

HISTORICAL LANDMARKS IN THE
TRADITION OF MOROCCAN JEWISH
FAMILY LAW:
THE CASE OF LEVIRATE MARRIAGES

by

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Introduction

This article examines the roots of the unique tradition of Jewish family law in Morocco at important Landmarks in history through changes that took place in the area of levirate marriages.

The legal activity of Moroccan sages and the extent of their legislative initiative in family law in the middle of the 20th century is a unique phenomenon that has no parallel in any Ashkenazi, Sephardi or Oriental community. Already on the eve of the establishment of the State of Israel, this phenomenon came to the attention of Ashkenazi Chief Rabbi Herzog, who communicated with the leading rabbis in Morocco to assist in coping with the hard challenges the Israeli Chief Rabbinate was facing, especially in matters having to do with the inheritance of the wife and the daughter.¹ In recent years, this phenomenon of the Moroccan tradition attracted the attention of Prof. Elon, the leading scholar of Jewish law of our generation and former Deputy Chief Justice of the Supreme Court of Israel. His writings suggest that he regards the Moroccan tradition over the centuries as an integral part of the Sephardi and Oriental traditions.² In this light, the uniqueness of the Moroccan

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¹ Rabbi Y.A. Halevy Herzog, *Teḥukah leYisra'el al pi ha-Torah* (Jerusalem: Mossad Harav Kook, 1989), II.194. R. Herzog addressed himself to the Chief Rabbi of Morocco, R. Shaul Dannan, in the matter of inheritance, and R. Dannan answered in a long and reasoned letter.

² Menahem Elon, *The Status of Women - Law and Judgment, Tradition and Transitions - The Values of the Jewish State and a Democratic State* (Tel-Aviv, Hakibbutz Hameuchad, 2005, Hebrew). Elon discusses in detail the uniqueness of family law in North Africa, with special emphasis on the

tradition in the middle of the 20th century is the result of circumstances and follows from the fact that other old Sephardi and Oriental centers have been destroyed and congregated in the State of Israel, which at its inception was under Ashkenazi domination.

Rabbi Y.M. Toledano served as the rabbi of the Tangiers community³ and of other communities in the East, and also served as Chief Rabbi of Tel-Aviv-Jaffa and subsequently as Minister of Religious Affairs of the State of Israel. In his important work about the history of Moroccan Jews, *The Candle of the West: The History of the Jews in Morocco*, published in 1911,⁴ he maintained that Moroccan tradition is special, as attested by the special status that the collection of regulations, *Kerem Hēmer*, originating in Morocco, acquired. He says:

It then became a cornerstone of Moroccan Jewry in general, and the Shulḥan Arukh that all relied upon ... And most of the decisions and rulings of religious law among Moroccan Jews were settled according to it, without checking whether there were dissenters to it among the better known Poskim.

A similar approach is followed by Rabbi Dr. Amar, a rabbi of Moroccan descent who has studied and published extensively about the teachings of Moroccan rabbis, and published a new edition of the Moroccan regulations, with an edifying and important introduction.⁵

To determine the extent to which the Moroccan tradition claims for itself a special place in Jewish law, it is necessary to carry out case studies of specific issues. I chose to focus this study on the topic of levirate marriages because

Moroccan community. But he perceives the tradition of Moroccan Jews as part of the general tradition of Oriental Jewry, and characterizes them all as similarly creative and capable of successfully coping with modern challenges and experiences. See the chapter entitled "Creativity in the world of the *halakhah* in countries of the Orient," *Ibid.*, pp. 418-435, and the chapter dealing with the inheritance rights of the daughter, in which he compares the conduct of the Chief Rabbinate in Israel on the eve of the establishment of the state with that of the rabbis in Morocco during the same period (*ibid.*, pp. 262-277). This was published for the first time in an article by M. Elon, "The uniqueness of *halakhah* and society among North African Jewry from after the expulsion from Spain to our days," in M. Bar-Yoda (ed.), *Halakhah and Openness: Moroccan Sages and Poskim for Our Generation* (Tel-Aviv: Hamerkaz letarbut ulehinukh shel hahistadrut, 1985), 15-38.

³ This community was an integral part of Moroccan Jewry and on his sojourn there R. Toledano was exposed to the special legal tradition of Moroccan Jews.

⁴ Y.M. Toledano, *The Candle of the West: The History of the Jews in Morocco* (Jerusalem: A.M. Lenz, 5671/1911), 77-78.

⁵ M. Amar, *Jewish Law in the Moroccan Communities* (Jerusalem: Hamakhon Lemoreshet Yahadut Morocco, n.d.). For Amar's position on the uniqueness of the Moroccan tradition, see the Introduction, 39-43. See also M. Amar, "Moroccan sages of the last generation coping with current issues," in *Halakhah and Openness*, *supra* n.2, at 50-52 and *passim*.

Moroccan sages addressed it in the middle of the 20th century,⁶ and because of the availability of other studies on this topic regarding the legal traditions of other communities. I will say at the outset that I am inclined toward the possibility that the Moroccan legal tradition should have a special and separate place, for both its content and its methods.⁷ Examination of the processes that the levirate issue underwent at important landmarks of history and of the patterns that were established at these landmarks will show that the Moroccan tradition is indeed special.

The Moroccan legal foundation in the second millennium of the common era rests on Rabbi Itzhak Al-Fassi (Rif), who was active during most of his life in the town of Fess (Fez) and was therefore named after it.⁸ It was there that he wrote his well-known work, the *Sefer Halakhot*, which became the principal codex in North Africa and Spain until the appearance of the Rambam's *Mishneh Torah*. Even afterwards, the *Sefer Halakhot* continued to play a central role until Rabbi Y. Karo used it, together with the Rambam's *Mishneh Torah* and with the ruling of Rabbi Asher ben Yehiel (the Rosh), as the foundation of his ruling in the *Shulḥan Arukh*.⁹ The teachings of Rif in the field of levirate marriage are well documented in his *Sefer Halakhot*. We shall see that from among the various trends common among the sages, he chose the trend that supports the levirate commandment vigorously. Nevertheless, the fact that he accepted the validity of the regulation of the Geonim regarding the rebellious woman mitigates the disadvantage of the widow who chooses to follow this approach with regard to the levirate commandment.

The legal creation in Morocco did not stop after Rif left and moved to Lusiana, in Andalusia. It is reasonable to believe that it continued to meet the new challenges it was facing in a changing reality. But no halakhic writings dealing with the issue of levirate marriages have reached us, and thus Rif continues to represent the position of the local Moroccan law until the arrival of the Spanish exiles. The

⁶ See my article "The Jewish Woman's Marital Status in Israel: Interactions among Various Traditions," *Pelilim, Israel Journal of Criminal Justice* 7 (1998), 323-325 (Hebrew).

⁷ I earlier tended to accept the position of Elon, *supra* n.2. See E. Westreich, "Levirate Marriage and the rebellious wife: Between Spain and North-Africa" (Hebrew), in A. Barak and M. Shava (eds.), *Minḥah leYitsḥak — Collection of articles in honor of Judge Yitsḥak Shilo on his 80th birthday*, (Tel-Aviv: Lishkat Orkhei Hadin, 1999), 145-166. But as I delved more deeply into the Moroccan tradition, including my latest study "Prevention of *iggun* in a levirate situation in the ordinance of the Castilian exiles in Fess," in M. Amar (ed.), *Fess: A Thousand Years of Creation*, in the press, I have inclined toward an approach that sees the Moroccan tradition as unique and representing a separate trend. These articles have been incorporated into the present study.

⁸ On the Rif see H.Z. Hirschberg, *History of the Jews in North Africa* (Jerusalem: Mossad Bialik, 1965), 261-262; M. Elon, *Jewish Law: Its History, Sources, and Principles* (Jerusalem: Magnes Press, 1988), 1166-1172 (Heb.).

⁹ Elon, *Jewish Law*, *supra* n.8, at 1317-1318.

exiles left Spain in two waves: the first after the edicts of 1391, and the second after the final expulsion in 1492.

The edicts of 1391 affected the communities in Aragon and Catalonia. The greatest sages, foremost among them Rabbi Itzhak ben Sheshet of Barcelona (Ribash) and Rabbi Shimon bar Zemaḥ Doran of Majorca (Tashbetz), fled to Algeria. These two sages caused a substantial change in the level of theory and practice of Jewish law in Algeria. In the matter of levirate marriages as well, their approach differed from that of Rif, with regard to both the legal power of the levirate commandment and the sway of the ordinance of the Geonim about the rebellious woman. This was the cause of a fierce struggle between them and the local tradition in their new homeland, the seashore towns of Algeria, which followed Rif's approach.¹⁰ I am not aware of sages of comparable stature who arrived in Morocco in general, and especially to the great center in Fess, and apparently Jewish law did not undergo there great development during this period. Nor do I know whether the teachings of the Aragonese and Catalan sages penetrated the environment of Moroccan sages and brought about any changes in the legal system there.

The second wave of Spanish exiles arrived in 1492, after complete expulsion was decreed against the Jews of Spain who chose not to convert to Christianity.¹¹ Those persevering in the religion of their forefathers wandered in the Mediterranean region and several tens of thousands arrived in Morocco.¹² One of the towns that absorbed many exiles was Fess, where many Jews from Castile arrived.¹³ The exiles quickly organized into separate communities and began addressing the many problems caused by the mass exile and the hardships of the voyage, especially in the family domain. The legal means they chose for solutions to their problems was legislation, and the first initiative came two years after the expulsion, in 1494. The introduction to the collection of regulations says: "These are the regulations that were legislated and stipulated for the holy congregations of the Castilian exiles according to the advice of their great sages."¹⁴ This collection was a beginning, followed by a flow of vast legislation in the area of family law that continued through the 20th century.¹⁵

¹⁰ Westreich, *supra* n.7, at 156-160.

¹¹ Yitzhak Baer, *A History of the Jews in Christian Spain* (Philadelphia: Jewish Publication Society of America, 1961-66), 433-439.

¹² Hirshberg, *supra* n.8, at 298-301; D. Korkos, *Studies in the History of the Jews in Morocco* (Jerusalem: Rubin Mass, 1976), 317-318.

¹³ On the Spanish exiles in Morocco see Korkos, *Ibid.*, 258-270.

¹⁴ Rabbi Avraham Ankawa, *Kerem Hemer*, in the introduction to the ordinances he compiled; Amar, *Jewish Law in the Moroccan Communities*, *supra* n.5, at 2.

¹⁵ On the ordinances in general, see Amar, *Ibid.*, 24-41; Elon, *Jewish Law*, *supra* n.8, at 806-809.

The issue of levirate marriages, through which I attempt to examine the uniqueness of the Moroccan tradition, was also represented in the first code of 1494. I will examine in detail the content of this regulation, which absolutely favors the widow, and the means of enforcement that was chosen, namely coercing the man to grant a *get*. This examination should reveal whether we are dealing with a meaningful stage that represents a landmark in the future development of the Moroccan tradition. The examination involves several levels: an analysis of the text of the regulation itself in light of the instruction and rules of the Talmud and of post-talmudic writing; comparison between the regulation and the original tradition that was common in Spain, with all its complexities and layers, including the heritage of the Rosh in the levirate area and the *halakhah* of the rebellious woman according to the Rambam; comparison between the law that was common and developed among the Sephardi exiles in other centers, and the legal means they chose to cope with problems following the expulsion.

About one hundred years later, in 1593, a rule was enacted in Fess that strengthens the levirate option even in the presence of a monogamy clause in the *ketubbah*. In its form as well it appears as an activist legal step that conforms to the social values of that era, although in this case the result of the regulation struck a significant blow to women and nullifies many of the protections that they had been granted by the Sephardi legal tradition. I will examine the factors that promoted this change and the extent to which it will be possible to identify similar trends among the Sephardi exiles who wandered to other centers along the Mediterranean. I will address especially the question of whether this is an expression of a revival of earlier local factors that succeeded in overcoming a Sephardi tradition influenced by the Rosh and restoring the tradition of Rif.

I end the study with an analysis of the method of Rabbi Ya‘akov Even Tzur (Yavetz) of the 18th century, who can be seen as representing one of the important landmarks of Jewish law in Morocco. His responsa, which were printed in the 19th century, reflect a high level of legal expertise, to which Prof. Elon drew attention.¹⁶ It was Yavetz who put together the collection of regulations that came to be known as *Kerem Hēmer*, and several of his rulings were added to the collection as commentaries. One of these rulings deals with the levirate regulation of 1593. In his commentary, he reduced the injury to women and restored to the widow some of her protections. The legal means he chose was not legislation but rather case law interpretation. The degree of flexibility available in interpretation is limited relative to that of legislation; I will examine the degree to which Yavetz made use of it. Subsequently, the Moroccan tradition had to wait more than another two centuries before returning to such activism in the area of levirate marriage.

1. *Foundations of the Levirate Laws in the Moroccan Tradition: Rif's Approach*

The levirate commandment establishes a matrimonial connection between the widow whose husband died without leaving offspring and the husband's brother, without the widow's consent.¹⁷ If both sides agree to consummate the matrimonial relation, the widow becomes her brother-in-law's wife and no legal problems arise.¹⁸ If the parties agree to break the levirate connection they must perform the *ḥalitsah* ceremony; the only legal problems that can arise have to do with the widow collecting her *ketubbah* from her husband's inheritance.

The situation is different if there is no agreement between the parties regarding the consummation or severance of the levirate connection. If either party refuses to consummate the levirate marriage while the other party is willing to do so, severe and at times profound legal questions arise.¹⁹ Is it possible to coerce the widow, directly or indirectly, to consummate the levirate marriage? Will the rabbinical court impose penalties on her for her refusal, such as declaring her to be a rebellious wife, with all the consequences? What will be the economic consequences of her refusal, for example her right to alimony and housing, or her ability to collect on the various components of her *ketubbah*? The same is true for the brother-in-law who refuses to sever the connection by means of *ḥalitsah* — whether the widow asks to consummate the levirate marriage or to perform *ḥalitsah*. Would the legal system ever recognize the widow's right to demand that the connection be severed, and what remedies will be at her disposal? Will the brother-in-law be coerced directly or indirectly, will he be subject to economic penalties, and what will be the scope of these penalties?

Rif was asked to rule on the controversy between the Tannaim and the Amoraim whether the *halakhah* follows the opinion that the levirate commandment takes precedence or the opinion that the *ḥalitsah* commandment takes precedence. This controversy, which was restricted mainly to the religious field, had direct repercussions on the legal field in several areas. For example, a talmudic issue

¹⁶ Elon, *The Status of Women*, *supra* n.2, at 426-429.

¹⁷ On the approach of the Bible and of Ḥazal to the levirate and *ḥalitsah* commandments, see M.A. Friedmann, "Now they said the *ḥalitsah* commandment takes precedence over the levirate commandment", *Teudah* 13 (1997), 35ff. On this topic in the post-talmudic era, see J. Katz, "Levirate marriage and *ḥalitsah* in the post-talmudic era", in J. Katz, *Halakha and Kabbalah: Studies in the History of Jewish Religion and Social Relevance* (Jerusalem: Magnes Press, 1984), 127-174.

¹⁸ The willingness of the widow to perform the levirate marriage is raised as a serious possibility by Rabbi Shlomo bar Shimon bar Tzemaḥ Doran (Resp. Rashbash, Jerusalem 5758, ch.84) who was active in Algeria in the second half of the 15th century.

¹⁹ For a detailed discussion, see E. Westreich, "Levirate marriage in the era of the State of Israel: Ethnic encounter and the challenge of modernity", *Israel Law Review* 37 [2003-2004], 432-437.

decreed that the question whether or not a widow who refuses to consummate the levirate marriage is considered to be a rebellious woman depends on the controversy whether the levirate commandment takes precedence over *ḥalitsah*. This topic had not been decided in the tradition of the Geonim, who followed two trends. One trend, centered around the Naharda yeshiva, maintained that the *ḥalitsah* commandment takes precedence, whereas the other, centered around the Mata Maḥasia yeshiva, maintained that the levirate commandment takes precedence. This is how Rif presents this controversy:

Two yeshivot were divided on the matter. One yeshiva maintained that she was not rebellious and relied on the words of Shmuel who said that one does not write a rebellious writ on a woman refusing to perform the levirate commandment. The other yeshiva maintained that she was rebellious and therefore one does write [a rebellious writ]. And the second opinion is preferable and more plausible and I follow it.²⁰

Rif ruled on this controversy that the levirate commandment takes precedence over *ḥalitsah*, based on the sages who say that “the levirate commandment applies to her in any case,”²¹ and therefore the motive of the brother-in-law is meaningless, and even an extraneous motive does not affect the levirate commandment, and it is his right to demand that the widow perform it. Rif extended this view to the legal field, maintaining that “Shmuel’s saying that one does not write a writ of rebellion on a woman of levirate status is no longer valid” and that because Shmuel’s position is in accordance with the opinion that the *ḥalitsah* commandment takes precedence. This ruling had a direct effect on women’s financial situation, since the direct result of a woman being declared rebellious is that she forfeits central components of her *ketubbah*. Moreover, the request for alimony of a widow who refuses to perform the levirate commandment will be rejected as a result, since the widow’s legal status would not be more favorable than that of a married woman who rebelled and lost her alimony.

This approach followed by Rif was accepted by the Rambam, and in his *Mishneh Torah* he ruled that the levirate commandment takes precedence and consequently that a widow who refuses to perform the levirate commandment is considered rebellious, with all financial and status consequences that follow from it (*Hilkhot Yibbum ve-Ḥalitsah*, 10:2). The positions of the two great sages were probably paramount in Jewish communities in Spain and in Muslim cultural environments, despite the different approach followed by Rabbi Yosef Megash,

²⁰ *Hilkhot Rav Alfass, Ketubot*, 90

²¹ The controversy of the Tannaim is mentioned in *M. Bekh.* 1:7.

Rif's student, and the teacher of the Rambam's father.²² We can assume with a great degree of confidence that the local community in Fess followed in principle Rif and Rambam, considered the levirate commandment as more important, and endowed it with full legal backing. There is no doubt that in an environment of this nature the atmosphere was not favorable to the creation of a legal ruling that would coerce a very ill man to divorce his wife in order to prevent the levirate connection applying to her. But, as I will show in the next section, this is not how things developed.

2. *The Exiles' Legislation for Avoiding Levirate Marriages*

2.1 Introduction

The legislation of the Castilian exiles in Fess of 1494 is probably the fundamental landmark in the crystallization of the Jewish legal tradition in Morocco as a unique tradition. In the body of regulations they enacted, the exiles made provisions first of all for proper *kiddushin* and marriage arrangements in their new residence, and defined the inheritance arrangements that seemed appropriate to them. The last clause in the first collection of regulations establishes an important rule that was intended to avoid by definition the application of the levirate connection. In this section I will show that the object of the regulation and the legal means chosen represent a new and far-reaching creation in the concepts of Jewish family law compared with the rules that generally appear in the Talmud and in the subsequent rabbinical literature.

2.2 Background and Motivations

What were the background and the motivations of the regulation? In their introduction, the legislators have provided us with no information either about it or about the clause dealing with the levirate marriage or about clauses dealing with other matters. It is possible that the legislators wanted to preserve the patterns of life to which they were used and to adapt to their new environment the legal arrangements that existed in their original environment, in Castile. I discuss this possibility in the next section and find that it is not plausible. It is possible that the expulsion caused a sharp increase in the number of cases that required a levirate marriage and also in those which could not be solved by means of a levirate marriage or *halitsah*. Except for the exiles who went to Portugal, the Spanish exodus was carried out by sea, which was fraught with many dangers such as

²² On the opinion of Rabbi Y. Megash, see Katz, *supra* n.17, at 134 and n.35 (comments of L. Ginsburg).

drowning or capture by pirates. As a result, there were many cases of men who died and women who were widowed, as well as cases of men who disappeared, whose widowed sisters-in-law remained “anchored” (*agunot*), without the possibility of consummating the levirate marriage or of receiving *ḥalitsah*.

Another factor is the separation of families, especially between brothers, when for example one brother went to Morocco and another to the Balkans. We have no data about the rate of separation within families, but we can assume that the number was not small. In principle, this factor, as the previous one, was in effect primarily during the expulsion. But it is possible that it took time for the exiles to settle down in new residences, and the wandering and search continued for some time, causing brothers to become separated.

A particularly difficult separation, especially for the widow, occurred when one brother converted and remained in Spain and the other persevered in his religion and was exiled. It is known that a large number of Spanish Jews converted and remained in Spain. There is no doubt that there were many cases of families that were separated, with some of the brothers remaining and some leaving. This phenomenon of separation between brothers, with one brother converting to Christianity and the other remaining Jewish, had been going on in Spain for a hundred years, ever since the 1391 edicts, which produced a large wave of conversions. But in this period there was no great physical distance between the converted and the Jews, and in many cases those who converted remained loyal to Judaism in their hearts and were part of the large group of Marranos (crypto-Jews or *anusim*). It is not clear to what extent the church prohibited the participation of converted Jews in *ḥalitsah* ceremonies or whether such a decree was effective. We may assume that in many cases *ḥalitsah* was performed despite of the position of the church. All this ended with the expulsion. The Jews were no longer allowed to return to Spain, and many limitations were imposed on those who had converted, which prevented them from traveling to places where there were high concentrations of Jews.

All the factors I have mentioned above are characteristic of all Spanish exiles and not specifically of those who arrived in Fess. Thus, if indeed any or all of these were the motives for the regulation, we would expect to find similar regulations in other centers of Spanish exiles. This matter is discussed in the next section, but I can say already that no such regulation is to be found in any other place where Spanish exiles congregated.

It is possible that this regulation has to do with a difficult and traumatic case mentioned in historical writings from the period close after the expulsion.²³ We hear about two hundred *agunot* who were expelled from Portugal in 1492-1493 and

²³ Shlomo ibn Virga, in Y. Baer (ed.), *Shevet Yehudah* (Jerusalem: Mossad Bialik, 1947), 144; Y.M. Toledano, *supra* n.4, at 53.

were put to land by boat captains in the vicinity of Fess. There were among them some whose husbands had disappeared, and some were widows whose brothers-in-law were not with them. Because of their inability to marry, they established for themselves a commune in the town of Sali. They maintained themselves from craft work and even contributed the profits to religious schools. We can assume that the presence of such a large group of widows and *agunot* assembled together served as a painful reminder to the sages and leaders of the community, and was likely to move them to enact a regulation that would alleviate the problem. But whereas for regular *agunot* the situation reverted to normal as soon as the families settled down and ceased wandering, for levirate *agunot* the danger of remaining *agunot* persisted because of the fact that many others had been separated by the expulsion.

3. *The Content of the Regulation and the Means of Enforcement*

Here is the text of the regulation:

14. And one who appears to be dangerously ill must grant a proper *get* to his wife if asked to do so in order that she may not remain in need of a levirate marriage. And if some people will delay or refuse to grant the *get* from fear that the *ketubbah* and dowry will be collected, we decree that the divorced woman will be treated the same as the widow, so that she will be divorced in such a manner that she collects according to this regulation and despite any condition the husband may impose at the time of the divorce.²⁴

This regulation has two main parts: one focuses on the matrimonial issue and the other on the financial one. In the first part the regulation obligates the husband to grant his wife a *get* at her request if he is dangerously ill, in order to prevent entirely the possibility of the creation of a levirate connection between the woman and the husband's brother following his death. The content of the regulation is, therefore, the total prevention of the levirate connection, and the means chosen is obligating the husband to grant a *get*.

In the Talmud or in later rulings we do not find an ordinance based on legislation or *halakhah* that places this type of obligation on a dangerously ill husband. Nor did we find an ordinance based on custom in the period preceding the expulsion, and only in the 16th century do we find this type of obligation in a *ketubbah* stipulation.

²⁴ A. Ankawa, *Kerem Hēmer*, Part 2, para.14; M. Amar, *Jewish Law in the Moroccan Communities*, *supra* n.5, at 6; *The Book of Ordinances*, ed. Sh. Bar-Asher (Jerusalem: Akademon, 1990), 54-55.

Cases of husbands divorcing their wives when they fear that they are mortally ill are known from the *halakhah*.²⁵ Already in *M. Gittin* 7:4 there is discussion of a case in which a husband divorces his wife and says to her: “This is your *get* from this day if I die of this illness.” There is no mention in the *mishnah* of what the man’s motive is to divorce his wife under these conditions, but it is reasonable to assume that it was the desire to prevent a levirate connection after his death. The matter is brought up more explicitly in the talmudic *sugya* at the end of tractate *Yebamot* (118b), in the case of the man who “grants a *get* to his wife in case of a levirate connection.” The question is whether this *get* provides an absolute right to the woman, and whether she can be handed the *get* by means of a third party who was not appointed directly by her, and therefore be considered immediately as divorced without her consent. The Talmud rules that this is not an absolute benefit, and therefore if the husband dies before the *get* reaches her, she is subject to *ḥalitsah*. (But for some reasons she may not consummate the levirate marriage.)

In all these cases it is the husband who initiated the divorce, and he was not asked to do so by any public entity. These *halakhot* were by and large incorporated into the *Sefer Ha-Turim* (*Even Ha’Ezer*, ch.145) authored by Rabbi Ya’akov ben HaRosh in Castile in the middle of the 14th century. Together with the Rambam’s *Mishneh Torah* and the Book of Rulings by the Rosh, this work became an authoritative code for the Spanish communities until close to the period of the expulsion. Indeed, I found in the book of responsa by the Rosh a case²⁶ in which a man divorced his wife on his deathbed, and I will discuss this responsum with regard to the second part of the regulation. Note that the *Shulḥan Arukh*,²⁷ the book authored by the famed Spanish exile, Rabbi Yosef Karo, follows *Sefer Ha-Turim*.

The most we can conclude from these *halakhot* is that the halakhic system does not oppose an initiative by the husband to release his wife from the levirate bonds by granting her a conditional *get* before his death. But none of these cases point to a public initiative to induce a dying man to divorce his wife in order to prevent her from being subjected to the levirate connection. And no such initiative is known to us in the Ashkenazi tradition, not even in the various cases of converted brothers-in-law, which were discussed extensively in medieval Ashkenazi rulings.²⁸ Nor is it known in Sephardi and oriental circles, which ruled in favor of precedence of the levirate commandment over *ḥalitsah*. By contrast, the divorce regulation of Fess

²⁵ There were apparently cases in which it was done at the request of the wife. See, for example, Rashi, *Ḥullin* 39.

²⁶ *Resp. HaRosh*, Klal 46, 1.

²⁷ *Shulḥan Arukh, Even Ha’Ezer*, ch.145, para.5.

²⁸ For a mainly Ashkenazi compilation of the subject see *Beit Yosef, Even Ha’Ezer*, ch.140, at the end of the chapter. Note that the Ashkenazi tradition used an even farther-reaching method of preventing levirate marriages, in very special cases, by adding a clause to the *kiddushin*.

obligated all dangerously ill husbands to divorce their wives, and imposed the obligation on the entire public.

Beyond the fact that the regulation places a general obligation to divorce, whereas in the past this was left to the discretion of the husband, the regulation is unusual in its finality and in the fact that there is no escape clause. For example, in the *Mishnah* and *Sefer Ha-Turim* the husband provides a condition, "if I die of this illness," and therefore, if the man recovers, the *get* is automatically invalidated. By contrast, the *get* granted according to the regulation is not contingent upon this particular illness, so that even if the man recovers and later dies of a different illness the *get* stands. It is difficult to know why the legislators chose not to add this qualification. It is possible that they took account of the responsa of Rashba, which describe the expected complications that are liable to occur in the case of a conditional *get* because of the possibility that the man will recover or that he will succumb to a different illness, and so forth.²⁹ In any case, there is no doubt that this final and sweeping formulation is yet another expression of the energy that the Castilian exiles demonstrated in the legislation they enacted in Fess.

The content of the regulation was greatly reinforced by the means they chose, obligating the husband to grant the divorce. There is no question that this is an extreme and far reaching measure from the point of view of Jewish law, for it is a firm rule that a man ought not be obligated or coerced to divorce his wife unless the wife has a clear ground based on an explicit talmudic instruction.³⁰ The issue of forcing a husband to divorce his wife without a recognized ground is one of the more serious problems of the *halakhah*, and it has burdened Jewish family law to this day. If the man is forced to divorce his wife not according to law, the consequences can be dire, because the woman continues to be considered the first husband's wife, her living with another man will be considered adulterous, and the children born of this relationship will be considered *mamzerim*. And I have shown that neither the Talmud nor later halakhic writings impose an obligation on a dangerously ill husband to divorce his wife.

There is a great superficial resemblance between the motivations for the Fess Regulation to reduce levirate marriages and those of the halakhic Sages in later generations regarding the *agunot*. But there is still a great difference between the married woman whose husband is missing (the classical case of the *agunah* discussed in halakhic literature) and the married woman whose husband lies on his

²⁹ *Resp. Rashba*, Part 1, Chapters 1243, 1244, 1246; see also *Beit Yosef, Even Ha'Ezer*, ch.145, at the end of the chapter.

³⁰ There is a distinction in the *halakhah* between obligation and coercion to grant a *get*. Coercion is direct, even by whipping. The obligation is enforced by various indirect means. See, for example, a discussion on this topic in *Sefer Ha-Turim* and *Shulhan Arukh, Even Ha'Ezer*, ch.154, para.24. Nevertheless, even an obligation to grant a *get* is considered a serious matter that requires great caution, and it is therefore a far-reaching step on the part of the exiles to have used this method.

deathbed where there is concern that she may become subject to levirate marriage. The halakhic system intercedes on behalf of the wife of the missing husband only after she became an *agunah*. By contrast, in the Fess regulation every potential widow and levirate candidate enjoys protection before the fact, whether or not an issue of *aginut* may arise subsequently. The legal remedy for the wife also differs in the two cases. To assist the *agunah*, the rules of evidence are brought to bear in order to solve the problem;³¹ in the case of the widow, the husband is forced to grant his wife a *get*. Use of the rules of evidence is solidly anchored in talmudic law, and the later halakhic sages followed a well-trodden path in this matter. But forcing the husband to divorce his wife without a proper ground that appears in the codes or case law is something the halakhic system recoils from, and little use has been made of this means at such a late stage of the *halakhah*.

I have however found common use of this type of approach in Spain even regarding a regular *agunah*, with the approval of the Rosh, according to which the husband must deposit a *get* on behalf of his wife before setting out on a journey, which comes into effect if he does not return within a specified period of time.³² This however is not a case of direct coercion but of coercion by means of a choice, since the man can opt to renounce his journey, in which case he is not forced to deposit the *get*. By contrast, the ordinance of the exiles of Castile leaves no choice to the ill husband; he is forced to divorce his wife without any possibility of escape.

In reality, the use that Sephardi Jews in the Ottoman Empire made of the *ketubbah* clause greatly mitigates the widow's difficulties. The husband obligated himself in the *ketubbah* to grant his wife a *get* if he becomes dangerously ill, and he takes an oath to that effect. Consequently, the legal system would intervene to force him not to breach his oath, which is a serious religious infraction, but not in order to force him to grant a *get* without a ground recognized by the law. The Fess ordinance, however, did not follow an indirect path and did not bring relief to the legal system, but intervened directly and forced the husband to grant a *get* to his wife so that she may avoid the levirate connection. The willingness to use legislation in the sensitive area of forcing a husband to grant a *get* to his wife attests to the daring legal culture of the Castilian exiles.

I must note here that there is no indication in the legal sources of any confrontation with members of the local community in any of the matters dealt with by the ordinances, including the levirate issue, and that despite the fact that the

³¹ Thus, for example, even people who are absolutely disqualified from testifying, such as women and slaves, are qualified to testify, and they also accept the testimony of a gentile speaking without knowing that his words will be used as evidence. Even circumstantial testimony or testimony from hearsay is acceptable in this case, contrary to other matters of nakedness (*arayot*) that require proper evidence. See *Shulhan Arukh, Even Ha'Ezer*, ch.17.

³² *Resp. HaRosh*, 44. ch.8. A *get* of this type is called a *timed get* because it comes into effect after a certain period of time.

local community most likely followed the tradition of Rif and the Rambam, which prefers absolutely the levirate marriage. It is reasonable to assume that even if the local community had intended to oppose the tradition of the Sephardi exiles, they would not have been able to do so in light of the difficult conditions of the exile community, which had been decimated and destroyed by persecution and the decrees that took place in the immediately preceding period.³³ The Sephardi exiles and their sages were therefore able to shape their legal and social world without interference from local interests.

4. *The Spanish Context*

4.1 Introduction

In the opening to the collection of regulations of 1494, which contains the ordinance concerning the levirate issue, it is written: “These are the regulations enacted and given among the holy communities of the exiles from Castile with the advice of her great sages.”³⁴ There is no doubt that the authors of the regulations regarded themselves as Spaniards who wished to shape their lives in a new environment according to their old tradition. The question is to what extent are the teachings of the Castilian legal tradition embedded in this ordinance.

This question has several aspects. First, I examine the degree of identity between the specific content of the paragraph concerning the levirate issue and the legal tradition common in Castile. If we do not find an identical legal rule in the Castilian tradition, legislation or case law, I will ask whether this tradition contained the infrastructure that may have been revived in the ordinance of the exiles in Fess regarding levirate marriages. We also want to know the extent to which use of legislation was common in the original legal tradition of the Castilian exiles, which they used intensively soon after their arrival. Simultaneously, I will compare the work of the exiles in Fess with that of the Spanish exiles and their offspring in this domain, to trace both the common Spanish source and the trajectories of separate and different developments.

³³ Toledano, *supra* n.4, at 70. There was a confrontation between the exiles and the locals in the matter of the inflated lung. See *Ibid.*, 81-91. For a detailed description, see M. Amar, *Rules of the Defect in the Lung of a Slaughtered Animal*, Doctoral dissertation submitted to Bar Ilan University, Ramat Gan, 1998, 358-367.

³⁴ Rabbi Abraham Ankawa (*Kerem Hæmer*), 19, in an introduction to regulations he has collected; Amar, *Jewish Law in the Moroccan Communities*, *supra* n.5, at 2.

4.2 Direct Precedents in Spain

I mentioned above that we are not in possession of explicit explanations or of background material either for the ordinance dealing with the levirate issue or for the entire body of legislation. I assumed that it was possible that the very move to a new environment was the main motive force, and that the Castilian exiles wanted merely to preserve the legal arrangements to which they were used in their native land. To this end, the exiles were required to legislate either because in Fess a different legal tradition was in effect, or because in their country of origin the legal rules followed from a local ordinance that was limited in its territorial sway to their environment in Castile.³⁵

To examine these possibilities I examine the legal tradition prevalent among Castilian Jews in the generation just before the expulsion. But we face real difficulties because no legal sources dealing with the levirate issue and its legal consequences have reached us from important halakhic sages of that period. There is no doubt that there were in Spain important halakhic sages in the generations preceding the expulsion, most prominent among them being Rabbi Itzhak Kanpanton, dubbed the Castilian *gaon*. His students and their students were also important sages.³⁶ Amar's work on the issue of the defect in the lung of a slaughtered animal demonstrates clearly that there was indeed significant halakhic creation, at a very high level, in Spain in the period preceding the expulsion.³⁷

This is also what transpires from the legislation of Medina del Campo as regards whether engagement gifts (*sivlonot*) are considered equivalent to *kiddushin*, in which the greatest halakhic sages of Castile were involved: Rabbi Itzhak de Leon and Rabbi Itzhak Avohav.³⁸ Moreover, the fact that among the exiles and their

³⁵ Many ordinances in the Middle Ages were territorial and applied only to a specific region. For a detailed discussion of these see Elon, *Jewish Law*, *supra* n.8, at 666-879. There were ordinances that were applicable personally (i.e. to the particular community to which a person belonged), not territorially, and these were transferred to the new environment when members of the community moved. A typical example is the Ban of Rabbenu Gershom, which was generally conceived as a rule applicable personally, but see the approach of Rabbi Karo, *Resp. Beit Yosef, Hilkhhot Ketubot*, ch.14, who believed that this ban is also territorial.

³⁶ For Torah learning in 15th century Spain and Torah-related works there, see A. Gross, "An Outline of the History of Yeshivot in Castile in the 15th century", *Peamim* 31 (1987), 3-21 (Hebrew); A. Gross, "Torah Centers and Yeshivot in Spain", H. Beinart (ed.), in *Moresheet Sepharad: The Sephardy Legacy* (Jerusalem: Magnes Press, 1992), 327-329; Y.M. Ta-Shma, "The State of Talmudic Studies in 15th Century Spain", in Yom Tov Assis and Yosef Kaplan (eds.), *Jews and Conversos at the Time of the Expulsion* (Jerusalem, Zalman Shazar Center for Jewish History, 1999), 47-62. See in the above articles various opinions about whether most of the sages belonged to the school of Rabbi Itzhak Kanpanton.

³⁷ Amar, *supra* n.33, at 345-356.

³⁸ A.H. Freimann, *Kiddushin and Marriage Arrangements After the Close of the Talmud* (Jerusalem: Mossad Harav Kook, 1965), 81-31.

offspring halakhic learning and legal scholarship reached such high peaks supports the presumption that the foundations of this tradition lie in their country of origin, Spain. Nevertheless, no halakhic works written in Spain in the 15th century and dealing with the levirate issue have reached us, and we do not know whether or not any such works were written there.³⁹

There is no doubt that the Spanish exiles in other places of immigration were faced with similar challenges in this area of *agunut* and levirate marriages. I also accept that wherever the Spanish exiles arrived they tried to preserve their Spanish tradition and fought to do so, so that if it was the norm in Spain that a dying man should divorce his wife to avoid a levirate connection, we are likely to find the same norm at the various immigrant destinations. But I have found no reliance on the Spanish tradition as regards preventing the levirate connection in any of the places to which the Spanish exiles migrated. If however the ordinance was new and a side effect of the expulsion, especially of the separation of families and brothers, and of the many difficulties in arranging *halitsah*, the situation of the exiles who arrived in Italy, the Balkans and the Land of Israel was similar in this respect to that of the Castilian exiles who arrived in Fess. I will state cautiously, based on my research, that we have no knowledge of any ordinance of this type in any place other than Fess, and it is likely that if it existed it would have found expression in the vast halakhic literature that has survived from the period following the expulsion.⁴⁰

There have been various attempts by sages in other locations of exile to ease the distress of *agunut* in levirate situations, even by means of prevention, but, as I will show in the following section, none of them compare with the Fess legislation in their intensity.

4.3 Modes of Operation of the Exiles in Other Centers

Unlike the Castilian exiles in Fess, who reacted immediately and chose legislation as their method, the exiles in the Balkans and in Istanbul chose the addition of a clause to the *ketubbah*, leaving the matter within the realm of dispositive personal law.⁴¹ An early proof, close to the time when the Fess

³⁹ On Torah-related works in Spain in the 15th century see Ta-Shma, *supra* n.36.

⁴⁰ Convenient locations for searching are the writings of Rabbi Karo in *Beit Yosef* and of Rabbi H'ayyim Benveniste in *Knesset Hagdolah*. These two works compile the responsa through the middle of the 17th century and summarize their essentials, organizing the topics according to the order in the *Sefer Ha-Turim*. The proper location for identifying sources on this topic is *Even Ha'Ezer*, ch.145, but we did not find any mention there of any legislation. In *Beit Yosef*, *Even Ha'Ezer*, ch.140, we find a case in which Rabbi Ya'akov Bei Rav ordered a terminally ill man, who had converted brothers in Portugal, to grant his wife (who was away) a *get* to prevent her becoming an *agunah* as a result of the levirate connection.

⁴¹ *Resp. Mahari Ben Lev*, Part 2, ch.18.

regulation was enacted, is found in the responsum of Rabbi Shmuel Kalay, issued in the first quarter of the 16th century:

... clause in the *ketubbah* that if her husband is ill [he] will obligate himself to grant her a *get* lest she ...⁴²

According to the details of the case, the woman feared a levirate situation and therefore they added a clause to the *ketubbah* that obligated the man to divorce her if he became sick. In the case at hand the husband did not get the opportunity to discharge his duty and died without writing the *get*. The legal discussion in the responsum was about whether to coerce a married brother-in-law to perform *ḥalitsah*, and not about the subject of our inquiry. For us, what matters is only that there was a custom whereby husbands obligated themselves in the *ketubbah* to divorce their wives in case of illness, in a way that is similar to the regulation of the exiles in Fess.

The sage is not surprised by the existence of such an obligation and does not regard it as exceptional. Nevertheless, it is difficult to infer from this the customs of Sephardi communities. Rabbi Shmuel Kalay and his father-in-law, Rabbi Binyamin Zeev, who also discussed the matter and wrote a responsum, belonged to the Romaniot community rather than the Sephardi one. This community resided in the territory of the former Byzantine Empire for hundreds of years and had a unique social and legal tradition. Therefore, we cannot infer from this the extent to which the custom was widespread among Jews of various communities, especially among the Spanish exiles.

A purely Sephardi source has come down to us from a later period. In a responsum, Rabbi Yosef Ben Lev (Maharibal), a sage of Spanish descent who was active in Salonika and later moved to Istanbul (Kushta), writes:

And if the *halakhah* is unsure in your hands, go out and see what the people do: they used to write in the *ketubbot* that if he becomes ill he takes an oath to divorce her so that she should not become bound to a levir.⁴³

In this case the issue was the validity of the obligation of the brother-in-law, who also took an oath to perform *ḥalitsah* in case his brother were to die without having sired sons, and the legal question was whether this oath does not interfere with the brother-in-law's free will to perform *ḥalitsah*, and whether it is therefore invalid.⁴⁴

⁴² *Resp. Binyamin Zeev*, ch.15. The responsum is signed by Rabbi Shmuel Kalay, who was Rabbi Binyamin Zeev's son-in-law. Rabbi Shmuel Kalay was commenting on Rabbi Binyamin Zeev's responsum in ch.78. See E. Westreich, *Transitions in the Legal Status of the Wife in Jewish Law: A Journey Through Traditions* (Jerusalem: Magnes Press, 2002), 253 (Hebrew), which places the responsum in the year 1529.

⁴³ *Resp. Mahari Ben Lev*, Part 2, ch.18.

⁴⁴ A similar matter to the brother's obligation in case of levirate connection in the future is discussed by Radbaz in his responsum, except that there the other party was the brother-in-law's wife

To this end, Maharibal brought evidence from what was widely customary, namely that the husband himself takes an oath and obligates himself in the *ketubbah* to divorce his wife if he becomes ill, and the oath is not considered to interfere with the husband's free will to grant the *get*. It is clear from the above that it was common practice to add a clause to the *ketubbah* on the part of the husband to divorce his wife in case of illness.

It is reasonable to assume that this responsum reflects the reality around the middle of the 16th century (Maharibal was born in 1505), but we do not know whether he wrote the responsum when he was serving in Salonika or later, when he was yeshiva head in Istanbul (Kushta). Nor is it explicitly stated whether the custom of adding a clause was common also among the descendents of the Spanish exiles in these parts, but it is a reasonable assumption that it was, because in this period they were already the dominant factor in Jewish society, and the other communities (Romaniot and Ashkenazi) were becoming marginalized. Were this custom not common among the descendents of the Spanish exiles, it would not be possible to view it as a custom practiced by the entire community, and it is not plausible that Maharibal would bring evidence from a custom that was common only among communities of secondary importance.

It is not clear from the what Maharibal wrote whether the custom became a type of standard contract or whether it obligated even as a custom. When a common practice becomes a custom it becomes an obligatory legal norm and not merely a private act in the realm of contracts. This norm is close in its essence to the norm created by the Castilian exiles in Fess even if its source is in a custom that produced a clause in *ketubbot* rather than legislation. But the continuation of Maharibal's answer casts doubt about the normative value of the oath, because he distances himself from its enforcement: "In any case, I maintain that he should not be forced to perform *ḥalitsah*, not by means of beatings, not by banishments, and not by bans." Maharibal reinforces his position by saying: "How many breached their oath and were not punished." An oath and obligation that are not enforced are transferred from the legal plane to the field of *Isur VeHeter* (prohibitions).⁴⁵ These touch upon our discussion only marginally.

Whatever the legal force of the clause in the *ketubbah* in preventing a levirate situation at the time of Maharibal, we have not yet been able to find its roots in Spain. Thirty Spanish *ketubbot* found in various archives were recently published

and not the wife of the dying man. The case is that of a man whose "brother is ill and dying and he had taken an oath to his wife that if his brother dies he will not take his wife in levirate marriage. His oath is valid ..." (*Resp. Radbaz*, Part 1, ch.114).

⁴⁵ We find a similar approach in Rashdam with respect to the monogamy oath and the extent of legal protection it provides the woman where the husband has not fulfilled the fertility commandment. For details, see Westreich, *supra* n.42, at 245-246.

in a collection.⁴⁶ In none of them was there a clause of the type mentioned by Maharibal. Moreover, I am not aware of such a clause being mentioned in any of the classical halakhic writings from Spain. The fact that the first one to discuss this clause is Rabbi Shmuel Kalay, a Romani, may point to possible Romaniot and not Spanish roots. But it is also possible that it was the Spanish exiles and their descendents who broadened its use to the point where it became a social custom because of the *aginut* issues they were facing following the expulsion.

Several generations later, at the dawn of the 17th century, Rabbi Arie of Modina, a halakhic sage from northern Italy, indicated that among Sephardi community in Venice:

every one used to obligate himself taking an oath as mentioned above that if the groom becomes dangerously ill, according to the opinion of the doctors who will visit him, the groom will be obligated to release the bride by a valid *get* so that she does not remain in need of a levirate husband.⁴⁷

The groom⁴⁸ obligated himself personally in the *ketubbah* to divorce his wife if his doctors determine that his illness is dangerous, so that she will not be subject to levirate marriage after his death. The legal content of the obligation is very similar to the clause mentioned by Maharibal as well as to the content of the Fess ordinance. So I will therefore try to determine whether there is a connection between them. Rabbi Arie of Modina claims that the clause was common among the Sephardi Jews, and that “this is a simple custom in every clause of *ketubbot* common among the Talmud Torah communities of Sephardi Jews.” The implication is that the clause was not customary among the Italian or Ashkenazi communities residing in Venice and in northern Italy. Rabbi Arie believes that by adding the clause, the Sephardi community in Venice “revealed their opinion that they are not eager to come to *halitsah*, and even less to a levirate marriage, in any shape or form.”

It follows, in his opinion, that the Sephardi Jews intended to adopt the Italian and Ashkenazi norm, which rejected levirate marriages in principle and preferred *halitsah*.⁴⁹ There is no question that this is in fact the case, since the above

⁴⁶ Jose Luis Lacave, *Medieval Ketubot from Sefarad* (Jerusalem: Magnes Press, 2002, Hispania Judaica 11), 15-30.

⁴⁷ *Resp. Ziknei Yehuda* (Simonson edition), ch.80. The responsum mentions a case that occurred in Hamburg in 1614, indicating that the responsum was written later.

⁴⁸ From the context it is clear that the obligation remains valid at the time when the couple is married and the groom becomes a husband. For otherwise this clause would in a way provide evidence of the opposite, namely that husbands were not obligated to divorce their wives in case of illness, which would attest to the strong status of the levirate commandment.

⁴⁹ On the Ashkenazi and Italian traditions in Italy see E. Westreich, “Polygamy and Compulsory Divorce of the Wife in Jewish Law in Italy during the 15th and the 16th Centuries”, *Bar-Ilan Law Studies* 9 (1992), 245-249 (Hebrew).

mentioned obligation appears in a *ketubbah* that has a purely Sephardi character. According to what Rabbi Arie of Modina writes, the obligation to issue a *get* in case of illness was appended to another, more common clause, which is the man's obligation not to marry a woman additional to his wife. This clause, known as the monogamy clause, did not exist among Ashkenazim, who were obliged to accept monogamy by virtue of the ban of Rabbenu Gershom (*herem deRabbenu Gershom*), and was not common among the local Italian communities.

We do not know when the use of the obligation started and at what stage it became a common norm among the Sephardim in northern Italy. Nor is the connection between this custom and the one described by Maharibal clear. If the statement of Rabbi Arie of Modina about the tendency to abolish levirate marriages being the motivation behind the clause forcing a dying man to grant his wife a *get* represents historical evidence, there is no necessary connection between the two phenomena. For it is clear that in the Balkans and Istanbul, where Maharibal resided, there was no general attempt on the part of Sephardi Jews to adopt the halakhic patterns of the Ashkenazim, and no such attempt with regard to levirate marriages specifically.⁵⁰

It is more likely, therefore, that there is a close connection between the two phenomena, the one in Italy and the one in the Ottoman Empire, since Sephardi Jews frequently travelled between the two centers; it is likely that they transferred the patterns of their *ketubbot* from one place to another. The commentary of Rabbi Arie from the beginning of the 17th century looks more like an anachronism, although it is possible that the intensive encounter with Ashkenazi and Italian communities reinforced this tendency among Venetian Sephardim.

Until now we have not seen in Spain any manifestation of the tendency to prevent levirate marriages contractually, by adding a clause to the *ketubbah*.⁵¹ This reinforces our earlier conjecture that the Castilian exiles in Fess created a new legal instrument and were not merely trying to perpetuate their age-old custom. My assumption is that the intensive use of the clause in various places began after the expulsion; we can see in it also an answer to the distressing realities of the day, of separation of brothers and of husband and wife, and a high risk of the widow becoming *agunah*. In the western part of the Ottoman Empire and in Italy, the Spanish exiles responded to the danger of the widow becoming an *agunah* in a way similar to that of their brothers who emigrated to Fess. But in Fess the legal source was statutory whereas in the Ottoman Empire and in Italy the legal source was basically contractual and took the form of a clause added to the *ketubbah*.

Obviously, the arrangement based on legislation has great advantages because it becomes a general norm and applies to all; it is not subject to conditions and there

⁵⁰ Westreich, *supra* n.42, at 250-255.

⁵¹ *Supra* n.46.

are no exceptions. Legislation also provided a solution for all women, both married and unmarried. By contrast, an arrangement recorded in the *ketubbah* is a private one and allows in principle freedom for the parties to make conditions, so that, in its absence or at least in case of an explicit contrary clause, it will be impossible to enforce. Moreover, adding a clause to the *ketubbah* could not solve the problems of women who arrived already married from Spain; it could only help women who were to marry in the future.

It seems, that the exiles who emigrated to the Ottoman Empire and Italy refrained from providing a comprehensive solution, probably because of the extreme nature of the legislative solution, and limited themselves to solving the problems of women who married after the expulsion from Spain. Nevertheless, it must be noted that in time the effectiveness of a clause in the *ketubbah* is likely to approach that of legislation and achieve similar results. But the married women, who arrived in Fess immediately after the expulsion, many of whom left behind brothers-in-law in Spain, did not hold *ketubbot* with such clauses, and were therefore in need of immediate legislation. It follows, therefore, that the motivation for the *ketubbah* clauses in the Ottoman Empire and Venice and for the legislation in Fess was identical: the desire to protect women from becoming *agunot* as widows in need of levirate marriage.

Another and less likely possibility is that in Venice the *ketubbah* clause developed as a result of the meeting, in the 16th century, between the Sephardi tradition on one hand and the Italian and Ashkenazi on the other. The two older traditions, the Ashkenazi and the Italian, maintained that the *ḥalitsah* commandment took precedence.⁵² The objective of addition of the clause was not to protect women from becoming *agunot* in the future but to erode the levirate commandment and to approach a situation in which *ḥalitsah* is preferred in principle. This is how Rabbi Arie of Modina saw the matter and, following this opinion of Rabbi Arie, the similarity between the Fess regulation and the *ketubbah* clause in Venice becomes strictly coincidental, since each had entirely different motives.

We also need to mention other legal sources (e.g. case law) as an additional possible means of addressing the problems of widows who become *agunot* as a result of a levirate situation where conversion is involved in the matrimonial relation.⁵³ Problems of this nature arose already before the expulsion from Spain because of the large number of *anusim* following the 1391 edicts, and the sharp

⁵² Of the two traditions, the Italian went further and decreed that the brother-in-law must be coerced to perform *ḥalitsah* in all cases, even if the widow does not have a special reason: Westreich, *supra* n.49, at 246.

⁵³ This topic is mentioned here briefly in order to complete the picture. For a detailed discussion of this matter, see S. Asaf, "The Spanish and Portuguese *Anusim* in the Responsa Literature", in *Be-Ohalei Ya'akov* (Jerusalem: Mossad Harav Kook, 1943), 245-249.

controversy between Rabbi Yosef Colon (Maharik) and Rabbi Moshe Capsali is well known.⁵⁴ Maharik claimed that a levirate connection is created even between a widow and her converted brother-in-law. He attacked sharply Rabbi Moshe Capsali, and imposed a ban on him for maintaining that there was no connection under these circumstances. The distress of widows connected to converted brothers-in-law was not solved by means of legislation before the expulsion, and only a portion of the sages adopted positions favorable to these women, based on regular interpretation of case law and commentaries.⁵⁵ The controversy between the sages continued even after the expulsion. Rabbi Eliahu Mizrahi (Raam) followed Rabbi Moshe Capsali, whereas Rabbi Ya'akov ben Haviiv was persistent in his opinion that the levirate connection with a converted brother-in-law exists.⁵⁶

Case law and legislation were integrated in Salonika in 1514. Here it was decided by a rabbinical assembly, with the participation of Rabbi Ya'akov ben Haviiv, to adopt the position that the levirate connection between a widow and a converted brother-in-law exists and requires *ḥalitsah*.⁵⁷ At the same time, a similar assembly decreed to adopt the legal precedent that maintained that *kiddushin* performed in Spain with someone who converted before his marriage and remained in Spain are not valid and thereby nullified the levirate connection between the widow and the brother of the converted man. This is legislation that solved the controversy only by incorporating existing case law, and did not result in an open change of the existing *halakhah*. In any case, it did not reduce significantly the suffering of the widow who remained chained to her converted brother-in-law in another country.

Given the content of the legislation of the exiles in Fess, it is not surprising that Moroccan sages followed the Castilian sages who decreed that a converted brother-in-law does not create a levirate connection and the widow is free to marry without *ḥalitsah*. This is what Rabbi Ya'akov Bi Rav, who spent some time in Fess and even served there as rabbi, said:

Sages of Egypt already asked me about a case like this and I answered them with a practical *halakhah*, that the brothers of those who settled among the *goyim* are not

⁵⁴ The controversy involved several issues, including the levirate connection of a converted Jew, which was discussed in the *Resp. Maharik*, ch.85, and the position of R. Moshe Kapsali, mentioned in *Resp. Binyamin Zeev*, 75. The issue of discarding *kiddushin* performed against the ordinance also triggered a sharp polemic between them. See Freimann, *supra* n.38, at 95-97, for a summary of the sources dealing with this confrontation.

⁵⁵ Supporting the position of Rabbi Moshe Kapsali were Rabbi Yehuda Mintz (*Resp. Rabbi Y. Mintz*, 12) and Rabbi David Hacohen from Korfu (Radach).

⁵⁶ The position of Rabbi Ya'akov ben Haviiv is given in *Resp. Rabbi Eliahu Mizrahi* (Raam), 47. Rabbi Eliahu Mizrahi's dissenting opinion is given in *Resp. Raam*, 48. See also the opinion of Rabbi Ya'akov Bi Rav (*Resp. Mahari Bi Rav*, 39), which is similar to that of Rabbi Eliahu Mizrahi.

⁵⁷ *Resp. Rabbi Yosef Tiatatsak*, ed. Benayahu (Jerusalem: Yad Harav Nissim, 1987), ch.48.

subjects for *ḥalitsah* and levirate marriage. And indeed I saw in the west [Morocco] several of the women who are married without *ḥalitsah* or levirate marriage, and thus decreed all or most Castilian sages, and I have instructions from some of them.⁵⁸

Not all Castilian sages ruled in this manner, although according to Rabbi Ya'akov Bi Rav most of them did. The chief Sephardi rabbis in Salonika decreed that the levirate connection between the widow and the converted brother-in-law is valid and requires *ḥalitsah*. The fact that the Moroccan sages held an opinion that was in opposition to the opinion held a few years later by the sages of Salonika shows clearly what their inclination was.

4.4 Indirect Spanish Influences

Was there in the Spanish tradition a proper legal infrastructure for the creation of a legal rule such as the Fess ordinance, under circumstances like those just before and after the expulsion? It is difficult to give a definite answer to this question. Nevertheless, I believe that it is possible to identify in the Sephardi tradition, with a high degree of plausibility, the sources of inspiration of the Fess exiles. One source of inspiration is the very erosion of the levirate commandment by creating a mechanism for avoiding it. A second source has to do with the means of enforcement used by the legislators, namely obligating the husband to divorce his wife. The first can point back to the tradition of the Rosh, who rejected the levirate commandment and eroded its legal status. The second is related to the issue of the rebellious woman, which, although it had eroded in time, had still not faded away.

The content of the ordinance that initiates a public norm of avoiding levirate marriages because of the possibility of the women becoming *agunot* points clearly to a spirit of the times that does not place a high value on the realization of the levirate marriage. Because we lack information about the halakhic tradition of Castile in the 15th century, we must go to the 14th century to examine the halakhic literature dealing with the subject. The central position in halakhic writing in the 14th century in Castile is taken up by the Rosh and his school. Their various writings were the foundation on which Jewish law in these parts rested. It is possible that the teachings of the Rosh and his school are reflected in this legislation about levirate marriages by the Castilian exiles, and were the inspiration for the favor that the legislators showed to widows in need of levirate marriages.

The Rosh adopted the Ashkenazi tradition of his days in the most extreme fashion. According to this tradition, the *ḥalitsah* commandment takes precedence

⁵⁸ *Resp. Mahari Bi Rav*, ch.39.

and the brother-in-law is coerced to fulfill it whenever the widow demands it.⁵⁹ He expressed his opinion in a trenchant and definite way, in a responsum published recently in which he laid down the main points of his position and legal policy in Spain.⁶⁰ He distinguished between three cases: (1) an unmarried brother-in-law who is willing to perform the levirate commandment and there is no knowledge of extraneous motives on his part; (2) an unmarried brother-in-law about whom there is knowledge of extraneous motives such as an attraction to the fortune or the beauty of the widow; (3) a brother-in-law married to another woman. The private opinion of the Rosh was that in every case the brother-in-law should be coerced to perform *ḥalitsah*, even if he is unmarried and untouched by extraneous motives. But he was aware of the fact that according to the tradition of the Rif prevalent in Spain, none of these situations were sufficient reason for forcing *ḥalitsah*, because according to the Rif's opinion the levirate commandment takes precedence and the personal status or motives of the brother-in-law make no difference.

Nevertheless, the Rosh intervened in the Spanish *halakhah* and enjoined it to reduce the options available to the brother-in-law. As the chief rabbi of Toledo and all of Castile, he laid down the following principles of operation. Where the brother-in-law is married, the Rosh would intervene directly and actively and force the brother-in-law to perform *ḥalitsah*, according to the Ashkenazi legal tradition and despite the opposing view of the Sephardi tradition. If the brother-in-law acts out of extraneous motives, the Rosh limits his intervention to a strong recommendation to the local rabbinical court handling the matter to coerce the brother-in-law to perform *ḥalitsah*, but will not intervene if his advice is not heeded. Only where the brother-in-law is unmarried and there is no knowledge of extraneous reasons will he abstain entirely from intervening in the position taken by the local court, despite his personal position that the brother-in-law should be forced to perform *ḥalitsah*.⁶¹

It is difficult to tell to what degree the Rosh was able in his days to inculcate the Ashkenazi principles that prefer *ḥalitsah* to levirate marriage within the realm of his direct influence in Castile. According to his own account, it appears that at a certain

⁵⁹ I first mentioned this responsum in my article, *supra* n.7, at 162-163.

⁶⁰ E.E. Urbach, "The Rosh Responsa in Manuscript", *Shenaton Ha-Mishpat Ha-Ivri* 2 (1975), 17-18.

⁶¹ E. Westreich, "Legal Decisions of the Rosh in Spain", in M Bar (ed.), *Studies in Jewish halakhah and Philosophy Presented in Honor of Rabbi Prof. Menachem Emanuel Rechman* (Ramat Gan: Bar-Ilan University Press, 1994), 168-170. This responsum, in which the Rosh expresses a decisive opinion in favor of the widow, was published only recently. Generations of sages and scholars have known another responsum, referred to as the "Ignoramus Boy" case. This responsum was quoted in the *Sefer Ha-Turim* (*Tur, Even Ha'Ezer*, 165) and was published in his book of responsa (*Resp. HaRosh, Klal* 52, ch.1), where the Rosh adopts a similar position for another reason, namely the inability of the brother-in-law to provide for the widow. See the comprehensive discussion of Katz, *supra* n.17, at 158-59, as well as Westreich, *supra* n.42, at 190-194.

stage of his activity these environments continued to follow the tradition of the Rif despite his presence there. He wrote: "In this country I saw that they behave according to the teachings of Rabbi Al-Fassi (Rif), and therefore I stopped ruling on whether to perform *ḥalitsah* or the levirate commandment."⁶²

It appears that the opinion of the Rosh did later penetrate the local legal tradition in various degrees because of the great admiration that members of the Toledo and Castile community had for him, placing him first among the *poskim*. This is most prominent in Fess, since it is reflected in the 1545 ordinance of the exiled sages, some 50 years after the ordinance under discussion. The subject of the ordinance was the smuggling of property from creditors and the cheating of creditors, and the ordinance was designed to plug up loopholes in the existing *halakhah*. At the end of the ordinance the authors note that the justification for the ordinance is that the time is ripe for it and that "wherever the Rosh turns we follow him and relying upon him is well worth it." In this way, the exiled sages in Fess continued the trend that began after the death of the Rosh and was manifested in an ordinance enacted on its own accord by the community of Toledo, the capital of Castile, that rulings must follow the Rosh in his disagreements with the Rambam.⁶³

His reputation and status did not diminish in the eyes of Castilian Jews, and some 150 years later, close to the expulsion, a Jew from Castile wrote to the Jews of Rome that they rule in halakhic matters according to the Rambam, except when the Rosh disagrees with him, in which case they follow the Rosh.⁶⁴ In the same period, Rabbi Avraham Zakut said about the Rosh that "we rely on his teaching more than on the Rambam, may he rest in peace, based on the fact that the Rambam wrote as if his words were prophetic, without evidence. This is what I heard from the greats of Castile."⁶⁵ In the 16th century, in the western part of the Ottoman Empire, Maharibal stated that "... we must make haste and take a hard line consistent with the opinion of the Rosh, for whom do we have who is greater among all the *aḥaronim*, and from his mouth we live, especially in all the Spanish Kingdom."⁶⁶

If indeed the tradition started by the Rosh regarding the precedence of *ḥalitsah* under certain circumstances penetrated the local legal tradition in Castile and moderated the exceptionally great importance of the levirate commandment, then it must have affected the birth of the legal norm that forced the ailing husband to divorce his wife. But the legal rule established by the Rosh regarding the balance

⁶² *Supra* n.60.

⁶³ *Resp. Zikhron Yehudah*, ch.54.

⁶⁴ Y.Z. Kahana, *Studies in Responsa Literature* (Jerusalem: Mossad Harav Kook, 1973), 26.

⁶⁵ *Ibid.*, 27.

⁶⁶ *Resp. Mahari Ben-Lev*, Part 1, ch.40; *Ibid*, Part 1, ch.37; *Ibid*, Part 2, ch.88.

between *halitsah* and levirate marriage is not sufficient to provide the necessary foundation for the creation of a legal norm of the statutory type like the one enacted by the exiles in Fess. Indeed, exiles who arrived in the Ottoman Empire chose an arrangement within the realm of private law, using the *ketubbah* clause.

Another innovation of the exiles in Fess was the energetic means of enforcement they chose — coercing the husband to grant a *get* — in order to bring the ordinance to bear. The legal framework for this is the rule of the rebellious woman (*moredet*) that was common in the period of the *geonim* and according to which it was possible to force the husband to grant a *get* upon his wife's request without a specific ground found in the Talmud.⁶⁷ Various works from the period of the first *geonim* attribute this rule to different legal sources. Some based the rule on an ordinance enacted in the 7th century by Babylonian *geonim* because of various constraints. Others based the rule on rulings from the Talmud itself, according to a certain interpretation or according to a certain version they possessed.⁶⁸ The rule of the rebellious woman was accepted in various centers across the Jewish world, including Spain and Ashkenaz, where they acted according to it for hundreds of years.⁶⁹ In Fess and later in Spain Rif supported the rule and based it on the ordinance of the *geonim* only; the Rambam, in Islamic Spain and later in Egypt, based it on talmudic law.⁷⁰

In the middle of the 12th century Rabbenu Tam launched a sharp attack on the rule, claiming that the Rambam's interpretation of the Talmud was erroneous. He also maintained that no new reasons should be created for forcing a husband to divorce his wife, and that the *geonim* of Babylon exceeded their authority when they enacted such a regulation.⁷¹ The process of erosion of the rule of the rebellious woman continued in the following centuries.⁷² At the end of the 14th century, the greatest sages of Aragon and Catalonia, Ribash and Tashbetz, adopted an approach that definitely opposed the rule of the rebellious woman, whether based on the Rambam's code or the ordinance of the *geonim*. Upon their arrival in Algiers following the edicts of 1391, they confronted the various communities they encountered there and which persevered in the Rambam's ruling.⁷³ In this sense,

⁶⁷ E. Westreich, "The Rise and Decline of the Law of the Rebellious wife in Medieval Jewish law", in H. Gamoran (ed.), *Jewish Law Association Studies, The Zutphen Conference Volume 12* (2002), 207-218.

⁶⁸ *Ibid.*, 209-212

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 212-213

⁷² In the 12th century, Rabbi Zerahya Ha-Levi from Provence ruled that the ordinance of the *geonim* was no longer valid there in his time (*ibid.*, 213).

⁷³ *Ibid.*, 216-217.

the ordinance enacted in Fess that requires forcing a dangerously ill husband to divorce his wife is in opposition to the trend that was common among the great halakhic sages in Spain.

But it is not impossible that the Castilian exiles represented a trend in Sephardi tradition that opposed Ribash and Tashbetz, and they conceivably found in Fess local traditions who continued to observe the Rambam's ruling. In Rashba's responsa we find references to various communities that continue to observe Rambam's teachings, which allowed coercion of the husband of a rebellious wife who demanded divorce. Rashba even validated post factum this legal tradition and instructed his questioners to allow members of these communities to act according to their customs despite his personal opinion that rejected the rule of the rebellious woman.⁷⁴

A sharp confrontation among members of the communities that upheld the rule of the rebellious woman erupted at the beginning of the 14th century between the Rosh, head of the sages in Castile, and the sages of Cordoba, in the south of Spain. the Rosh attacked sharply this tradition and asked that a stop be put to using the rule of the rebellious woman, whatever its legal basis. In principle, the authority of the Rosh among members of the Castilian community should have been decisive and should have resulted in an end to the use of this rule.⁷⁵ But this is not what happened, and already in the days of his son and heir to the rabbinical seat of Toledo, Rabbi Yehuda ben HaRosh, we find attitudes and attempts aimed at continuing to follow the Rambam's rule. The second son of the Rosh, Rabbi Ya'akov, author of *Sefer Ha-Turim*, described in his book both the tradition promulgated by his father and that of the Rambam.⁷⁶

The same is true for the second half of the 14th century. A responsum by Ran mentions a local community in Spain that enacted an ordinance whereby all rulings should conform to the Rambam, including those involving rebellious women.⁷⁷ Moreover, we have found in the writings of Tashbetz evidence of a community in Spain that at the end of the 14th century still enacted an ordinance in this spirit.⁷⁸ From this point on, there are no documents in our possession that provide evidence of what was going on in Castile in general, and we cannot know therefore whether these trends continued. But it not impossible that even in the 15th century there were local traditions that continued to follow the Rambam's rule.

⁷⁴ *Ibid.*, 214-215.

⁷⁵ *Supra* n.67.

⁷⁶ *Tur, Even Ha'Ezer* 77.

⁷⁷ *Ibid.*, 216.

⁷⁸ *Ibid.*

The fact is that even in Algeria in the 15th century, which was the territory under the direct authority of Ribash and Tashbetz (the great opponents of the rule of the rebellious woman), Tashbetz's grandson was forced to attack the local traditions that followed the position of the Rambam.⁷⁹ It is all the more likely that in Fess, where no great Spanish sages opposing the rule arrived after the 1391 edicts, there still were sages who supported the Rambam's or Rif's rule. All this leads us to the conclusion that there was a real basis in the Castilian tradition for the creation of a law that coerced the husband to divorce his wife without relying upon a specific talmudic ground.

5. *The Economic Component of the Ordinance*

The innovation in the first part of the ordinance that forces the ailing husband to divorce his wife required changes and adjustments in inheritance arrangements and the methods of collecting the *ketubbah*.

And it should not happen that some person will delay and refuse to grant a *get* because of the fear that the *ketubbah* and dowry will be collected, and therefore we decree that the divorced woman will be treated as would the widow when she is divorced in this manner and will collect based on this ordinance.⁸⁰

The change in the wife's status from that of a widow to that of a divorced woman following the implementation of the instruction in the ordinance was liable in many cases to have economic consequences, and there was a fear that for this reason some people would refuse to comply with the ordinance. Therefore, the authors of the ordinance ruled in advance that with respect to collecting the *ketubbah* and the inheritance arrangements the woman's status would be that of a widow and not of a divorced woman.

What are the economic differences between a widow and a divorced woman, and who shouldered the burden following the enactment of the ordinance for prevention of levirate marriages? To answer this question I examine the ordinance that provides instructions for the case when a wife survives her husband:

When the husband dies while his wife is alive and he had no children by her, the woman will take from all the assets of her husband two thirds, and the third third will be taken by his heirs up to the third generation. And the heirs mentioned will pay from their said portions the debts ... If he had sons by her, the widow will share with the offspring everything that is found at the time of death half and half. And also if his heirs are his father and brothers, they will also be considered his seed.

⁷⁹ *Ibid.*, 217.

⁸⁰ *Supra* n.24.

And his relatives, whether from this woman or another, will pay the debts in advance, and the remaining wealth will be divided.

According to Torah law, established in the Talmud and in rabbinic law, a woman does not inherit her husband's wealth⁸¹ and all her rights upon becoming a widow are based solely on her *ketubbah*. Her financial rights include the right to receive the amounts specified in the various portions of the *ketubbah*: the main portion, the supplement, and the dowry.⁸² Her other rights are for alimony and housing throughout her widowhood⁸³ according to the different customs of the descendants of Yehuda and the Galilee. Her financial rights encumber the estate as a debt, and are entirely independent of the size of the estate.⁸⁴ At times she will be able to be paid from property sold in the course of the marriage by virtue of the general mortgage that a woman holds on her husband's property.

This ordinance establishes entirely different arrangements from those present in the Talmud and the *Mishneh Torah*, and continues a trend that was common in Spain already at the time of the Rosh.⁸⁵ Here the widow no longer collects her *ketubbah* as a debt on the inheritance but becomes an heir competing with other heirs. And a distinction is made in the identities of the heirs. If the husband has a son by the widow, or he has a father or a brother, the widow is awarded half the assets of the estate and the other heirs are awarded the other half. If other relatives remain, including a child from another woman, the widow is awarded two thirds of the estate and the other heirs receive only one third. There is a difference between the two groups of heirs also with respect to the payment of debts on the inheritance. If her competitors inherit from the first group of relatives, first they pay the debts of the estate and then they divide the inheritance equally. If her competitor is an heir from the second group (except for a child from another woman), the widow first takes the two thirds due to her and the other heirs pay from their share the debts of the estate.

The economic discrepancy between the talmudic method and that of the ordinance depends of several factors: (1) the difference between the amount of money specified by the *ketubbah* and the amount of the estate; (2) the identity of the heirs; (3) the scope of the debts on the inheritance, the time when they were

⁸¹ *Rambam, Hilkhhot Naḥalot*, Part 1, *halakhah* 8: "The woman does not inherit her husband at all, and the husband inherits all his wife's property."

⁸² *Ibid.*, *Hilkhhot Ishut*, 16:3.

⁸³ *Ibid.*, 18:1-2.

⁸⁴ *Ibid.*, 16:10.

⁸⁵ See S. Asaf, "Ordinances and Various Customs Regarding the Husband Inheriting from his Wife", in *Jewish Studies 1-2* (Jerusalem: Hamakhon leMada'ei HaYahadut, 5686-87/1926-27), vol. 1, 83-89. *Tur, Even Ha'Ezer* 118 opens with the words: "The marriage ordinance of the Toledo community and the response to it by my father" (i.e., the Rosh).

incurred and the nature of the securities. If the amount of the *ketubbah* is greater than half the estate (or two thirds of the estate, respectively) and if it is encumbered by debts that must be paid in advance, the woman would prefer to be divorced and receive the value of her *ketubbah*, whereas the legal heirs would prefer the regulations of the ordinance that apply to the widow. It is easy to see that in this case a man interested in improving the situation of his legal heirs would oppose granting his wife the status of a divorced woman instead of that of a widow.

This is the background to the second part of the ordinance, which decrees that women in this situation will have the status of widows and not of divorced women for the purpose of collecting their share of the inheritance. The legislators do not hesitate to divide the status of the women between its various components. There is no doubt that from the personal and substantive points of view the woman is a widow and not divorced, since the couple had no intention of terminating their matrimonial relation by divorce. As far as her marital status is concerned, she will clearly be considered divorced and not widowed, so that she will not require a levirate marriage, but neither will she be able to marry a *cohen*. But in all matters having to do with her financial rights, she will be considered a widow who is entitled to a portion of the estate as an heir, and will not collect her *ketubbah* as prescribed by talmudic law.

A division of this nature attests to great confidence and daring, which was characteristic of the exiled sages — as manifest in the entire body of their legislation. It would not have been at all groundless if the exiled sages had feared granting widow status to the women, based on the argument that people were liable to slander the *get* and claim that it was not valid, leaving the woman without *halitsah* and in need of one. A fear of this nature was raised by several Ashkenazi halakhic sages in cases in which the ill husband, on his own accord, granted a *get* to his wife to prevent the levirate connection. Their position was that the woman was prohibited from mourning her husband's death, since from the legal point of view she was divorced and was not his wife when he died, and if she mourned him people would slander her and would claim that she was a widow and the *get* was invalid.⁸⁶

We have found a connection between granting a *get* out of fear of death in order to prevent the levirate relation and the argument about the woman collecting her *ketubbah*, in the halakhic teaching of the Rosh and the *Sefer Ha-Turim* by his son. In answer to a question addressed to him by his congregation in Toledo, the Rosh wrote:

In the matter of your ordinance that every widow who comes to take a share in her husband's assets the heirs prevail: they can give her half of the assets if they are few

⁸⁶ On the subject of commentators to *Shulḥan Arukh* see *Even Ha'Ezer*, ch.145, para.9 in the Rema edition, and in *Pitḥei Teshuvah*, *ibid.*, para.7.

and if they are many they can give her the *ketubbah*. And Reuven divorced his wife on the eve of his death, and she demands her *ketubbah* and her dowry because she says she is divorced, and the ordinance talks only about widows; and the heirs say that he gave her the *get* only so that she will not be subject to a levirate marriage, and therefore her status is that of a widow and they will divide the inheritance with her.⁸⁷

In this case the man divorced his wife apparently on his own initiative in order that she not become subject to a levirate connection. The question that needed to be answered was whether she is to be considered divorced for financial purposes as well or only from the point of view of her status. Here, too, the root of the controversy was an ordinance that clearly changed the financial rights of the widow unfavorably.⁸⁸ According to the instructions of the ordinance, the heirs could, if they wished, assign the widow a status of heir, so that she receives half the estate and not her *ketubbah*. They also had the right to allow her to retain her original legal status according to talmudic law, whereby she collects her *ketubbah* and does not receive any of the estate. Because the ordinance applies only to widows and not to divorced women, it is obvious why the woman asked to be considered a divorced woman for the purposes of financial matters as well, whereas the heirs asked that she be considered in this respect as a widow, according to the substantive but not the legal state of affairs.

The opinion of the Rosh was that if the man chose to divorce his wife before his death her status is that of a divorced woman and she is entitled to collect her *ketubbah* and not merely half the estate. The questioners' claim that this woman is in fact a widow and not a regular divorced woman was rejected by the Rosh by formal legal arguments, and it is clear that neither this nor any other individual case could damage the objectives of the ordinance. This answer is quoted in the *Sefer Ha-Turim*,⁸⁹ and there is no doubt that at the end of the 15th century the Castilian exiles knew about it.

The exiles' decision to make the custom mentioned in the Rosh's responsum into a general norm, granting divorced status to a not insignificant group of widows, was liable to subvert the inheritance ordinance that changed the arrangements used to settle the financial matters of widows. The opinion of the Rosh in his responsum was not valid here, since the man did not divorce his wife on his own initiative but the ordinance forced him to do so. As a result, the sages of Fess added this instruction and decreed that divorced women who were granted

⁸⁷ *Resp. HaRosh, Klal 50, ch.10.*

⁸⁸ As opposed to the ordinance of the Fess exiles, who changed the method but did not necessarily cause injury to the widow.

⁸⁹ *Even Ha'Ezer, 118.*

their *get* while their husbands were on their deathbeds by virtue of the ordinance would be considered widows for the purposes of their inheritance rights.

This instruction, granting the divorced woman the status of a widow for financial purposes, skirted also a problem that arose as a result of the Algiers ordinance.⁹⁰ The latter placed an obligation on the husband to give his wife an additional *ketubbah* payment in the amount of half the dowry but only were the wife was divorced against her will. The date of the ordinance is 1394, a hundred years before the Fess ordinance, and it remained in effect hundreds of years thereafter.

In the second half of the 15th century, Rabbi Shlomo bar Shimon bar Tzemaḥ Doran (Rashbash) was asked what to do where a dying man divorced his wife on his own initiative, in order to prevent her becoming subject to the levirate connection after his death.⁹¹ Was the woman to be treated as someone who was divorced against her will and thus entitled to the supplement to which her husband was obligated, or as someone who agreed to the divorce and therefore was not entitled to the supplement? Rashbash responded that there was no unequivocal answer to this question, and that it depended on the circumstances and on the evidence. If the woman was willing to perform the levirate commandment but acquiesced in her husband's divorce so that he would not suspect her of preferring his brother and look forward to his death, she is entitled to the supplement as a woman who was divorced against her will. But if the woman desired the divorce to avoid the levirate marriage, either because she was hostile to him or because he was already married to another woman, and if her husband divorced her in order to comply with her will, she would lose the additional payment in the *ketubbah*.

We do not know whether such an ordinance existed locally before the arrival of the exiles. But after the exiled sages in Fess decreed that the divorced woman was to be treated as a widow who participates in the estate as an heir and does not collect her *ketubbah*, the problem was circumvented and the judges no longer needed to decide on the matter of the woman's intentions.

6. *The Levirate Commandment and the Monogamy Clause: the 1593 Ordinance*

About a hundred years after the expulsion, the exiles were already unchallenged masters of their new environment in Fess, both in the community institutions and in its cultural and halakhic life.⁹² At this juncture, the descendants of the exiles continued to take legislative action, but in contrast to the 1494 ordinance, which

⁹⁰ The Algiers ordinances were compiled by Rabbi Shimon bar Tzemaḥ Doran (Tashbetz), who participated in their enactment and wrote a commentary to them. The entire collection was published in the *Tashbets Resp.*, Part 2 (Jerusalem Institute, 2002), ch.292, Tikun 1-2.

⁹¹ *Resp. Rashbash* (Jerusalem Institute, 1998), ch.84.

⁹² Toledano, *supra* n.4, at 95-96.

was intended to reduce and avoid the levirate connection, the 1593 ordinance was intended to strengthen and promote observance of the levirate commandment.

There was a custom among the Jews of Spain to assume an obligation not to take another wife, by means of a monogamy clause in the *ketubbah*.⁹³ Occasionally the husband also took an oath to honor the clause (I will call it the monogamy oath) in order to strengthen the obligation.⁹⁴ The Castilian exiles brought this custom with them to Morocco. For many generations, one of the prominent differences between the descendants of the exiles and the original population was the addition of the monogamy clause to the *ketubbah*. Cases of a married brother-in-law were very common, and the following issue arose: does the monogamy clause (with or without the oath) override the levirate commandment and is it possible, on its strength, to coerce the brother-in-law to perform *ḥalitsah*, or does the levirate commandment override the monogamy oath?

This question is not new in Jewish law; the Rambam had addressed it some three hundred years before the expulsion.⁹⁵ The Rambam's answer was not mentioned explicitly in the sources of the Moroccan sages in the period we are discussing, but it can serve as a frame of reference for the discussion of the exiles' position. The facts of the case discussed by the Rambam were simple: a man married a woman and obligated himself in the *ketubbah* not to marry another, and subsequently a levirate connection was created between him and his brother's widow. His wife asked him to perform *ḥalitsah* to the widow, but the man sought to perform the levirate commandment, arguing that his obligation not to marry another woman did not contradict the levirate marriage, because at the time he obligated himself he did not think that a levirate situation will arise.

The Rambam's argument consisted of several stages. His basic assumption was that if the man obligated himself explicitly that he would not perform the levirate commandment, his obligation was valid and he was prohibited from performing the commandment. But in this case the obligation said only that he would not marry another woman, and the question was whether this also included an obligation not to perform the levirate commandment. The Rambam argued that the interpretation of the man's intentions depends on whether one maintains that the levirate commandment or *ḥalitsah* takes precedence. In the first case, the assumption is that

⁹³ On the monogamy clause see M.A. Friedman, *Jewish Polygamy in The Middle Ages: New Documents from the Cairo Geniza* (Jerusalem: The Bialik Institute, 1986), 34-46.

⁹⁴ See, for example, *Resp. HaRosh, Klal* 8, ch.8. After the expulsion, the oath became a common custom in the Land of Israel and Egypt, as noted by Rabbi David ben Zimra (Radbaz): "Of late they used to take an oath on every clause of the *ketubbah*." *Resp. Radbaz*, Part 4, ch.1, 292 (221).

⁹⁵ *Resp. Rambam* (Blau), ch.373. notes that the questioners raise the argument that the widow was not a regular woman but one who was granted the brother-in-law by heaven. We shall see that in the 1593 ordinance this argument is made explicitly in order to reject the monogamy clause in favor of levirate marriage.

the man did not intend to include the levirate connection in his obligation, since he complies with the requirements of the levirate commandment and can claim that “marriage performed by commandment was not in my mind and I did not make it a condition nor was it in the wife’s mind.” Only if we maintain that the *halitsah* commandment takes precedence or is on a par with the levirate commandment, do we interpret the man’s obligation not to marry another woman to apply to all matrimonial relations, including the levirate.⁹⁶

The custom among the community of exiles was not to perform the levirate marriage when the husband obligated himself through the monogamy clause, which means that the levirate commandment was not considered by them to take precedence over *halitsah*. It is reasonable to assume that in this matter also it was the position of the Rosh that was responsible for the attitude that depreciates the value of the levirate commandment.⁹⁷ But also in neighboring Algiers the legal tradition held that if the brother-in-law was married *halitsah* takes precedence, according to the opinion of Ribash⁹⁸ and Tashbetz.⁹⁹ However, the positions of these sages were formed with regard to a conflict between the brother-in-law and the widow, and we cannot know if this is how they would have ruled in a conflict between the brother-in-law and his wife. By contrast, the general approach of the Rosh is valid in upholding the demand of both women, the wife and the widow, to perform *halitsah* rather than the levirate marriage.

This state of affairs continued for about one hundred years after the enactment of the 1494 ordinance. In the month of Shvat of 1593 a woman still demanded from her husband that he pay her *ketubbah* before performing the levirate marriage with his sister-in-law, based on the monogamy clause in her *ketubbah*.¹⁰⁰ The court without hesitation accepted her demand in principle and obligated the man to pay out her *ketubbah* before performing the levirate marriage with his brother’s widow.

It is not impossible that the position of the man who demanded permission to perform the levirate marriage despite the monogamy clause reflects a change of direction in the attitude toward the levirate commandment among the Fess community, which is what motivated the enactment of an ordinance in the month of Av of 1593 which states:

⁹⁶ This ruling received the agreement of two other judges, and of an additional judge who had initially adopted a different opinion and then changed his mind following the Rambam’s position.

⁹⁷ As we shall see, the exiles refrained from marrying another woman even when the husband had not fulfilled the fertility commandment. I believe that in this matter too we witness the influence of the Rosh, since he had ruled in a case like this that the monogamy clause takes precedence over the commandment to be fruitful and multiply and annuls it. See *Resp. HaRosh, Klal* 33, ch.1.

⁹⁸ *Resp. Ribash*, 1, 302.

⁹⁹ *Resp. Tashbets*, Part 2, ch.95.

¹⁰⁰ The ruling in this matter is found in the collection of ordinances. See Amar, *supra* n.15, at 21-22; Ankawa, *supra* n.24, at ch.35.

The sages having assembled ... and checked thoroughly and found that to the distress of several families their seed was uprooted from the world because of the clause that he will not marry another woman, so that the levirate commandment, which is one of the commandments of the Torah, was also cancelled as a result of the mentioned oath, and the sages saw, together with people of substance and their leader, that because of this distress the coming of the Messiah is delayed, the sages ordained that from now on every married man who comes into a levirate connection with his brother's wife, even within ten years and even if he has sons from his wife, can perform the levirate marriage with his brother's wife that was given him by heaven and need not grant his wife a *get* or her *ketubbah*.¹⁰¹

This ordinance expresses a sharp change in the overall approach to levirate marriage, and marks the beginning of a trend of strengthening the levirate bond at the expense of *ḥalitsah*, as well as of a clear preference of the wishes of the husband at the expense of those of his wife and probably also of the widow. The authors of the ordinance decree that the importance of the levirate commandment is on a par with that of the commandment to be fruitful and multiply, deserving of protection from contractual limitations such as those imposed by the monogamy clause and oath. Therefore they decree that the monogamy oath must be rejected in favor of the levirate connection and that the brother-in-law is entitled (but not required) to perform the levirate marriage with his brother's widow despite his obligation to his wife.

The legislators based the ordinance on the argument that the widow is not any normal woman whom the man may marry, but rather one granted him by heaven, and therefore the levirate act does not formally breach the monogamy clause.¹⁰² The argument that the wife is granted by heaven is mentioned by an Ashkenazi sage at the beginning of the 13th century, who instructed that *ḥalitsah* not be compelled where the brother-in-law was married, despite the prohibition of the ban of Rabbenu Gershom.¹⁰³ The Castilian sages do not mention the Rambam's arguments in favor of rejecting the monogamy clause in case of a levirate connection, and it is likely that his responsum did not reach them.¹⁰⁴

¹⁰¹ Amar, *ibid.*, 22-23.

¹⁰² This argument is mentioned also in a question addressed to the Rambam and in the writings of other judges who wrote the ruling. See *supra* n.95.

¹⁰³ The sage is Rabbi Barukh, who wrote: "There is in our parts an ancient ban not to marry two women, but nevertheless one does not coerce a married brother-in-law to perform *ḥalitsah* because she was granted to him and he did not marry two women as the second one befell him from heaven and therefore one does not coerce him to perform *ḥalitsah* nor to consummate the levirate marriage." (The Book of Truma, Daf 46, 73).

¹⁰⁴ The Rambam's answer is mentioned by Rabbi J. Karo in a responsum that was published in 1598 in the work *Resp. Beit Yosef, Hilkhoh Yibbum ve-ḥalitsah*, ch.14, some five years after the enactment of the second Fess ordinance. This responsum of the Rambam was not quoted in Rabbi Karo's other works, *Kesef Mishneh*, *Beit Yosef*, and *Shulḥan Arukh*.

This type of approach in the case of a married brother-in-law is clearly in opposition to the Rosh, who maintains that even Sephardi brothers-in-law are coerced to perform *ḥalitsah* in a case like this, despite the Rif. In my opinion, this position is also opposed to Ribash, who decreed that *ḥalitsah* takes precedence in cases like this. But Ribash referred to situations in which the parties to the family conflict were only the brother-in-law and the widow, in which case he favored the position of the widow over that of the brother-in-law, and not when the parties were the brother-in-law and his first wife. But his definite argument that if the brother-in-law is married *ḥalitsah* takes precedence would have served also the brother-in-law's wife, who could argue that in this case the levirate marriage is no longer a commandment.

The legislators do not explain what caused the change, and there is no hint about it in the collection of ordinances. I can only speculate about one or more factors that may have caused this change in position. Because we assumed the position of the Rosh to be an indirect basis for the first ordinance of the exiles, in 1494, we can assume here also that the decline in the status of the Rosh is what caused the change and the strengthening of the levirate commandment. Indeed, this period sees a decline in the status of the Rosh as supreme authority for the Castilian exiles; he is ranked together with the Rambam and Rif, with rulings being based on the majority position of the three. A clear manifestation of this is the ordinance enacted about 10 years later, in 1603, which says:

To the place indicated by the Rosh, may his memory be blessed, we follow ... but if two of the pillars of teaching, Rif and the Rambam, disagree, it is proper that we lean toward them and drink from their waters.¹⁰⁵

They treat in the same way another rule of the Rosh, and note that there are no *poskim* of his stature in this matter "because there were not many who disagreed with him."¹⁰⁶ The position of the Fess sages thus matches the approach of Rabbi Yosef Karo who in the *Shulḥan Arukh* decreed that the Rif, the Rambam and the Rosh are the three pillars on which the rulings of the *Shulḥan Arukh* rest.¹⁰⁷ It is possible that this opinion of Rabbi Yosef Karo affected the Fess sages and resulted in a decline in the status of the Rosh, which in turn made possible the renewed rise in the prestige of the levirate commandment.

Nevertheless, on the monogamy clause Rabbi Yosef Karo espoused a position that opposed that of the Fess sages and even that of the Rambam. He was asked: "Someone who took an oath not to marry another woman and his brother's widow

¹⁰⁵ Amar, *supra* n.15, at 40, ch.61.

¹⁰⁶ *Ibid.*, 41.

¹⁰⁷ Elon, *Jewish Law*, *supra* n.8, at 1094-1095.

came before him ... is he authorized to marry her?"¹⁰⁸ Rabbi Karo decreed that the clause is valid in principle even in the case of a levirate connection, and that the levirate marriage contradicts the obligation assumed in the clause. This is against the Rambam's approach, according to which the clause can be compatible with a levirate marriage. Rabbi Karo went a long way to reject the Rambam's responsum and claimed that it was not the work of the Rambam himself or that it was written in his youth and that later he changed the opinions expressed in the *Mishneh Torah*. Apparently there was no awareness in Fess of the existence of Rabbi Karo's responsum, which was published for the first time some five years after the 1593 ordinances.¹⁰⁹

There is no telling how such awareness might have affected the Fess sages, and it makes no difference for the purposes of our discussion. It is entirely clear that in Fess, one hundred years after the expulsion, the attitude toward the wife is most severe given that her husband, who is in a levirate connection with his brother's widow, is released from the obligation he took upon himself not to take another wife. This trend is further sharpened by the fact that the husband is also released from his oath, despite the gravity with which annulment of an oath is generally treated, so much so that in Rabbi Karo's opinion even the Rambam would have been obliged to prohibit the levirate marriage if the clause were reinforced by an oath.¹¹⁰

It is possible that the appearance of *Kabbalah*, at the beginning of the 16th century, also affected the enactment of the ordinance. Katz has already pointed out that the rise of the *Kabbalah* in Italy and in the Ottoman Empire in this period affected the growing importance of the levirate commandment.¹¹¹ In Italy the phenomenon gained prominence especially in the light of the opposing view that was current in the 15th century, and which adamantly preferred *ḥalitsah* over the levirate marriage, especially when the brother-in-law was already married.¹¹² Katz maintained that this fact was manifest also in the east of the Ottoman Empire in the stand taken by Radbaz, a Spanish exile and one of the great halakhic sages of the 16th century in the Land of Israel and Egypt.¹¹³ It is possible, therefore, that the tendency of assigning great weight to the kabbalistic factor in the legal field existed in Morocco as well, and it is what prompted the exiles to enact an ordinance that

¹⁰⁸ *Resp. Beit Yosef Hilkhoh Yibbum ve-ḥalitsah*, ch.4.

¹⁰⁹ *Supra* n.104.

¹¹⁰ *Supra* n.108.

¹¹¹ Katz, *supra* n.22, at 167, 171.

¹¹² Westreich, *supra* n.49, at 247-249.

¹¹³ Katz, *supra* n.22, at 167. The words of Radbaz are recorded, among other places, in the *Resp. Beit Yosef, Hilkhoh Yibbum ve-ḥalitsah*, ch.2.

would make possible the levirate commandment despite the monogamy clause.¹¹⁴ A certain amount of support for this view can be found in a statement in the introduction to the ordinance that has a kabbalistic ring, which says that the monogamy clause delays the coming of the Messiah.¹¹⁵

Katz's statements should be reexamined in the light, *inter alia*, of the positions and claims made in the present article.¹¹⁶ Rabbi Karo disagreed with the position of Radbaz in the matter of the Ashkenazi widow and ruled that the brother-in-law may be coerced to perform *ḥalitsah*.¹¹⁷ As regards the monogamy clause and oath we mentioned above that he also adopted an attitude that favors the woman and rejects the levirate commandment. There is no question that Rabbi Karo was a committed kabbalist, and that mysticism played as important a role in his spiritual world as in that of the other great kabbalists, including Radbaz himself.¹¹⁸ Nevertheless, we find no traces of the influence of the *Kabbalah* on the rise in the strength of the levirate commandment in these responsa.

It appears that the 1593 ordinance, which deals mainly with the relationship between the brother-in-law and his wife, had a direct effect also on the right of the widow to demand *ḥalitsah* where the brother-in-law was married. It is difficult to see how it is possible to reject the wife's demand to prevent her husband from marrying the widow, especially if it is supported directly by the monogamy clause and oath, and at the same time the widow herself can refuse to perform the levirate marriage and demand from the brother-in-law that he perform *ḥalitsah*. It is reasonable to assume that in the wake of this ordinance, which was intended to ensure that the levirate marriage takes place in every case owing to the importance of the commandment, the widow's demand to perform *ḥalitsah* was also rejected, and that her argument that the brother-in-law was married would not help her. Thus, the third landmark of Moroccan Jews is also characterized by legislative activism, but the tendency of the ordinance is opposed to that which characterized the ordinance enacted by the exiles immediately after the expulsion.

¹¹⁴ On the importance that the Kabbalah acquired in North Africa at this time see N.A. Chouraqui, *History of the Jews in North Africa* (Tel-Aviv and Jerusalem: Am Oved and Hasifriyah Hatsionit, 1975), 120-123.

¹¹⁵ It appears that the authors of the ordinance had in mind first and foremost the commandment to be fruitful and multiply, and that they followed the Midrash that says that the Messiah will not come until all souls have been embodied. It is possible however that they also meant the levirate commandment, which, according to Kabbalah, is perceived as a repair (*tikun*) of the soul of the deceased, who did not live to fulfill the commandment to be fruitful and multiply.

¹¹⁶ Katz believed that the two cases caused a great stir at the time. Radbaz and other sages were involved in both cases. I believe that this interpretation is erroneous, resulting in a substantial reduction in the importance that Katz assigned to the Kabbalah factor. See Westreich, *supra* n.42, at 293-296.

¹¹⁷ *Resp. Beit Yosef, Hilkhoh Yibbum ve-ḥalitsah*, ch.2.

¹¹⁸ See R.J.Z. Werblowsky, *Joseph Caro: Lawyer and Mystic* (Oxford: Oxford University Press), 1962.

7. *Yavets and the Blunting of the 1593 Ordinance*

The last landmark in the traditional era of Jewish law in Morocco is related to the legal work of the great sage Rabbi Ya‘akov Even Tzur (Yavetz).¹¹⁹ It is he who compiled and edited the complete collection of ordinances of Moroccan Jews, where the ordinances of the exiles from 1494 appear, and which were later published in *Kerem Hemer*.¹²⁰ Moreover, Yavetz added comments and commentaries to the ordinances, which in time merged into the original ordinances. The levirate ordinance is one of these cases. I believe that the legislative tradition in Morocco did not stop at this point, but it did not enjoy the visibility and status comparable to those of the ordinances compiled by Yavetz. In any case, I am not aware of any legislation regarding the levirate following the 1593 ordinance, but case law continued to shape the subject and Yavetz made important contributions in this area as well.¹²¹

Yavetz addressed the issue at length in connection with the case of a widow who became subject to a levirate bond with a brother-in-law who was not only married but also the father of children, who was burdened by heavy financial difficulties and was loathsome to the widow.¹²² Yavetz’s answer is comprehensive and in-depth. It provides precise and structured orders on the subject and these are incorporated in the Book of Ordinances itself close to the 1593 ordinance.¹²³

The matter is discussed by Yavetz on two levels. First, he examines each ground in itself, to determine whether it justified coercing the brother-in-law to perform *halitsah*. To this end he analyzes whatever documents and sources were at his disposal. Second, he discusses the question of whether, despite the theoretical position, one ground is sufficient in practice in order to coerce *halitsah*, or whether it is necessary to have several cumulative grounds, and if so which. An important portion of the responsum addresses the brother-in-law’s financial ability at the factual level, and its consequences at the legal level. It is his discussion of the second ground, the fact that the brother-in-law was married, that is important for the purposes of our discussion.

¹¹⁹The biography of this sage was written by M. Amar in the introduction to *Resp. Mishpat U-Tsedakah Be-Ya‘akov* (Jerusalem: Hamakhon Lemoreshet Yahadut Morocco, 1981, next to n.25). See also Toledano, *supra* n.4, at 195.

¹²⁰Amar, *supra* n.5, at 25-28.

¹²¹Note also the legal work of this sage, distinguished by its high quality, which earned great praise from Prof. M. Elon, former Deputy Chief Justice of the Israeli Supreme Court, *supra* n.16.

¹²²*Resp. Resp. Mishpat U-Tsedakah Be-Ya‘akov*, Part 2, ch.24.

¹²³Ch.41. See Amar, *supra* n.24, at 26-27.

Based on Ribash's responsum¹²⁴ Yavetz decreed that if the brother-in-law is married the *ḥalitsah* commandment takes precedence over the levirate commandment. In doing so, he took a giant step forward, because if *ḥalitsah* takes precedence it is no longer possible to declare the woman to be rebellious and prejudice her rights under the *ketubbah*. But Yavetz strove to sever the levirate connection even against the brother-in-law's will and was not satisfied with favoring the widow at the purely financial level; he therefore proceeded to discuss the issue of whether it is possible to coerce a married brother-in-law to perform *ḥalitsah* on that ground.

The legal basis for coercing a brother-in-law on grounds that are not present in the Talmud in relation to the married man was the Rosh's responsum in the case of the "ignoramus boy" (*naar baar*).¹²⁵ Various sages claimed that this responsum could serve as a basis for coercing also those subject to the Sephardi tradition, but they hesitated to do so where all of conditions in the above case were not present. By contrast, there were sages, such as Radbaz, who attributed the Rosh rule in the ignoramus boy case only to the Ashkenazi tradition, which favors *ḥalitsah* over levirate marriages in principle. In order to get around a position such as that of Radbaz, Yavetz used the writings of Ribash, who ruled that if the brother-in-law was married, *ḥalitsah* took precedence. Yavetz found explicit evidence for this position in Rabbi Karo's responsum in the case of the Ashkenazi widow and the western (Moroccan) brother-in-law.¹²⁶ However, this responsum did not reach him from a primary source but through the responsum of Rabbi Ya'akov Levy, who quoted exactly the portion that fits Yavetz's position. Rabbi Yosef Karo combined Ribash's rule, stating that if the brother-in-law is married *ḥalitsah* takes precedence, with the position of the Rosh in the ignoramus boy case, stating that in cases like this the brother-in-law should be coerced to perform the *ḥalitsah*.

In the light of his conclusion that if the brother-in-law is married he should be coerced to perform *ḥalitsah*, Yavetz reexamines the 1593 ordinance. The ordinance appears clearly to favor levirate marriage over *ḥalitsah* even if the brother-in-law is married, to which end it released the brother-in-law from his obligations under the monogamy clause and oath. These ordinances took root in Morocco and became an integral part of the legal tradition and arrangements there. Yavetz did not challenge their binding validity and was aware of the contradiction between the content of the ordinances and his own position, based on Ribash. He noted this contradiction in his writing:

¹²⁴ *Resp. Ribash*, 302.

¹²⁵ See n. 61, *supra*.

¹²⁶ *Resp. Beit Yosef, Hilkhoh Yibbum ve-ḥalitsah*, ch.2, *supra* n.117.

... despite the fact that in the book of ordinances by our predecessors there is an ordinance enacted in 1593 to observe the levirate commandment even with a married man and even within ten years of marriage and even if he had sons from his wife ...

In order to narrow the contradiction, he used a restrictive interpretation, so that the content of the ordinance could be integrated with his approach to the issue of grounds for coercing *ḥalitsah* upon the widow's request. In his opinion, the ordinance was intended solely for the relationship between the brother-in-law and his wife and it was not its purpose to settle the relationship between the brother-in-law and the widow:

They did not come to contradict Ribash and say that the levirate commandment has precedence over everything. They did not come to decree except what concerns the brother-in-law and his first wife, since before the ordinance she could have stopped him from performing the levirate commandment on the strength of the oath that he took on her behalf at the time of their wedding that he would not take another wife ... And thus they decreed ... that thereby the oath will not apply in any way to a brother's widow and that his first wife could not stop him in any way. But the rules between the brother-in-law and the widow stand and the sages who enacted the ordinance did not mention them at all ... And if this is the case, we must say that the sages of the ordinance did not speak except for the case when the brother-in-law and the widow are both desirous to perform the levirate marriage, but if one of them refuses, the matter depends on the ruling of the law.

There is no doubt that this commentary is aimed at fitting the ordinance to Yavetz's position, which is based on Ribash's answer and is not consistent with the obvious meaning of the ordinance. In so doing, he reintroduced to the center of the legal stage the restrictive approach that was common among a portion of the Spanish *poskim* and that was heavily under the influence of Ashkenazi sources, especially the Rosh. It is likely that it is because of this, *inter alia*, that Yavetz was not willing to coerce *ḥalitsah* merely on the basis of the brother-in-law being married, and required other, cumulative grounds.

Another ground that was present in the circumstances of this case is that the man was loathsome to the widow, a ground that in fact is present in almost all cases in which a widow refuses to perform the levirate marriage. As I have written elsewhere, this ground (*ma'is alay*) was available to married women since the beginning of the period of the geonim until the 15th century in Algiers, and was used to force husbands to grant their wives a divorce.¹²⁷ Clearly, if this ground was sufficient to coerce a husband to divorce his wife it was also strong enough to force a brother-in-law to perform *ḥalitsah*. When this ground was abolished for married women, they also stopped using it directly in case of widows seeking to avoid

¹²⁷ *Supra* n.79.

levirate marriage. But in the case of levirate connections the loathsomeness ground was not suspended and there was a willingness to continue using it as an additional reason (*snif*), appended to another. Yavetz cites several important *poskim* who use the loathsomeness ground similarly in levirate cases, among them Rabbi Yosef Colon (Maharik),¹²⁸ one of the great sages of Italy in the 15th century, as well as Rabbi Karo himself.¹²⁹ Yavetz concludes that this ground can indeed serve as a *snif* to another ground. But use of this ground has a significant economic price, since the rebellious woman loses both the main and supplemental portions of her *ketubbah* and receives only her dowry, whereas other grounds grant the woman all the components of the *ketubbah*.

Discussion of the rebellious woman ground is connected directly to the second level discussion, devoted to the question of the need for an accumulation of grounds in order to coerce a brother-in-law to perform *ḥalitsah*. Clearly, if a ground is sufficient to force a married man to grant a *get*, this ground alone would also be sufficient to force a brother-in-law to perform *ḥalitsah*. The need for an accumulation of grounds arose only with regard to those grounds that were not recognized in themselves for married women but were recognized for widows. The Rosh's answer in the ignoramus boy case served here as well as a source for the possibility of creating grounds for coercing *ḥalitsah* that are not available to married women. But in this case, the widow has several grounds available to her, and the question that was brought before Yavetz was whether special grounds created in case law for the benefit of the widow could each stand on its own or whether it was necessary to have at least two grounds.

Yavetz was alert to the fact that there were sages who interpreted the Rosh's ruling in the ignoramus boy in a narrow way, requiring an accumulation of several reasons, and that these sages were not satisfied with only one of those reasons. He does not rule decisively which of the approaches is preferable, the one favoring the widow and satisfying itself with one ground, or the one that makes it difficult for the widow and requires an accumulation of grounds. In any case, the position he adopts throughout the responsum is that there is indeed a need for at least two grounds. One ground, created without any opposition, was the fact that the brother-in-law was married. The loathsomeness ground has also crystallized but it placed an economic burden on the widow even if she used it only as an additional ground, and therefore he expressed his desire not to make use of it.

If judges will find that the first claims are sufficient to coerce then we will not add this claim, which appears to lose her the *ketubbah* for nothing.

¹²⁸ *Resp. Maharik*, ch.102.

¹²⁹ *Supra* n.117.

To this end he made efforts throughout the responsum to provide an additional ground for the widow, and this is the inability of the brother-in-law to feed a woman, despite the theoretical difficulties that this ground raises and the controversies around it in the commentaries and the case law. In addition, there was difficulty in determining the factual evidence under the given circumstances. Thus, if the ground of the brother-in-law's inability to feed has been established, then this, together with his being married, justifies coercing him to perform *ḥalitsah*, and the widow will receive all portions of her *ketubbah*. If the man's inability to feed cannot be proven, the widow will have to use the loathsomeness ground, which results in her losing several components of the *ketubbah* and thus causes her significant economic loss.

8. *Summary*

This article has discussed levirate marriages in Morocco before the modern era, a prism for considering the historical landmarks of Jewish family law in Morocco and of its special methods. We have encountered here a varied and highly activist legal work. Its beginning is marked by Rif's ruling and decree in the controversy between two traditions of geonim; it continues with strong legislation that obligates the man to divorce his wife in order to avoid a situation of *aganut* as a result of a levirate marriage and with additional legislation that rejects the validity of the monogamy clause and oath in the *ketubbah* in favor of the levirate marriage, causing injury to women; and ends in a restrictive interpretation of this ordinance given by Yavetz in a ruling that expands the protection extended to the widow.

The first stage is characterized by Rif's ruling in the second half of the 11th century in his great *Halakhot*, in which he gives preference to the levirate commandment over the *ḥalitsah* commandment, following one of the traditions common in the Babylonian yeshivot. This ruling placed the widow in an inferior legal position if she chose to refuse the levirate marriage, without a ground that would justify a married woman in asking for a divorce. A refusal was liable to lead to her being declared a rebellious woman, with severe consequences in the economic areas but not in the matrimonial sphere. This legal foundation appears to have prevailed for hundreds of years, and we do not know whether changes were made to it.

The second stage occurred about two years after the expulsion from Spain as a result of an initiative by the exiled sages and leaders, who chose legislation to prevent situations of *aganut* among widows in a levirate connection. To this end, they enacted an ordinance that forced husbands on their deathbed to divorce their wives to prevent their forming a levirate connection after the husbands' death. This was a new ordinance, and we have not found a model for it either in pre-expulsion

Spain or amongst Spanish exiles who arrived to other destinations. Only later do we find, in the Ottoman Empire and in Italy, a custom of adding a clause to the *ketubbah* with a content similar to that of the ordinance.

The means chosen by the authors of the ordinance in Fess, namely obliging the husband to divorce his wife before his death, is far-reaching and extreme in Jewish law. We assumed that the exiles were inspired by the ruling of the Rosh, who from the beginning of the 14th century inculcated among Castilians a legal theory that narrows the importance of the levirate commandment. At the same time, we assumed that in southern Spain and at Fess traditions still persisted which followed the position of the Rambam regarding the rule of the rebellious woman, which served as a platform for the sanction specified in the ordinance that forced the husband to divorce his wife, without having to base it on a special talmudic ground.

The third stage is also one of strong legislation, but this time it acts against the interest of the women. The ordinance rejected, in cases of a levirate connection, the monogamy clause and oath that were common among the exiles. The ordinance is consistent with the position espoused by the Rambam several hundred years earlier but was unknown to the authors. At the same time, it opposed the position taken by Rabbi Karo in a responsum in which he accepted the clause, thus denying the levirate bond. It appears that a decline in the status of the Rosh among the Fess exiles made possible this type of legislation, which prejudices both the brother-in-law's wife and the widow. It is possible that the rise in the status of *Kabbalah* had a hand in the strengthening of the levirate commandment, because of the importance that *Kabbalah* attributed to it.

The fourth and last stage involves legal work of a different nature: commentary and analysis of legal decisions. The rulings of Yavetz, one of the great halakhic sages and Jewish legal scholars of Morocco, who compiled the body of ordinances of Moroccan Jews, were appended as a commentary to the ordinances. Yavetz restricted the ordinance that rejected the monogamy clause to the relationship between the brother-in-law and his wife, and rejected its applicability to the relationship between the brother-in-law and the widow.

The intense controversy surrounding the levirate issue and the manner of coping with it at all landmarks reveal a rich picture of legal work which may well be unique in Jewish law. The Moroccan sages were able to cope with new and difficult situations and to promote deserving solutions for the future by means of far-reaching and energetic legislation and the adjustment of varied traditions. On this foundation would eventually emerge the legislative activism of Moroccan sages in the middle of the 20th century, designed to cope with the pressures of modernity and its challenges in the area of family law, including the issue of levirate.