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ANNULMENT OF MARRIAGE WITHIN THE CONTEXT OF CANCELLATION OF THE *GET*

INTRODUCTION

Recent essays on contemporary halakhic problems have centered on the utilization of the rabbinic annulment of marriage to alleviate the plight of the *mamzer*. In particular there have been proposals to activate this principle in the context of annulment of the *get* prior to its reaching the divorcee.[1] This essay will analyze this premise and its practical application.

I

Retrospective annulment of marriage by the rabbis, after it has already taken effect, is limited to three instances.[2] Among these cases is one involving the husband's right to cancel the divorce before it reaches his wife. The *Mishnah* (*Gittin* 4:1) states:

> If a man after dispatching a *get* to his wife meets the bearer; or sends a messenger after him, and says to him, the *get* which I have given to you is cancelled, then it is cancelled. If the husband meets the wife before the bearer or sends a messenger to her and says, the *get* I have sent to you is cancelled, then it is cancelled. Once, however, the *get* has reached her hand, he cannot cancel it. In former times a man was allowed to bring together a *Bet Din* wherever he was and cancel the *get*. Rabban Gamliel, the elder, however, laid down a rule that this should not be done, so as "to prevent abuses."

The sages of the Talmud later explain why Rabban Gamliel enacted this rule "to prevent abuses" (*Gittin* 33a). Accord-

ing to R. Johanan it was to prevent illegitimacy, for he held with R. Nahman that the *get* could be cancelled before a *Bet Din* of two. Since the proceedings of two are not generally known there is always the fear that his wife will not hear and not know that the *get* is nullified. She might therefore remarry and bear illegitimate children. Resh Lakish, however, explained that the enactment is to prevent wife desertion. He held with R. Shesheth that he has to cancel it before a *Bet Din* of three. The proceedings of three are generally known and she will not be able to remarry since it is assumed that she will learn about the cancellation. She will therefore become a deserted wife since she can neither remarry nor will her husband return to her.

The Talmudic sages then questioned what the status of the woman would be if the husband nevertheless cancelled the *get* before a *Bet Din* in defiance of the enactment of Rabban Gamliel. Judah Ha-Nasi ("Rabbi") held that if the husband did nullify the *get* in such a fashion it is cancelled. Rabban Shimeon b. Gamliel, however, ruled that the *get* is not nullified since the power of the *Bet Din* (i.e., the enactment of Rabban Gamliel) must be upheld. The rabbis then explain how it is possible to declare a *get* valid to enhance the authority of the *Bet Din* if according to the Written Law it is cancelled. In reality it is not the nullified *get* which the rabbis validate but rather it is the original betrothal that is retroactively cancelled.

Since a man betroths a woman under the conditions laid down by the rabbis they may later annul his betrothal.[3] They can accomplish this by expropriating the money he originally gave her for *kiddushin* since a court expropriation is binding. Therefore the money he gave her was a mere gift, retrospectively, so that the marriage is automatically annulled. Similarly when there is betrothal by sexual intercourse, the rabbis can declare their relationship to be licentious. Therefore its force as *kiddushin* is annulled.

The law is decided in accordance with "Rabbi" and therefore the *get* is nullified if the husband contravened the ordinance of Rabban Gamliel.[4] *Tosafot* nevertheless concluded that if the husband cancelled the *get* clandestinely before only one person then it is not nullified. Under such circumstances even

"Rabbi" must stress the power of the *Bet Din* and the marriage is instead retroactively annulled.[5]

II

The early commentaries probed the outcome when a husband knowingly utilized this law to "save his sister's daughter" or to legitimize the offspring. If his wife, who was also his niece, committed adultery, the husband could nullify the *get* before one witness prior to its reaching her hands. In such an instance there is agreement that the rabbis cancel the original betrothal. In retrospect she is not an adulteress and the resulting child is not a *mamzer*. Rabbenu Tam held that if it is certain that the husband annulled the *get* in such a fashion solely to save his wife and the child, then the rabbis do not annul the marriage. He reasoned that the "rabbis instituted the annulment to strengthen the law and not to enable Jewish daughters to indulge in wanton and unrestrained sexual behavior.[6]" On the other hand, Rabbi Isaac ben Samuel of Dampierre declared that we may permit the saving of the woman and child in this fashion "as long as it is within the letter of the law." This viewpoint is strengthened by Rabbi Aaron Ha-Levi, who cited his teacher, Nachmanides, as stating,

> It does not concern us that *mamzerim* may now be legitimized since it is our desire that they be purified . . . as long as it is within the context of the law.[7]

Within a practical context, Rabbi Ezekiel Landau, the 18th Century rabbi of Prague, discussed this possibility in the case of a repentant adulterer.[8] The incident concerned a man who had an illicit relationship with a married woman during the three years that he boarded in her home. He later married her daughter and among the questions he asked when he repented was whether he was obligated to inform his father-in-law of his impious deeds? Perhaps his father-in-law was obligated to know since he was required to divorce his miscreant wife.[9] Rabbi Landau questioned whether mitigating factors were cre-

ated by the possibility that the father-in-law may retrospectively exonerate his wife so that she was not truly married at the time of her misdeeds. This would be accomplished by his sending her a *get* and annulling it before only one witness in accordance with the opinion of Rabbi Isaac ben Samuel. He declined to do so because of the stringent viewpoint of Rabbenu Tam and the seriousness of the sin of adultery.

During the middle of the 19th Century, Rabbi Yom Tov Lipman Heilprin of Bialystok raised the possibility of annulling the *get* before one witness within the context of saving the marriage of a *kohen* to his wife who claimed that she was raped.[10] By utilizing this solution the woman would retroactively not be married to the *kohen* at the time of her violation. She therefore could remarry the *kohen* afterwards as long as she was not abused by an individual who was forbidden to her.[11] Rabbi Heilprin held that there was no true intent to utilize the *get* for divorce under such circumstances since the husband knew that he would soon annul it. Without the total resolve of the husband the *get* would not be a "document of severing their relationship" (Deuteronomy 24:3). He therefore declared that the rabbis could not advise the *kohen* to undertake this course of action since it could not resolve the problem. Rabbi Heilprin similarly was apprehensive since "No *posek* mentioned this solution and nor did we observe its introduction by the elder learned rabbis."[12]

III

During the latter part of the 19th Century Rabbi Shalom Mordecai Shvadron of Brezen, Galicia, outlined the possibilities inherent in a literal application of this Halakhah.[13] He received an inquiry from Rabbi Abraham Joel Abelson of Odessa regarding the grievous plight of an *agunah* who had incorrectly been permitted to remarry. The facts are:

> A woman who had been without her husband [who was in the United States] for twelve years. Afterwards her husband's brother arrived with a letter from his mother which declared that his brother, the woman's husband, died without children. He also had ascertained

> this to be true, and he came to grant his sister-in-law *halizah*. The brother was believed and *halizah* was subsequently administered in accordance with the ruling of the Rashdam (as cited in the *Be'er Hetev* to *Shulkhan Arukh* EH 158:1). The woman was also granted permission to remarry. She also attained a legal certificate of death from the American authorities which stated her husband's name and the cause of death. She afterwards remarried and became pregnant. Now she learned that her husband lent his passport to another man. It was in reality the borrower who died and was incorrectly identified, while her husband was still alive. The law is clear that she must leave both husbands [*Yevamot* 10:1]. She has already attained a *get* from her first husband and her second husband will also divorce her. However, in relation to the child there is a real possibility that she will place him in a gentile orphanage if he is a *mamzer*. Or there is the risk that she will kill herself along with the child since he will be her only child from her second husband.
>
> Her first husband is not mentally stable and he has been in mental institutions a number of times. He currently is not of sound mind, and some claim that he was like this before his marriage. However, there is no way to verify this.

In his responsum Rabbi Shvadron concluded that there was no possibility of saving the child from the stigma of *mamzerut*. The factor of the first husband's current mental instability was dismissed since there was no evidence that he was also in such a state of mind at the time of his marriage. Rabbi Shvadron further reasoned that he certainly was not constantly of unsound mind since has was permitted to grant a *get*.[14] In the midst of his answer the rabbi of Brezen wrote to his inquirer,

> I will not conceal that had you consulted with me before obtaining a *get* from the first husband, that I would have suggested a resourceful solution, theoretically but not practically (*Le-halakhah ve-lo-le maaseh*).

Rabbi Shvadron then analyzed in detail the activation of the rabbinic retroactive annulment of marriage in the context of cancellation of the *get* before one witness prior to its reaching the divorcee. He reasoned that even Rabbenu Tam would approve of the annulment in this particular case. Elsewhere Rabbenu Tam was stringent lest the rabbis aid "wanton and unrestrained sexual behavior"; but in this case the woman "erron-

eously remarried with the permission of the *Bet Din,* and there was no fear of abetting sinners."

IV

Rabbi Shvadron's theoretical proposal became practically significant in an equally vexatious case which came before Chief Rabbi Reuven Katz of Petah Tikvah in 1951.[15] The case concerned a Yemenite family which arrived in Israel during the "Magic Carpet" immigration of 1949-50. While still in Yemen the father travelled to Asmara where he accepted a betrothal for his minor daughter in the presence of two valid witnesses. The daughter was then with her grandmother and had no knowledge of her marriage. Afterwards she wed another man and bore him a son.

> Now with the *aliyah* of the Yemenite exile it has been revealed that the woman was already married to her first husband, through her father's act. Her father told us that he did write to the grandmother to inform her of the marriage. The woman related that her grandmother did tell her about the contents of the letter at that time. She, however, did not take the news seriously since she did not think it possible to marry without the bride being present.
>
> Both husbands have appeared before the rabbinate, and each has presented reliable witnesses who testify that each marriage was in accordance with our religious law. They now ask for our decision and halakhic guidance (p. 74).

Rabbi Katz referred the problem to the Ashkenazic Chief Rabbi Isaac HaLevy Herzog. In his analysis, reference was made to the Yemenite custom of not specifically designating the witnesses to the marriage ceremony. Therefore in accordance with the viewpoint of a few of the early commentaries all the bystanders at such a marriage become part of the group of witnesses.[16] Since there are invariably relatives or people invalid to testify present, the entire party of witnesses is nullified in accordance with the rabbinic dictum "that a company of witnesses which is partially voided is totally voided" (*Makkot* 1:8). Rabbi Herzog reasoned that perhaps it can be assumed that this was the case when her father accepted her betrothal

and there were thus no acceptable witnesses to the marriage. Under such circumstances her initial marriage would be voided and there would be no dilemma of *mamzerut* in relation to the child from her second husband. Rabbi Herzog recognized that this was an extremely tenuous solution since this was only a minority opinion. In addition one cannot be certain that all the Yemenite Jews did not specifically designate witnesses. It is not clear from the published responsum exactly what the final ruling of Rabbi Herzog was since the written word was an elaboration of oral conversations with Rabbi Katz about the case. The responsum, however, concludes with a very significant addendum:

> At the start of my conversation with you on this topic, I suggested that there is no other solution except for the first husband to grant a *get* and to nullify it prior to its reaching the divorcee.[17] Then the rabbis would retroactively annul the marriage. Nevertheless you did not give this proposal any attention since you considered it far fetched. I, however, noticed that the Maharsham [Morenu ha-Rav Shalom Mordecai] suggested in a similar case that had he been asked before the first husband granted a *get*, he would have suggested (exactly like our solution) that the husband send a *get* and annul it before one witness. The *mamzer* would then be retroactively purified.
>
> While it is true that he wrote that his proposal was only "theoretical and not practical," perhaps he meant that he wanted the consent of another one or two scholars as is customary. Of course if this was his intention why did he not explicitly state it? However, in our case there is the additional lenient factor of the invalidation of the witnesses (p. 82).

It may be that in Rabbi Herzog's final published ideas concerning this case there is guidance for a viable conclusion to the practical application of the Maharsham's proposal. A basic guide to decision making in Jewish Law is the principle that leniency is permitted when there is a double doubt. When there is a single doubt pertaining to a Torah law the stricter view must be followed, but not when there is a double doubt.[18] In relation to the specific laws of *mamzerut* even a single doubt is sufficient to remove the stigma according to the Torah law. The rabbis, however, "set a higher standard in respect to

genealogy" and disbarred a doubtful *mamzer* (*Kiddushin* 73a). Nevertheless when a double doubt challenges the taint of *mamzerut* there is consensus among the rabbis that the stigma is removed.[19] In this instance there is a double doubt since there is a possibility that the witnesses were invalidated due to the Yemenite custom of not specifically appointing them. In addition it may be that the viewpoint of Rabbi Isaac of Dampierre can be adopted and the first husband can be encouraged to annul the *get* before one witness. The initial marriage will then either be voided *ab initio* or retroactively nullified so that her second relationship will not be adulterous.

In retrospect it may be that this very conclusion was inherent in Rabbi Shvadron's suggestion. Since, in his case, the possibility of activating the proposal of nullification of the *get* was no longer actual, he likewise dismissed the factor of the husband's mental illness. If, however, there had been a chance to annul the *get* and to create one doubt, then the additional factor of mental instability could have been utilized to create a second doubt. While there was no definitive testimony that the husband was similarly ill before his wedding, there was nevertheless some intimation that this was the case. If so, there is the additional factor that perhaps the original marriage was really in error since the woman was not informed of his mental illness. In such circumstances it may be that the marriage is not binding.[20] In this event there would have been a double doubt in the case before the Maharsham. The first doubt would have been created by the possibility of nullification of the *get*. The second would have been the chance of the initial marriage being in error due to the woman's lack of knowledge of her husband's true mental state. This theoretical possibility may also account for Rabbi Shvadron's caution that his thoughts were only "theoretical and not practical" since they were not practical in the particular circumstances of the case referred to him. Under different conditions his proposal would have indeed resulted in practical results.

V

These conclusions are perhaps challenged by a recent ex-

haustive study of this topic by Rabbi Shlomo Zalman Auerbach, the *Rosh Ha-Yeshiva* of Jerusalem's Kol Torah Yeshiva.[21] While there was no actual case before Rabbi Auerbach, he based his study upon the Maharsham's proposal. He referred to "the great anguish of the women . . . which led the leading Torah scholars to seek a solution which would have compassion on her and legitimize the child" (p. 6). Rabbi Auerbach heard on a number of occasions from Israeli *dayyanim* that they "desired to rely upon the ruling of the Maharsham, and to institute his suggestion in practice." Since Rabbi Shvadron explicitly stated that his ideas were only theoretical, Rabbi Auerbach undertook to analyze the topic and express his "humble opinion." He concluded that this legal device could not be accepted in practice and enumerated no less than six reasons to support his viewpoint. Among these was the fear that the child was still rabbinically considered a *mamzer* even after the nullification of the initial marriage.[22] Rabbi Auerbach also questioned whether it was permissible for the rabbis to advocate a solution which resulted in a licentious sexual relationship between the woman and her first husband. He also was apprehensive that perhaps the entire concept of retroactive annulment of the marriage by the rabbis was only operative when the man acted in defiance of the law. In this instance there would be no annulment since all his actions were dictated by the rabbis. Rabbi Auerbach also explored in great detail all the other interpretations of the Talmud (*Gittin* 33a) which served as the basis for the Maharsham's proposal. Rabbi Auerbach concluded,

> Therefore in my humble opinion one must be very hesitant to be lenient in this matter since it concerns a doubt in a Torah prohibition (p. 24).

The previous conclusion that Rabbi Shvadron's ideas could be practically utilized in a situation of double doubt would therefore not be challenged by Rabbi Auerbach's viewpoint. His entire study is related to "one doubt in a Torah prohibition," and there is no discussion of the consequences within the framework of a double doubt. Under such circumstances len-

iency would be permitted even in relation to a Torah law. There is also another very basic difference between Rabbi Auerbach's conclusion and the viewpoints of Rabbis Shvadron and Herzog. The former wrote his analysis without any formal case before him but rather in the context of a halakhic essay. The latter rabbinical leaders were concerned with pressing and grievous problems when they penned their responsa. It may be that the answer to a practical question is to be preferred over a different conclusion which was reached in a theoretical essay.[23] Rabbi Naftali Zevi Yehudah Berlin of Volozlin declared that the responsum is decisive even when it contradicted a previously recorded theoretical decision.[24] He wrote:

> One truly researches and comprehends the topic when responding to an inquiry concerning a practical case rather than when conclusions are reached in a theoretical study. The help of heaven is also more intense when the question concerns practice. Our sages already informed us that Divine help greatly aids us in correctly determining the practical Halakhah (*Ketubot* 60b). R. Johanan explicitly stated "Do not use my decisions as a practical guide unless I declare it to be an Halakhah in connection with a practicable decision" (*Bava Batra* 130b) . . .
>
> Therefore the conclusion reached at the time of a practical halakhic decision is preferable and closer to truth than theoretical conclusions reached at a time of study.

VI

The insights of Rabbi Shvadron and Herzog therefore have preference in this area since their ideas were stated in reaction to practical situations. Particularly is this the case when this viewpoint is qualified with the additional concept of the double doubt. Even though the great rabbis of previous generations did not advocate this solution nevertheless each new era is privileged to contribute to the function of the Halakhah. The Talmud declared: "Whenever a scholar reports a decision [however strange it may sound], he should not be rejected nor regarded as arrogant" (*Hulin* 7a). The Meiri elaborated upon this passage:

A sage who institutes a new Halakhah, whether he is more stringent or more lenient than the previous generation, is not to be considered arrogant. He is not acting improperly even though the earlier authorities did not advance such a viewpoint. As long as he indicates the reasons for his new decision he may be relied upon. The Torah has allowed every student a new area in which he may display his acumen.[25]

It therefore may be concluded that the rabbinic annulment of marriage within the context of cancellation of the *get* prior to its reaching the divorcee may be utilized as a solution to the problem of *mamzerut* under the conditions outlined in this essay.

NOTES

1. E.g. Moshe Silberg in *Panim el Panim,* No. 705, (January 12, 1973), pp. 14-17; Louis I. Rabinowitz in *TRADITION,* Vol. 11, No. 4 (Spring 1971), pp. 5-15; Yitzchak D. Gilat in *TRADITION,* Vol. 13, No. 4 (Spring 1973), pp. 73-79; and J. David Bleich in *TRADITION,* Vol. 14, No. 2 (Fall 1973), pp. 127-131.

2. Among the two cases not discussed in this article is when a man divorces his wife conditional upon his not doing something and subsequently is forcibly prevented from doing it. For example, he states, "If I do not come back from now until thirty days it shall be a divorce." Subsequently he is forcibly prevented from returning so that his non-arrival is not of his own choice. According to Torah law it is not a *get,* since he was prevented from coming *force majeure.* However, the rabbis enacted that a plea of duress is not acceptable in divorce and annulled the marriage under such circumstance. Se *Ketubot* 3a.

The other case was when a critically ill man divorced his wife and then recovered. According to Torah law he can retract the divorce because his intention was only to divorce her if he died. However, the rabbis decreed that he may not retract it, and they annulled the marriage in the event of such a divorce. See *Gittin* 73a.

For further details of these cases and this principle see Abraham Hayyim Freimann, *Seder Kiddushin ve-Nissuin Aharei Hatimat ha-Talmud* (1945), p. 14; and *Talmudic Encyclopedia,* 2:137-140.

3. *Tosafot* explains that it is due to this principle that the groom declares that he is taking the bride "in accordance with the law of Moses and Israel." (*Aosafot, Gittin* 33a, s.v. Kol Deme Kadosh).

4. See *Gittin* 33b; Maimonides *Yad, Hilchot Gerushin* 6:16 *and Maggid Mishnah ad loc.;* and *Shulkhan Arukh EH,* 141:60.

5. *Tosafot* to *Gittin* 32b, s.v. *V'Rav Nahman.*

6. *Tosafot* to *Gittin* 33a, s.v. *V'Afkinon Rabanon.*

7. *Shitta Mekubezet* to *Ketubot* 3a, 1953 New York edition, p. 22.

8. *Noda B'Yehudah, Orah Hayyim: Mahadurah Kamma,* no. 35.

9. *Yevamot* 11b; *Maimonides* Yad, *Hilchot Gerushin* 11:14; *Shulkhan Arukh EH* 11:1.

10. See his *Shealot U-Teshvot Oneg Yom Tov, EH,* no. 169, pp. 497-498. Regarding the law of the wife of a *Kohen* who is raped see Maimonides *Yad, Hilchot Issurei Bi'ah* 18:7; *Shulkhan Arukh EH* 6:10, and the commentaries *ad loc.*

11. Relationship with a forbidden individual would grant her a status of *zonah,* and she would then be forbidden to a *kohen* because of the prohibition of his marrying a *zonah.* See Leviticus 21:7; *Kiddushin* 77 a-b; Maimonides *Yad, Hilchot Issurei Bi'ah* 17:1; 18:1, 2, 5; *Shulkhan Arukh EH* 6:1, 8, 9: and the commentaries *ad loc.*

12. The concept of new solutions being advanced to long standing problems will be discussed at the conclusion of this essay.

13. *Teshuvot Ha-Marsham* (Warsaw, 1902), Vol. 1, *Responsum* 9.

14. The validity of a *get* granted by a man who at times was mentally unstable was the focal point of a controversy which concerned a divorce administered in Cleves, Germany in 1766. This debate became a *cause celebre* in *responsa* literature and almost all the leading rabbis of the era were to author answers. The complete episode was recorded in *Or Ha-Yashar* (Amsterdam, 1769) by Aaron Simeon Copenhagen, and by the administrator of the *get,* Rabbi Israel Lipschuetz, in his *Or Yisrael* (Cleves, 1770). Also see the writer's "The Divorce in Cleves, 1766" in *Gesher* (Student Organization of Rabbi Isaac Elchanan Theological Seminary, 1969), Vol. 4, No. 1, pp. 147-169. Rabbi Moshe Feinstein discussed a similar problem in his *Igrot Moshe: EH,* no. 120. Also see the writer's "The Responsa of Rabbi Moses Feinstein" in *Niv HaMidrashia (Midrashia Noam,* 1971), p. 69f.

15. The case is discussed in detail in Chief Rabbi Isaac Halevy Herzog's *Heichal Yitzhak: EH* (Jerusalem, 1967, Vol. 2, nos. 17-19, pp. 74-82.

16. Ritbah to *Kiddushin,* 43A, and to *Gittin,* 18b; and in both sources a similar viewpoint is cited in the name of his teacher, the Rashbah.

17. It is not clear whether this solution was yet feasible in the case under discussion since Rabbi Katz wrote to Rabbi Herzog in the initial inquiry that he already "obtained a *get* from both husbands" (p. 74). However, from Rabbi Herzog's addendum it appears that this solution was being proposed in a practical sense. It may be that Rabbi Katz simply wrote of his intentions, and in subsequent conversations with Rabbi Herzog it became clear that this proposal was operative.

18. For these basic guidelines of decision making see *Avodah Zarah* 7a; Maimonides *Yad, Hilkhot Mamrim* 1:5; *Shulkhan Arukh HM,* 25:2; and *Hanhogat Hora'ot Issur Ve-Heter* of the Shah, following *Shulkhan Arukh YD,* 242.

Regarding the principle of double doubt and its application see *Ketubot* 9A and the detailed analysis in the *Shev Shemateta* of R. Aryeh Leib Heller, "Shemateta One," chapters 18-24. For a digest of the halakhic literature on the topic

consult the *Sedei Hemed* of R. Hayyim Hezekiah Medini, s.v. index *sefek sefekah*. This concept occupies a central role in the granting of *agunot* the right to remarry. See the"Leket Derahim v-hanhagot Be-haturat Agunot" in *Ozar Ha Posekim,* vol. 8, p. 210, and "Agunot Be-Tushuvot Rabbi Isaac Elchanan" of R. Shlomo Josef Zevin in his *Soferim V-Sefarim: Geonim, Rishonim, Teshuvot* (Tel Aviv, 1959), pp. 168-172.

19. See the Bet Shmuel to *Shulkhan Arukh EH* 4, no. 43, and the *responsum* of R. Meir Posner in *Shealot U-Teshuvot Rabbi Akiva Ager,* no. 100, particularly p. 63, column 2. Also see *Ozar Ha Posekim,* Vol. 1, to *Shulkhan Arukh EH* 4:14, no.45.

For a contemporary lenient ruling in a case of suspected *mamzerut* based upon this principle see Rabbi Yizhak Yaakov Weiss, *Minhat Yizhak,* Vol. 3, no. 107.

20. For a contemporary example where a woman was permitted to remarry without obtaining a *get* after such an initial marriage to a man who did not reveal his mental instability to her, see Rabbi Moshe Feinstein, *Igrot Moshe: EH,* no. 80. The *responsum* should properly read to Rabbi Nahum Drazin of Baltimore and not to Rabbi Zev. Rabbi Drazin related to the writer that Rabbi Feinstein orally requested that he obtain the concurrence of two other prominent rabbis to this decision. Both Rabbis Pesah Zevi Frank and Ezekiel Abramsky of Jerusalem agreed with Rabbi Feinstein's conclusion. Also see *Igrot Moshe: EH,* Vol. 3, no. 46 for another such example.

21. The article is entitled "Be-Inyon Afk-inhu Rabanan L'Kiddushin Minei" and it appeared in *Moriah,* Vol. 2, nos. 9-10 (Elul 5730 - Tishrei 5731), pp. 6-24. Rabbi Rabinowitz (see f.n. 1) describes Rabbi Auerbach's negative conclusion "as almost a painful surprise" (p. 11). Rabbi Auerbach's decision, however, can be viewed within the tradition of the great *posekim.* While they will strive to stress "the opinion of leniency which is preferred" (*Bezah* 2b), they nevertheless will be stringent when their research indicates such an approach. For analysis of the concept of "leniency is preferred" see Rabbi Gedalia Felder, *Nachlat Tzvi* (New York, 1972), Vol. 2, pp. 22-24.

22. See the Ramban to *Ketubot* 3a where he concluded that rabbinically "the *mamzerim* are not purified and the woman remains forbidden to her husband's relatives and to *kohanim.*" The *Hiddushei Ramban* to *Ketubot* were published as part of the *Hiddushei Rashbah.* See the introduction of Rabbi Isser Zalman Meltzer to his edition of the *Hiddishei Ramban,* Vol. 1, p. 2.

Rabbi Yom Tov Lipman Heilprin was also concerned with this viewpoint in his *responsum, op. cit.*

23. For a full discussion of this problem see the essay "Ha-Pesak V-ha-Teshuvah" by Izhak Zev Kahane in his *Mehkarim B'Safrut Ha-Teshuvot* (Mosad HaRav Kook, 1973), pp. 97-107.

24. See his *Shealot U-Teshuvot Mashiv Davar,* Vol. 1, no. 24.

25. For further discussion of this concept and its application in another context see the article "Al Ha-Haza'ah Le-Takanat Nashim Be-Inyanei Niddah" by Rabbi Menahem Kasher in *Noam,* Vol. 8, pp. 348-349.