, to contradict his well-known self-confidence and independence.⁶⁵ He himself declared that he would not rely upon any author's interpretation of the Talmud but only upon his own, based upon direct investigation of the text.⁶⁶ There is no contradiction here since the spiritual and cultural milieu in which a rabbi is trained comprises his halakhic tradition. It provides the intellectual building-blocks which shape his halakhic world and is, for him, unquestionable. Thus, self-confidence actually motivates the rabbi to be more adamant in defending what has become his own personal asset, an inseparable part of his spiritual-legal world.⁶⁷

⁶³ See n. 56, above.

⁶⁴ See e.g. *Resp. Maharshal*, 98, on his adamant opposition to introducing any change based on kabbalistic consideration in the Ashkenazi practice concerning phylacteries. It is noteworthy that Maharshal was the first to publish a history of the rabbis of Ashkenaz and France in the Middle Ages (*Resp. Maharshal*, 29).

⁶⁵ Nothing expresses this more poignantly than his grandiose plan to write a comprehensive composition on the halakhah, *Yam shel shelomoh*. Explicit remarks on this may be found in his introduction to this work.

⁶⁶ *Ibid.*

⁶⁷ Two other Ashkenazi rabbis who were noted for their great assertiveness and self-confidence—R. Asher ben R. Jehiel (Rosh), and R. Judah Mintz—both strongly defended the Ashkenazi legal tradition. Rosh migrated to Spain in the early 14th century, where he served as chief rabbi of Toledo.

The Synthetic Approach

R. Joel Sirkes, one of the next generation of rabbis, discussed the subject of the Ban in his *Bayit hadash*,⁶⁸ and essentially presented the stand taken by R. Shalom Shakhna: 'where the precept of procreation is at issue, R. Gershom's decree does not apply at all'. He notes there that 'The rabbis of Frankfurt also wrote a lengthy responsum on this, siding in favour of waiving [the Ban], and all the rabbis of Ashkenaz and Russia agreed with them.'⁶⁹ Here R. Sirkes made an original attempt at bridging the opposing views and arriving at a more harmonious approach, lending expression to the independent course pursued by some of his teachers, on the one hand, yet not explicitly contradicting the words of Maharshal, on the other. In principle, he favoured allowing the husband to marry another woman in the spirit of the ruling by R. Shalom Shakhna. Yet whereas R. Shalom Shakhna ruled that the Ban does not apply at all in these circumstances, thus implying that the man is free to marry another woman without any legal severance from his first wife, R. Sirkes demanded that the man file a writ of divorce and deposit the woman's *ketubah*, thus obliging him to obtain permission from one hundred rabbis.⁷⁰ He also based the waiver on the precept of procreation, stating that, 'even though R. Gershom Me'or Hagolah banned marrying a second woman in addition to one's wife, he surely did not decree this where the precept is at issue';⁷¹ thus he maintained that the precept of procreation superseded the Ban.⁷² R. Sirkes based his remarks on the words of R. Shalom Shakhna, but he was also aware of the rulings and responsa of Maharshal and apparently did not wish to take a stand explicitly contradicting the latter. Hence, he claimed that Maharshal only forbade divorcing an insane woman against her will, but did not forbid marrying another woman. He put it thus: 'As for the leave granted by the Rabbi [Rema] in his glosses to marry an additional wife in the case of an insane woman, Maharshal also acknowledges such leave.'⁷³

However, elsewhere in the same work, in a section on divorcing an insane woman, he discusses the position taken by Maharshal, quoting the latter's words

Nevertheless, he defended the Ashkenazi tradition in his rulings on several central issues. At the same time he was extremely independent, not hesitating to challenge the status of the *ge'onim*, to whom even such an astute sage as R. Abraham ben David, the great critic of Maimonides, deferred. The second, R. Mintz, also emigrated from Ashkenaz to a land where he came into contact with different legal traditions. Evidence of his adherence to the Ashkenazi tradition is found directly in the rulings discussed in this article.

⁶⁸ A commentary on *Sefer haturim*; discussed in Elon, *Jewish Law*, 1303–4 n. 1.

⁶⁹ *Bayit hadash, Tur*, 'Even ha'ezer', 119, 'Ve'katav ha-rambam'.

⁷⁰ *Bayit hadash, Tur*, 'Even ha'ezer', 1, at the end. R. Sirkes held this to apply also with regard to the commandment of levirate marriage. ⁷¹ Ibid.

⁷² The same holds for the commandment of levirate marriage, namely, that it takes precedence over the Ban; but this was not a question of practical importance in Poland.

⁷³ *Bayit hadash, Tur*, 'Even ha'ezer', 1. Similar remarks may be found in his responsa, *Resp. Bayit hadash: Hayeshanot*, 78.

as follows: 'Now that we have the ban of R. Gershom prohibiting divorcing a woman against her will and prohibiting polygamy, there is no remedy for him, as Ravyah has ruled in practice and as I have written in my book on *Yevamot*.⁷⁴ While this is a faithful representation of Maharshal's position, it does not accord with R. Sirkes's own interpretation in section 1 of *Bayit hadash*.⁷⁵ It is unlikely that he simply misunderstood Maharshal, but rather that he was seeking an interpretative approach which could achieve harmony between the various rabbis. The specific question asked of Maharshal was whether abandonment of the husband constituted cause for divorcing against her will a woman who was forbidden to her husband; and to this end the questioner cited the case of an insane woman. R. Sirkes interpreted all of Maharshal's decisions as binding only with respect to cases of divorce from a wife against her will. He did not view Maharshal's remarks pertaining to such cases as binding in other contexts. Hence, he saw no need to draw inferences from the law on divorcing a woman against her will to unrelated judgements about marrying a second wife, even though Maharshal had drawn such inferences himself.

R. Sirkes's approach calls to mind the distinction drawn in Anglo-American law between *ratio decidendi* and *obiter dicta*, between the core of the responsum and asides that are not essential to deciding the case. Since the core of Maharshal's responsum is his discussion of divorcing a woman against her will, all that he says is binding only in that context; whereas his additional opinions voiced on subjects beyond this core are not binding. Just as it is clear to us that Maharshal did not distinguish between divorcing a woman against her will and giving permission to marry a second wife, so too we may assume that R. Sirkes was aware of this. Further on in the same section of the *Bayit hadash* in which he had cited Maharshal's words, he again refers to Maharshal's views on a woman who is sometimes mad and sometimes sane, and notes that 'Maharshal took a very strict view regarding this, too . . . and in actual practice one ought to be strict.' Later, however, he adds: 'In any event, one ought to rule strictly specifically regarding divorcing her; however, if he does not divorce her, but rather takes an additional wife, even Maharshal admits that this is not prohibited, as I have written.' R. Sirkes's approach undoubtedly yields a narrow interpretation of the words of

⁷⁴ *Bayit hadash*, Tur, 'Even ha'ezer', 119.

⁷⁵ This contradiction has been noted by several commentators on the *Shulhan arukh*. The author of *Helkat mehokek* (*Shulhan arukh*, 'Even ha'ezer', 1. 16, and Elon, *Jewish Law*, 1429-30 n. 1), comments on Rema's glosses on the *Shulhan arukh*, which say that one should rule leniently and permit the man to marry another wife in the case where his wife is insane, noting: 'It has been the practice not to give leave without the [consent] of one hundred rabbis; cf. *Bayit hadash*.' Then he adds, 'Also see the responsum of Maharshal, sect. 65, which indicates that, unlike *Bayit hadash*, in his opinion one should forbid it.' In other words, the author of *Helkat mehokek* considers that the *Bayit hadash* misunderstood the Maharshal. *Beit shemuel* (*Shulhan arukh*, 'Even ha'ezer', *Beit shemuel*, 1. 23) makes a similar point in its commentary on sect. 1, and writes with respect to sect. 119 of the *Bayit hadash*: 'What he says there, citing Maharshal, contradicts what he writes in this section.'

Maharshal, removing them from their wider context; but this is precisely what he chose to do in order to preserve the continuity of the tradition of Ashkenazi rulings received from Maharshal while at the same time opening the field for the innovative approach which R. Shalom Shakhna adopted and transmitted to his disciples.

R. Sirkes's synthesis is also manifest in curtailing the legal efficacy of the argument of insanity. As mentioned earlier, he required that the husband obtain leave from one hundred rabbis in order to divorce his wife against her will; that he file a writ of divorce in favour of the wife before the Ban could be waived for him; and that he deposit the sum of his wife's *ketubah* in the hands of the court.⁷⁶ This approach explicitly opposes that of Rema, who waived the Ban altogether. R. Sirkes largely preserved the spirit of the Ban and rejected bigamy, since filing a writ of divorce and *ketubah* could be viewed as severing the marital relationship from the side of the husband, even if the wife was not yet free to remarry. In such circumstances, one could view the permission to marry another woman as a legal formality designed to overcome the difficulty of the wife not having the legal competence to be divorced. It is true that this did not give the insane woman absolute protection, since her husband essentially had the right to divorce her, but this legal prerogative was extremely limited by the need to obtain the consent of one hundred rabbis. It is worth noting that a hint of this approach can be found in a ruling by R. Simḥah of Speyer, a twelfth-century Ashkenazi, cited in Maharshal's responsum,⁷⁷ but his view was rejected by Ravyah and the rabbis of Speyer; Worms, and Mainz, who refused to waive the Ban, even if it were viewed as a pure formality.⁷⁸

The rabbinical community of Poland apparently rejected both the extremely strict approach of Maharshal and the unqualifiedly lenient approach of R. Shalom Shakhna, preferring the intermediate course charted by R. Sirkes, who wrote: 'Thus it was the practice of the rabbis in our times to permit marrying another wife, in addition to the one who had become insane, with the consent of one hundred rabbis; and this has been done several times.'⁷⁹

Note that the legal argument given both by R. Shalom Shakhna and by R. Sirkes for waiving the Ban in the case of insanity was fulfilment of the precept of procreation. According to the ruling given by Rema, each rabbi was free to decide for himself whether or not to accept this as cause for waiving the Ban; but, in all the sources I examined, there was not a single instance in which the Ban was waived solely on this account, where the wife was sane and nothing precluded the couple from cohabiting. Moreover, no petition on these grounds was presented to halakhic scholars, who, nevertheless, did discuss and reject Rema's position. This seems to reflect the existence of a deeply rooted social norm according to which the precept of procreation in itself does not constitute sufficient reason for changing the marital status of a couple. There is positive evidence of this from the

⁷⁶ *Tur*, 'Even ha'ezer', I and 119.

⁷⁷ *Resp. Maharshal*, 65.

⁷⁸ *Ibid.*

⁷⁹ *Bayit ḥadash*, *Tur*, 'Even ha'ezer', I, at the end of the section.

late seventeenth and eighteenth centuries, in addition to the silence of the sources throughout the entire early period in Poland. In fact, the practice was deeply rooted in Ashkenazi society of the Middle Ages,⁸⁰ and among the Ashkenazi Jews who migrated to the Ottoman Empire.⁸¹

SUMMARY

In this article I examined the Ban of R. Gershom and analysed the attitude of early rabbis in Poland towards the Ashkenazi tradition of halakhic rulings, in light of the fact that the Jews in Poland viewed themselves as belonging to the Ashkenazi community, yet maintained good relations with Jewish centres in Italy and the Ottoman Empire. I investigated whether this fact was reflected in their rulings on a specific issue, either by absorbing influences from other areas or by developing their own independent approach.

Two directions were encountered. Maharshah adhered strictly to the Ashkenazi legal tradition and viewed the Ashkenazi rulings as binding precedents, not to be challenged. This is not surprising, since on various occasions we have seen that Maharshah viewed himself as carrying on the Ashkenazi tradition and defended it strongly against other traditions. The second direction was represented by R. Shalom Shakhna, Rema, and others. There is no doubt that fundamentally they upheld the Ashkenazi tradition, but they were also open to other influences. For example, the Rema and R. Mordecai Jaffe accepted the ruling of Rashba, cited in the responsum of Maharik, that the validity of the Ban had expired, in contrast to Maharshah, who flatly rejected this notion. However, they did not ascribe far-reaching practical implications to this, as R. Joseph Caro, their

⁸⁰ Ravyah, at the end of his responsum cited by Maharshah (*Resp. Maharshah*, 65), presents a sociological argument in support of his position against waiving the Ban on account of the precept of procreation: 'How many women there are with medical disabilities or barrenness, and how often is there failure to fulfil the precept of procreation; yet we have not heard controversy among them.' On medieval Ashkenaz in general, see my article 'Causes for Waiving the Ban in the Late Middle Ages', 49–52. R. Yehezkel Landau wrote in the second half of the 18th century: 'The fact that for several generations the Ban has not been waived for a man who has spent ten years with his wife, as was done for a man whose wife had become insane, is in my humble opinion due to their concern with the opinion of some of the *posekim* that this law is not applied outside Israel' (*Resp. Noda biyehudah*, Batra edn., sect. 102, p. 55a, s.v. 'omnam ma shelo ira'. Towards the end of the 17th century R. Jonah Landsofer was asked, 'in the case of a man who has spent ten years with his wife and she has not given birth, nor is she capable of bearing, whether it is correct for him to follow the general practice of the world, that do not try to divorce their wives who have not borne them children' (*Resp. Me'il tsedakah* (Prague, 1761), n. 33; emphasis added).

⁸¹ At the end of the 16th century the Ashkenazi R. Samuel Yaffe, who was active in Constantinople, adopted the Sefardi position that the Ban should be waived for Ashkenazi Jews on account of the precept of procreation. Nevertheless, he noted that Ashkenazi society was unwilling to accept this ruling, and would not change its practice of not altering marital status in order to fulfil the precept of procreation. This responsum was published by Y. S. Spiegel in *Vayita eshel* (Tel Aviv, 1990).

contemporary in the Land of Israel, did in the *Shulhan arukh*. They based the prohibition of polygamy on custom, and determined that whoever violates this instruction should be coerced by means of bans and excommunication to divorce his second wife. The impact of non-Ashkenazi sources is more evident in those cases in which the man had legal cause to sue for a waiver of the Ban. In his glosses, the Rema presented two views on the question of whether to waive the Ban on account of the precept of procreation and stated that nothing was lost by deciding leniently. The lenient approach was actually employed in a case where the wife was insane and the husband had not yet fulfilled the precept of procreation. R. Shalom Shakhna had ruled that the Ban is superseded in such a case by the precept of procreation, and according to R. Joel Sirkes, who followed this approach, R. Shalom Shakhna's ruling was supported by rabbis from various localities. This position was diametrically opposed to that of the rabbis of Ashkenaz, as expressed by the ruling of the rabbis of Speyer, Worms, and Mainz in the twelfth century, but accorded with the position taken by Maharik.

Maharshal did indeed take the opposite stand, relying on this ruling, and likewise he opposed permitting a husband who could not cohabit with his wife to divorce her against her will. Nevertheless, a waiver was not given in the case of an intermittently insane wife. R. Sirkes stated in his work on the *Tur*, as well as in his responsum, that in addition to obtaining the consent of one hundred rabbis, a man had to file a writ of divorce and the sum of the *ketubah* as pre-conditions for permission to marry another woman. This approach is a synthesis of the Ashkenazi rabbis' approach, flatly opposing any waiver of the Ban, and the approach first taken by Rashba, viewing the Ban as completely superseded in such a case, especially if the husband had not yet fulfilled the precept of procreation.

It should be noted that no case has come down to us in which the husband petitioned for a waiver of the Ban solely due to his desire to fulfil the precept of procreation. In the cases discussed, the reason for the petition was insanity of the wife or abandonment of the husband, even though the precept of procreation was the only legal cause mentioned. It appears that the changes that emerged in the attitude of the rabbis towards the precept of procreation did not reach the public at large, among whom the deeply-rooted Ashkenazi custom of not filing suit against a woman for being barren persisted.