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Survey of Recent Halakhic Periodical Literature

A 19TH CENTURY *AGUNAH* PROBLEM AND A 20TH CENTURY APPLICATION

I. THE HAPSBURG CIVIL CODE

To persons raised on these shores the very notion that a government might have the temerity to demand that a clergyman of any denomination compromise religious principles and solemnize a union he regards as forbidden is repugnant. Even in its severely attenuated form subsequent to the U.S. Supreme Court decision in *Employment Division, Department of Human Resources of Oregon et al.* v. *Smith*, 494 U.S. 872[1] (1990), the Free Exercise Clause prevents government from singling out religious practices for proscription or imposition of a burden. Not so in other climes in which minority religions were—and in some cases continue to be—the objects of overt discrimination. Although religious practices were not infrequently forbidden, rare was the case in which civil authorities sought to impress clergy as officers of the state for purposes of ministerial functions religiously repugnant to them.

Yet, as reported by R. Moshe Sofer, *Teshuvot Hatam Sofer*, *Even ha-Ezer*, I, no. 108, precisely such an edict was issued in Trieste[2] *circa* 1786. In that year a new codex was promulgated that incorporated novel marriage regulations including, *inter alia*, a requirement for the publication of banns for three consecutive weeks prior to solemnization

Dedicated to Rabbi Emanuel Feldman who, quite apart from his myriad other accomplishments, is to be hailed as the architect and builder of an exemplary and paradigmatic Jewish community.

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of a marriage and established the age of legal capacity of both men and women for marriage without paternal consent as twenty-four. The same legislation declared any union celebrated other than in conformity with the newly enacted statute to be void *ab initio*. Moreover—and herein lies the real problem—the newly promulgated Civil Code demanded that clergymen celebrate any subsequent marriage contracted by either spouse and that they officiate at the marriage of the issue of any subsequent union. Failure to do so rendered the clergyman culpable for both financial and corporal punishment and—to add insult to injury—required the recalcitrant clergyman to be present and witness the marriage when ultimately solemnized by another officiant.

Throughout the medieval period marriage was acknowledged by temporal rulers to be a religious matter governed by the ecclesiastic law of the Church which, to be sure, incorporated many principles of Roman law. Subsequent to the Reformation, the rulers of many European countries became disposed to regard marriage as a civil act, to withdraw it from the control of the Church and to entrust it entirely to the state. The Napoleonic Code was the first example of the treatment of marriage as a purely civil act. The Napoleonic Code did not deny the religious element present in marriage nor did it attempt to control or interfere with the religious aspect of marriage. Recognizing the religious element of marriage as beyond the domain of civil authority, it was content to allow the religious aspect of marriage to remain under the exclusive control of ecclesiastic authorities while reserving to the state the right to regulate all civil aspects of the union.

This was not the case in the Austro-Hungarian Empire. The 1783 Hapsburg Marriage Patent (*Ehepatent*) promulgated by Joseph II and the Civil Code of 1786 established a civil definition of marriage and asserted total secular jurisdiction over the establishment of that relationship. Marriage was decreed to be a civil contract whose validity was derived from the law of the land. State courts were declared to be the sole legal forum for adjudicating disputes pertaining to the permissibility and validity of marriage. However, the law failed to provide for civil marriage ceremonies. Quite to the contrary, solemnization of the union by a clergyman was a requirement for a legal marriage. Clergymen were, in effect, not only permitted, but required, to serve as civil functionaries or servants of the state. The result was state control of marriage and state definition of marriage as a civil institution but with involuntary cooption of the clergy to do the state's bidding in celebrating marriages and in maintaining marriage registers.[3]

The stance adopted by the Hapsburg regime seems to have had little practical effect upon most Jewish communities. Historically, Jewish communities had been legally autonomous in matters of marriage and divorce and, despite the Austro-Hungarian Empire's novel assertion of state control, professing Jews continued to regard marriage and divorce to be governed by religious law. Hence they had little reason to bring such matters to the attention of secular authorities or to involve them in any dispute that might arise within the community with regard to matrimonial affairs. In the wake of the *Ehepatent*, at the behest of the Emperor, R. Ezekiel Landau of Prague did prepare a German-language monograph, *Das Mosaich-Talmudeiche Eherecht auf Verlangen Kaiser Josephs des Zweiten gegen Anwendung des Kaiserlichen Ehepatentes vom* 16. *Januar* 1783 *auf die Juden*, in which he identified instances of conflict between Jewish law and the laws of the state. That work was translated into Hebrew by Zev Wolf Shenblum with the title *Hukkei ha-Ishut al Pi Dat Mosheh ve-ha-Talmud* and later published by R. Yekutiel Aryeh Kamelhar in his biography of Rabbi Landau, *Mofet ha-Dor* (Pietrokow, 5663). The Austro-Hungarian government seems to have been little impressed by the specter of potential conflict between civil and ecclesiastic authority and asserted simply that Jews must be subject to the same laws as Christians.[4]

II. THE TRIESTE INCIDENT

The matrimonial provisions of the Civil Code would be of scant interest to contemporary rabbinic scholars but for the attention focused upon that legislation by Rabbi Moses Sofer, renowned for his prolific works bearing the title *Hatam Sofer*. Some eighteen years after promulgation of the Civil Code, a certain R. Abraham Eliezer,[5] addressed by *Hatam Sofer* as the *Hakham* of the community of Trieste, informed *Hatam Sofer* of an incident that had occurred some years earlier in which a marriage was performed in violation of the statute. The bride subsequently became affianced to another man. The civil courts issued a decree permitting the bride to remarry without benefit of a *get* and ordered the leaders of the community and the local rabbi to arrange for a religious marriage ceremony. Understandably, the incident caused R. Abraham Eliezer much anguish. Ultimately, but only with great difficulty and as a result of the intervention and assistance of other dedicated individuals, did R. Abraham Eliezer, prevail upon the groom to execute a religious divorce. Fearful that in the future a similar incident might not might not

have a happy resolution, R. Abraham Eliezer consulted *Hatam Sofer* for guidance in devising an expedient that might render such marriages void in Jewish law and thus obviate the danger of subsequent adulterous marriages and the imposition of penal sanctions upon rabbinic officials.

Actually, with the exception of Trieste, the provisions of the *Ehepatent* seem not to have given rise to problems for Jewish communities within the Hapsburg Empire. Eloquent testimony to the absence of conflict is the fact that in 1804 *Hatam Sofer* responded to the aforementioned query addressed to him by the Chief Rabbi of Trieste with a recommendation for promulgation of a communal ordinance designed to engender a device providing a mechanism for effectively enforcing the provisions of the *Ehepatent* by means of religious law. At the time, *Hatam Sofer* was Chief Rabbi of Mattersdorf,[6] a city within the Austro-Hungarian Empire and no less subject to the *Ehepatent* and the Civil Code of 1786 than was Trieste. Yet there is not the slightest hint that he entertained the notion that such an expedient might be necessary in Mattesdorf as well. An explanation of why problems arose in Trieste but not in other parts of the Austro-Hungarian Empire[7] is best left to historians. Nevertheless, it seems to be the case that the problem, in practical terms, was limited to Trieste.

The incident to which R. Abraham Eliezer alludes began in August, 1796.[8] Jacob Pardo, a poor clerk in his early twenties, secretly married Corona Luzzatto, the teenage daughter of Elia Moise Luzzatto, a wealthy and influential merchant who, at the time, held office as a member of the governing body of the Jewish community. Luzzatto objected to the union and contended that it was void because it violated the recently enacted *Ehepatent* by virtue of the fact that, although properly witnessed by two laymen, it had not been celebrated by an authorized clergyman. Moreover, neither the bride nor the groom, who were below the age of legal capacity, obtained parental consent and, in addition, the requisite banns had not been published. Elia Moise Luzzatto demanded that the marriage be declared null and void and, furthermore, that the groom and the two friends who had served as witnesses be punished.[9] The then incumbent Chief Rabbi of Trieste was R. Raphael Nathan Tedesco[10] who died in 1800 at the relatively young age of fifty. Rabbi Tedesco solicited the opinions of a number of rabbinic authorities, including Rabbis Eleazar Fleckles of Prague, Ishmael Kohen of Modena and Abraham Jonah of Venice,[11] with a view to annulling the marriage by disqualifying the witnesses. Upon consultation, it was, however, determined that the marriage was valid in Jewish law and could be dis-

solved only by means of a *get*. Rabbi Tedesco was supported in this ruling by the lay leaders of the community[12] who forced Luzzatto to resign his communal office. Nevertheless, Luzzatto steadfastly refused to countenance a divorce and continued to demand an annulment.

The local government officials supported Luzzatto's claim and banished the foreign-born Pardo and his two witnesses from Trieste. As might have been anticipated, an appeal to Vienna was of no avail. The Hapsburg authorities asserted unequivocally that the Jewish law of marriage could not overrule the civil law of the monarchy. They ruled not only that Corona was free to enter into a marriage with another man but demanded that Rabbi Tedesco also declare that she was free to do so and, moreover, that he state explicitly that religious scruples would not prevent him from officiating at her future marriage.[13] Rabbi Tedesco was ordered to issue such a statement upon pain of expulsion from Trieste for failure to do so.

Although Rabbi Tedesco had stated formally that he would officiate at a wedding for Corona without a prior Jewish divorce he appears to have reluctantly resorted to a tactical subterfuge. Rabbi Tedesco seems to have let it be known in the community that such a ceremony would have only civil validity but would be of no religious effect. By performing a marriage ceremony he would have satisfied the technical requirement of the civil law and have avoided penal sanction; by announcing the halakhic invalidity of the marriage he would have remained true to his religious scruples. Apparently, having been made aware of the religious impropriety of the prospective relationship, the person to whom Corona had become affianced refused to go through with the marriage. As a result, in late 1799 Luzzatto finally consented to allow his daughter to seek to have the exiled Pardo execute a religious divorce and the latter was eventually permitted to return to Trieste.[14] Nevertheless, Rabbi Tedesco's premature death in January, 1800 was widely attributed to his anguish over the affair and Luzzatto is reported to have met with shame, poverty and a horrible death.[15]

III. PROPOSED SOLUTIONS

1. *Hefker Bet Din*

R. Abraham Eliezer had cogent reason to fear a repetition of such a scenario and sought an expedient designed to render marriages solemnized in contravention of the *Ehepatent* void in Jewish law as well. In his letter addressed to *Hatam Sofer,* R. Abraham Eliezer proposed enactment

of a decree by the communal *bet din* declaring any marriage celebrated in violation of the law of the land to be null and void. The mechanism harnessed in order to achieve that end was *hefker bet din hefker*, i.e., expropriation of the ring used by the groom to betroth the bride. The effect of the act of the *bet din* rendering the ring *res nullius* is that, from the vantage point of Halakhah, since the groom's title was extinguished, in presenting the ring to the bride, the groom would not be transferring title to any object of value from himself to the bride. Thus, there would be no marriage in Jewish law.[16]

The crucial issue is the question of authority to exercise the power of *hefker bet din*. R. Solomon ben Abraham Aderet, *Teshuvot ha-Rashba*, I, no. 1206, reports that, in the wake of a certain problem that arose in his city, he sought to invoke the authority of *hefker bet din*[17] and that R. Moses ben Nachman (Ramban) acquiesced in his right to do so.[18] Nevertheless, responding to another community that sought to invalidate any marriage performed without the presence of a quorum of ten individuals, Rashba concludes that resolution of the question of who is empowered to invoke *hefker bet din* requires further deliberation.[19] *Hatam Sofer* notes the reluctance of rabbinic decisors to invoke the authority of *hefker bet din* and points to the statement of Rabbenu Tam cited by *Mordekhai, Bava Batra*, sec. 480. Rabbenu Tam declares that the power of expropriation is vested solely in a *bet din* comparable to that of the Amora'im R. Ami and R. Asi,[20] i.e., rabbinic judges who have no peer.[21] *Hatam Sofer* explains that Rabbenu Tam's position is predicated upon the fact that the Gemara, *Gittin* 36b, establishes the principle of *hefker bet din* on the basis of Ezra 10:8 that recounts Ezra's confiscation of the property of those who disobeyed his command. Accordingly, explains *Hatam Sofer*, the power of eminent domain is limited to personages comparable to Ezra, i.e., the preeminent rabbinic authority of the generation.[22]

Moreover, argues *Hatam Sofer*, even those scholars who rule that the power of *hefker bet din* is vested in the *bet din* of any locale concede that the power exercised by such a body is rabbinic, rather than biblical, in nature. The biblical power of *hefker bet din*, he asserts, is presumably vested solely in qualified judges possessing the ordination conferred by Moses upon the judges appointed by him in the wilderness and passed on from generation to generation until such ordination lapsed in the time of the Roman persecution and, furthermore, the biblical power may be invoked solely in order to prevent possible transgression of biblical law. In any other situation, contends *Hatam Sofer*, the power of

hefker bet din is derived only from rabbinic legislation. Citation of the verse in Ezra in conjunction with confiscation of property justified only by virtue of rabbinic decree is only by way of allusion or mnemonic device (*asmakhta*). If so, asserts *Hatam Sofer*, there is no evidence indicating that the Sages decreed that the power of *hefker bet din* may by exercised in order to nullify a marriage.[23]

An example of a situation in which the Sages apparently curtailed invocation of *hefker bet din* when exercise of that power would serve to nullify a marriage exists in the case of a person who utilizes certain objects from which it is forbidden to derive benefit (*issurei hana'ah*) for the purpose of contracting a marriage. Since such an object is bereft of value, presentation of a biblically proscribed object to the bride by the groom cannot serve to effect a marriage.

The question of the validity of a marriage contracted by presentation of an item prohibited by rabbinic decree is more complex. It is only by virtue of rabbinic decree that it is forbidden to derive any benefit from *hamez* during the sixth hour of the day preceding Passover. Similarly, there are some forms of *hamez* that are prohibited even on Passover itself only by virtue of rabbinic decree. In effect, the Sages expropriated such foodstuffs. Some authorities, including Rambam, *Hilkhot Ishut* 5:1, rule that transfer of such *hamez* cannot effect a valid marriage; others, including *Ba'al ha-Ma'or*, *Pesahim* 7a, maintain that, since, in terms of biblical law, there is no impediment to deriving benefit from such objects, the marriage is valid.

The question of a marriage contracted by means of transfer of *hamez* that is prohibited only by virtue of rabbinic decree during the sixth hour of the day preceding Passover, a time at which even biblically proscribed *hamez* is prohbited only by virtue of rabbinic edict, is a matter of further controversy. Although Rashi, *Pesahim* 7a and Rabbenu Nissim, *Kiddushin* 58a, followed by *Bet Shmu'el*, *Even ha-Ezer* 28:52, disagree, Rosh, *Kiddushin* 2:31, whose ruling is codified by *Shulhan Arukh*, *Even ha-Ezer* 28:21, maintains that, since the infraction involves only a rabbinic prohibition superimposed upon another rabbinic prohibition, the marriage is valid *post factum*. It is indeed the case that, since it is forbidden to derive any benefit even from rabbinic *hamez* during the sixth hour, such items have no halakhically recognized monetary value. Nevertheless, according to these authorities, the Sages did not nullify a marriage contracted during the sixth hour of *erev Pesah* by means of transfer of rabbinically prohibited *hamez*. *Hatam Sofer* is of the opinion that, since there is no possibility of biblical transgression

because the *hamez* itself is not biblically forbidden even on *Pesah*, the Sages did not seek to expropriate the *hamez* in situations in which the result would be the invalidation of a marriage.

Rashi, *Avodah Zarah* 54b, makes a similar point with regard to funds realized from the forbidden sale of *issurei hana'ah*. Rashi comments that money received in exchange for *issurei hana'ah* is forbidden to all persons by virtue of rabbinic decree but that, when such funds are used for effecting a marriage, the marriage, is valid.[24] *Hatam Sofer* observes that since objects received in exchange for *issurei hana'ah* are only rabbinically prohibited, the Sages did not wish a marriage to fail on that account.[25]

For the same reason, contends *Hatam Sofer*, *hefker bet din*, invoked in situations in which such expropriation is not designed to prevent infraction of a biblical prohibition, cannot be employed to nullify a marriage. When invoked other than for prevention of a biblical prohibition, *hefker bet din* is valid only by virtue of a rabbinic edict that was not designed to render a marriage void.

Hatam Sofer further asserts that, even if the judicial power of eminent domain is regarded as biblically vested in every communally established *bet din*, it cannot serve to nullify a marriage that has been consummated. Cohabitation for the express purpose of marriage is one of the three modes of betrothal enumerated by the Mishnah, *Kiddushin* 2a.[26]

The Gemara, *Ketubot* 3a, does indeed question the power of a *bet din* to nullify a marriage contracted on the basis of cohabitation and responds that the Sages have the power to render the marital act an act of fornication. That assertion is rather astonishing since even conferral of the power of *helfker bet din* seems to be limited to expropriation of property.[27]

As stated by the Gemara, *Sanhedrin* 46a, the *bet din* has the power to impose extrastatutory punishment upon transgressors of even rabbinic decrees. *Hatam Sofer* develops a novel position in astutely suggesting that the power to impose such sanctions derived from Leviticus 27:29 and reflects Ramban's understanding of that verse. "*Kol herem asher yaharam*—every *herem* that is made *herem*" is to be put to death. The meaning of the phrase "every *herem* that is made *herem*" is rather obscure as evidenced by Rashi's strained interpretation of the verse as a reference to a transgressor already condemned to capital punishment. Consistent with that understanding, Rashi interprets the verse as declaring that such a person, since he faces imminent death, has no monetary value. Thus, according to Rashi, the verse declares that a pledge of the statutory monetary value of such a person need not be redeemed.

Ramban, however, understands the verse as announcing the power of *herem*, i.e., the power of the community to promulgate edicts and to impose the death penalty upon violators. According to Ramban, the connotation of the phrase "every *herem* that is made *herem*" is that violation of a *herem* imposed by the community is punishable by death.[28]

As noted, the Gemara, *Ketubot* 3a, states that, in certain circumstances, the Sages invalidated marriage entered into by means of cohabitation by "rendering the coital act an act of fornication." That concept is difficult to comprehend. The source and nature of such rabbinic power is elusive. *Hatam Sofer* roots that power in Ramban's explanation of Leviticus 27:29. If judicial authorities have the power to take or "expropriate" the life of one who violates their decree, a *fortiori*, contends *Hatam Sofer*, they must also have the right to expropriate any part of his body. Thus, concludes *Hatam Sofer*, the Sages have the right to expropriate the ejaculate, or perhaps more precisely, the membrum,[29] of one who violates their decree.[30] The effect of such "expropriation" is that the act of cohabitation no longer has the guise of a conjugal act serving to effect a marriage between the persons entering into the act. That power, asserts Hatam Sofer, is certainly vested only in the sovereign who is subject to no superior power or, presumably, to the judicial authorities to whom such power has been delegated.[31] Hence, argues *Hatam Sofer*, even those authorities who regard every communal *bet din* as vested with the power of eminent domain must concede that a local *bet din* lacks the authority to nullify a marriage that has been conjugally consummated.[32]

2. Declaration of *Issur Hana'ah*

Hatam Sofer himself offers another suggestion for a mechanism designed to render a marriage not recognized by civil law void in the eyes of Jewish law as well. Citing *Bet Yosef*, *Even ha-Ezer* 28, and R. Shlomoh Luria, *Yam shel Shlomoh, Kiddushin* 3:22, he suggests that, upon reaching the age of halakhic capacity, each young lady be instructed to declare any ring or object of pecuniary value presented to her for purposes of marriage other than in accordance with the law of the land to be an object from which she is forbidden to derive benefit. Since she dare not derive any benefit from an object presented to her she will have received nothing of value and hence there can be no marriage. *Teshuvot ha-Rashba*, I, no. 551, reports that he introduced a similar practice in his own city. Rashba counseled "the daughters of his city" to renounce benefit from any object of value given to them for

purposes of effecting a marriage other than in the presence of explicitly named individuals.[33] Rashba reports that the practice was instituted and encouraged in a much earlier age by R. Sherira Ga'on and the latter's forebears.[33a] That expedient served to negate the validity of any marriage celebrated other than in the presence of communally designated witnesses. The social problem prevalent at the time of Rashba was elopement of impressionable young women who were later abandoned by their husbands.

Hatam Sofer further suggests that the mechanism be reinforced by a communal edict reiterated four times each year requiring all fathers to instruct their daughters to make such a declaration. *Hatam Sofer* proceeds to declare that, if such a practice is instituted pursuant to a communal edict, every subsequent marriage not in conformity with the edict would be void even if the woman in question did not abide by the edict and failed to make such a declaration. It is a general principle of Jewish law that a person has no standing to brand himself an evildoer. Hence, in general, a confession of transgression has no credibility. Thus, a women's statement that she acted in violation of the communal edict in not making the requisite declarations would not be accepted. *Hatam Sofer* adds that even if it be contended that a woman might have credibility to label herself a transgressor for the limited purpose of generating a prohibition against entering into a second marriage (*shavya anafshah hatikhah de-issura*), witnesses to the marriage who have no reason to believe that she was acting in violation of the edict would assume the marriage to be farcical in nature. Hence, since Jewish law requires the presence of witnesses as a necessary condition of any marriage ceremony, the marriage would be void in any and all events for lack of attesting witnesses.

Hatam Sofer freely concedes that his proposed expedient would not be efficacious in situations in which the marriage was subsequently consummated. A marriage contracted by means of a conjugal act does not require conveyance of an item of value and hence cannot be invalidated by means of prior declaration on the part of the bride.

Not content merely to offer an alternative mechanism, *Hatam Sofer* argues that the feasibility of his proposal serves, in and of itself, to negate employment of *hefker bet din*. *Hatam Sofer* endeavors to demonstrate that invocation of the power of *hefker bet din* is authorized only as an expedient of last resort. Else, he argues, why did the Sages decree that marriage be celebrated "in accordance with the law of Moses and Israel," a provision that effectively creates a marriage conditionally con-

tingent upon conformity with the edicts of the Sages? And, if *hefker bet din* is a readily available expedient, why did Moses enter into a stipulation with the tribes of Gad and Reuben that they join with the other tribes in the conquest of the Promised Land as a condition of receiving their portion east of the Jordan?

3. The Edict of R. Abraham Eliezer

Some time after this exchange of correspondence, the Chief Rabbi of Trieste seems to have promulgated an edict designed to invalidate marriages celebrated in violation of the civil statutes. In doing so he incorporated in some measure the proposal suggested to him by *Hatam Sofer*. R. Abraham Eliezer informed *Hatam Sofer* of the action he had taken and *Hatam Sofer* responded immediately. The information was received on a Friday and *Hatam Sofer*'s highly erudite reply replete with citation of sources was penned that Saturday evening. *Hatam Sofer*'s responsum, written as a reaction to the information received by him, is dated 2 Adar II 5568.

R. Abraham Eliezer promulgated a three-pronged edict that provided for:

1) Expropriating any object of value transferred to the bride for the purpose of contracting a marriage is violation of the edict.

2) Prohibiting all persons from serving as witness to such a marriage and disqualification as a witness for any person who would do so.

3) Obligating each individual to have each of his daughters declare that any object of value received for purposes of marriage be an object from which it is forbidden for them to derive benefit unless the marriage takes place with the knowledge of her father or guardian and in the presence of the Chief Rabbi.

4. *Hatam Sofer*'s Response

Consistent with the view he had expressed some three and a half years earlier, *Hatam Sofer* found little merit in the first clause.[34] Despite significant deficiencies which he identified, *Hatam Sofer* did find some limited value in the second clause. *Hatam Sofer* takes note of a view that he ascribes to R. Joseph di Trani, *Teshuvot Maharit*, II, *Even ha-Ezer*, no. 40. *Hatam Sofer* cites Maharit as recognizing that persons who violate such an edict do indeed become disqualified from serving as witnesses.[35] But, maintains this authority, they become disqualified

only upon disobedience of the edict in the act of witnessing the marriage.[36] Hence, at the time of the marriage, the witnesses are not yet disqualified and consequently that marriage remains valid.[37] Moreover, witnesses who act in ignorance of the edict or who unintentionally happen to be present when the ring is presented by the groom to the bride are not at all disqualified. Accordingly, since everyone is presumed to be law-abiding—and a person does not have standing to declare himself to be otherwise—it must be presumed that the witnesses did not intend to transgress the edict and hence the marriage would be deemed valid.[38] Nevertheless, *Hatam Sofer* recognized some value in the edict since, although it would be of no avail against persons who might wantonly flaunt the edict, in point of fact, it would serve as a deterrent to potential witnesses who would not wish to become transgressors.

The third clause was, of course, suggested by *Hatam Sofer* himself, but in a completely different form. *Hatam Sofer* had proposed that the young girls cause a prohibition against deriving benefit to become attached to any object given to them for purposes of marriage in violation of the codex. Rabbi Abraham Eliezer's text called for such a declaration to be applicable in instances of marriage celebrated without knowledge of the father or guardian and the presence of the Chief Rabbi.

Hatam Sofer found that change to be less than totally satisfactory. He reports that R. Abraham Eliezer had informed him of a case in which a person who was already married entered into an illicit polygamous marriage in Trieste. Since the groom failed to disclose the already existing marriage, the father had no reason to withhold consent and the Chief Rabbi had no reason to refuse his services. Nevertheless, although in Jewish law polygamous marriages are valid at least *post factum*, the marriage was void in the eyes of the civil authorities. *Hatam Sofer* pointed out that the communal edict, as formulated by R. Abraham Eliezer, would be of no avail in such situations whereas *Hatam Sofer*'s formulation would have resulted in nullification of even such a marriage in the eyes of Jewish law.[39]

One significant point emerges from the second responsum. In his first responsum *Hatam Sofer* strongly argued against harnessing the power of *hefker bet din* both because of the position of the authorities who maintained that such authority is not vested in every local *bet din* and because, in our day, the power of *hefker bet din* cannot be invoked to nullify a marriage. In the second responsum, *Hatam Sofer* completely ignores the second consideration. He does reiterate his first point but, while insisting that no person should enter into a second marriage with

the woman whose prior marriage was nullified by virtue of *hefker bet din*, he nevertheless ruled that a rabbi who would otherwise be subject to sanctions by the civil authorities were he to refuse to officiate at such a marriage might rely upon the more liberal view with regard to exercise of the power of *hefker bet din* and pronounce the nuptial blessings. So great was the fear of governmental sanctions!

IV. A HISTORICAL NOTE: A MISUNDERSTANDING OF THE PROBLEM

As noted earlier, the incident reported by R. Abraham Eliezer occurred during the tenure of his predecessor, R. Raphael Nathan Tedesco. Rabbi Tedesco consulted R. Eleazar Fleckles, a disciple of *Noda bi-Yehuda* and his successor as chief rabbi of Prague, a city also within the Austro-Hungarian Empire. Rabbi Tedesco's two letters to Rabbi Fleckles, dated 4 Tishrei 5557 and 27 Heshvan 5557, as well as Rabbi Fleckles' response are published in the latter's *Teshuvah me-Ahavah*, I, no. 117. Rabbi Tedesco reports that, "as is also known to you," marriages must be solemnized by the rabbi of the community and banns must be announced in the synagogue three times prior to the wedding. Accordingly, Rabbi Tedesco was concerned that "if the Emperor shall decree that the marriage is not valid because it was performed other than in accordance with his will and will compel us to execute a *get* on behalf of the betrothed" a *get* executed under such circumstances would be invalid for reasons of duress.

Rabbi Tedesco seems to have been poorly informed regarding the marriage reforms instituted in the Hapsburg Empire. The Emperor had no interest in the execution of a *get*. Quite to the contrary, the law simply did not recognize the validity of the marriage celebrated other than in conformity with civil law and sought to implicate the clergy in permitting each party to enter into a subsequent union without further religious formalities. The *bet din*, even if as a practical manner it was capable of doing so, certainly had no halakhic grounds to compel a divorce on its own initiative. Hence the invalidity of a religious divorce under such circumstances was not really the issue.

Teshuvah me-Ahavah seems to have been equally ill informed. *Teshuvah me-Ahavah* responded that it is unthinkable that the Emperor would seek to nullify the laws of the Torah and permit a forbidden union; quite to the contrary, the Haspsburg rulers granted freedom of religious practice to all their subjects. Moreover "the Emperor is a sov-

ereign who loves righteousness and law in his domain and wishes all [his subjects] to be people of faith and does not wish to uproot any religion given to any people or nation."

Curiously, *Teshuvah me-Ahavah* chose to interpret the language of the Hapsburg statute as rendering *nisu'in* invalid but as inapplicable to *eirusin* or betrothal. In Jewish law, it is in *eirusin* that a woman surrenders her capacity to contract another marriage. Thus, he assumed that there was, in effect, a marriage recognized by civil law. But, declared *Teshuvah me-Ahavah*, in any event, the marriage was certainly valid in the eyes of Jewish law despite governmental decree to the contrary. After all, he asserted, the matter is not dissimilar to that of a marriage interdicted by the Divine King by means of a negative prohibition (e.g., marriage between a *kohen* and a divorcée) that, *post factum*, is valid and must be dissolved by a *get*.

In any event, declared *Teshuvah me-Ahavah*, the groom might not legitimately be compelled to execute a *get* on behalf of his wife but certainly government officials would have no objection if he did so of his own free will. Obviously, *Teshuvah me-Ahavah*'s assessment of the legal state of affairs was diametrically opposite to that of Rabbi Tedesco who assumed that the government would compel a *get*. There is no record of Rabbi Tedesco's reaction to the reply of *Teshuvah me-Ahavah*. However, as indicated earlier, in the case under discussion, the groom was ultimately prevailed upon by R. Abraham Eliezer to execute a *get* without duress.

Of socio-historical interest is Rabbi Tedesco's reference to a similar incident that had occurred in Prague at an earlier time and his consideration of Rabbi Fleckles' experience in that matter as one of his reasons for soliciting the latter's advice. Rabbi Fleckles responds with an emphatic denial that any event of a similar nature had ever taken place in his community. The tone of that reply conveys the impression that intervention by government authorities at the behest of a member of the Jewish community would have been unthinkable in Prague.

V. A CONTEMPORARY APPLICATION

1. The Problem of *Kiddushei Ketanah*

Hatam Sofer's detailed discussion of the problem faced in Trieste and his proposed solution may well serve as a model for a lurking problem that has come to the fore only in recent years.

Biblical law accords a father the right to contract a marriage on behalf of a minor daughter who has not reached the age of halakhic

capacity, *viz.*, twelve years and one day. Later, in the talmudic period, when child marriage was no longer the norm, the Sages frowned upon that practice, knows as *kiddushei ketanah*, and declared that a father should not give his minor daughter in marriage. Rather, they advised, he should delay seeking a groom until "she matures and states 'I wish [to marry] so-and-so.'"[40] During the Middle Ages, the Tosafists observed that discouragement of the marriage of minor girls was not raised to the level of an actual rabbinic prohibition and hence abrogation of the practice is not absolute in nature. Taking notice of the vicissitudes of the time and the frequent economic reversals suffered by members of the Jewish community, *Tosafot*, *Kiddushin* 41a, remark that prudence would dictate that a father arrange for the marriage of his daughters at as early an age as possible while he yet finds himself financially capable of doing so properly.

Halakhah not only gives the father the right to give the hand of his minor daughter in marriage but also gives him virtually unlimited evidentiary credibility to declare that he has done so. Nor, in declaring that he has accepted a ring or other object of value in solemnizing the marriage of his daughter, is the father obligated to divulge the name of the groom or to identify the persons who witnessed the event.

Some years ago, a husband in the midst of a dispute concerning terms surrounding the severance of his marital relationship appeared before a *bet din* and announced that he had given his minor daughter in marriage to a man he declined to name.[41] It is not clear whether he acted out of sheer malice, whether he acted as he did in order to exact certain concessions from his wife in return for which he would disclose the name of his daughter's groom so that the daughter's marriage might be dissolved by means of a *get* or whether he was motivated by some other consideration. It is not even clear whether the father's declaration was aught but a fabrication. Indeed, an informed but malevolent husband would have known that his purpose could be achieved simply upon his declaration that the act occurred even if in fact there was no such occurrence. In any event, unless there are halakhic grounds to impugn the father's credibility, he succeeded in creating a situation in which his daughter will, in effect, be a lifelong *agunah*.[42] Since the identity of her purported husband is not known, and even were he to come forward he would have no standing to establish his status as a husband capable of freeing her from marital bonds, the daughter remains "chained" to an unknown husband but bereft of any of the positive aspects of a marital relationship.

The husband alleges that he has exercised the authority vested in a father by biblical law in contracting a marriage on behalf of his daughter. In doing so, he has deprived her of capacity to enter into any future marriage so long as the first marriage is not dissolved by death or divorce. In refusing to disclose the identity of the groom unless and until his demands are satisfied the father has placed his daughter at his mercy for the rest of her life. An anonymous husband cannot be persuaded to execute a religious divorce; neither will his wife ever be able to prove her widowhood.

It is ironic that an institution variously encouraged and discouraged, depending upon whether or not it contributes to the welfare and protection of female progeny, has been harnessed for use as a weapon against an estranged wife by generating misery and misfortune for her daughter. Fortunately, there is only one known instance of such an occurrence but the specter of future abuse looms on the social horizon.

Divine law needs no apologia; scoundrels who misuse it owe an apology both to God and to man. Biblical law makes provision for institutions that appear bizarre when viewed through the prism of twentieth-century Western culture—but the Bible does not mandate their utilization; much less does it desire their distortion. "For the ways of the Lord are just and the righteous walk in them, but the wicked stumble therein" (*Hosea* 14:10).

Cultural anthropologists have long recognized that in many widely diverse societies marriage takes place at an age corresponding roughly to one third of the average life span and that husbands are generally somewhat older than their wives. Examination of the scriptural passages describing the age of the marriage and death of various biblical personalities in the antediluvian period shows this to be the case, as does a reading of the social history of Western civilization and the history of our own country as well as an analysis of marriage licenses and actuarial projections in our own day. Child marriage was common—and indeed the norm—in an age in which longevity anticipation was all too brief.

A father's right to contract a marriage on behalf of his minor daughter was designed to assure her a husband and to enhance fecundity and with it the propagation of the Jewish people. The Gemara itself declares that it is far better—indeed the term employed is "*mizvah*"—to delay marriage until the child reaches the age of legal capacity and can give meaningful assent to make her own choice. A situation in which the father refuses to identify the groom defeats the very purpose for

which authority was conferred upon him and makes a mockery of biblical license for child marriage.

Fortunately, the potential for multiplication of this type of noxious parental abuse is limited. First, the active cooperation of a "groom" must be forthcoming. Since polygamy is now prohibited by Jewish law, men already married are not eligible candidates and any unmarried male entering into such an arrangement forecloses to himself possibility of any future marital relationship. Surely the class of men who would even consider blandishments to enter into such a sham marriage must be quite limited. Moreover, two other observant Jews, unrelated to any of the parties and to each other must agree to serve as witnesses. None-theless, sadly, media attention tends to encourage copycat phenomena. Although we are unlikely to witness an epidemic of child marriage, even one additional case of a young girl rendered an *agunah* (a chained woman deprived of the potential to enter into a viable marriage) is one too many.

Little solace can be taken from the fact that this widely-reported event did not generate a spate of "copycat" incidents. The danger of repetition remains ongoing and constant. Potential misfortune can be avoided only by prophylactic communal action designed to put into place a device that would have the effect of rendering nugatory all marriages of minors. Achievement of that goal in its entirety may be illusory but there do exist expedients which would serve to establish a formidable deterrent in most, if not all, cases of *kiddushei ketanah*.

2. Possible Remedies

The first and most obvious remedy involves a variation of the procedure advanced by Rashba and *Hatam Sofer*. Rashba and *Hatam Sofer* encouraged young ladies to declare forbidden (*assur be-hana'ah*) any benefit to be derived from a ring presented to them for purposes of marriage in contravention of the communal edict thereby rendering such marriage by means of a ring to be halakhically impossible. Halakhically, the father of a minor stands in the place of a minor bride. A declaration of a father to the same effect, i.e., that, upon acceptance of a ring or other object of value in return for giving the hand of his daughter in marriage, any and all benefit form the ring or object of value be prohibited to him,[43] would have a similar effect because, since he would be receiving nothing of value, any subsequent marriage contracted by the father would be nugatory. Such a pronouncement might be required of every groom on the eve of his marriage and encompass any and all objects that might be presented to him in conjunction with the marriage of any female issue. Thus

every prospective father would effectively renounce his prerogative of contracting a marriage on behalf of any future minor daughter.

That expedient is, however, somewhat less foolproof than the similar expedient proposed by Rashba and *Hatam Sofer*. The technical nature of the prohibition against deriving benefit (*isur hana'ah*) that is generated by such a procedure is that of a *konam*. A *konam* is an oral declaration similar in nature to a vow. Although it does not pledge either performance or abjuration of an act, a *konam* serves to transform a heretofore permitted entity into an entity from which one may not derive benefit. However, since a *konam* is a form of vow, it is subject to nullification by a *bet din* upon various grounds. The fact that the father would not have entered into the generation of a *konam* had he anticipated future difficulties in dissolving his own marriage would be sufficient grounds to justify nullification of the *konam*. At the same time, it must be emphasized that, although such vows are subject to nullification by a *bet din*, they are not void *ab initio*.

Rashba and *Hatam Sofer* were surely at least reasonably confident that the impressionable young women they sought to protect would not resort to nullification of the vow because 1) they probably were ignorant of the possibility of nullification and 2) it was highly unlikely that even an ad hoc *bet din* could have been persuaded to accommodate them in nullifying the *konam*.

One cannot be quite so sanguine with regard to the present situation. Indeed, in the earlier reported incident of *kiddushei ketanah*, a *bet din* did convene for the purpose of hearing and accepting the father's statement and issued a written declaration attesting to that fact. Putting aside well-founded skepticism and viewing the matter in the most favorable light, the persons importuned to serve on that *bet din* may have been persuaded that the husband was the aggrieved party and that his rather bizarre act was warranted as an expedient to seek redress of his grievance. That same *bet din* might also have annulled any *konam* that could have served as an impediment to the marriage.

One way to prevent annulment of that *konam* would be enactment of a communal ban, or *herem*, prohibiting nullification of a *konam* of this nature. Presumably, the members of the *bet din* would not transgress the prohibition entailed in violating such a *herem*. Another way of precluding nullification would be to predicate the *konam* "upon the will of the community" (*al da'at rabbim*). As recorded in *Shulhan Arukh*, *Yoreh De'ah* 228:21, a vow undertaken in such manner cannot be nullified other than with the consent of the community.

A second remedy, one that might readily be employed concomitantly with the first, is also based upon *Hatam Sofer*'s discussion. A communal ban or *herem* might be pronounced against: 1) any person who accepts an object of value in order to effect a marriage with his minor daughter; 2) anyone who presents an object of value to a father for that purpose; 3) anyone who encourages or counsels such an act; 4) as well as against anyone who serves or agrees to serve as a witness to such an act.

The proposal analyzed by *Hatam Sofer* in the context of legislation promulgated by the Austro-Hungarian Empire was limited to pronouncement of a ban against serving as a witness to an act deemed reprehensible by the community. The goal was to disqualify such an individual as a witness to the marriage because of transgression of a communal edict. That proposal was deficient by virtue of the fact that, as Maharit contends, the witnesses become disqualified only in the actual process of witnessing the act with the result that, although they become disqualified for the future, the marriage in which they wrongfully participate remains valid.

In an endeavor designed to prevent *kiddushei ketanah*, a ban against *even agreeing* to serve as a witness would render presentation of oneself for purposes of witnessing the marriage[44] or the mere agreement to serve as a witness a culpable act with the result that, if prior collusion could be established, the ensuing marriage would be entered into in the presence of already disqualified witnesses. The communal ban would, in effect, be pronounced against anyone who conspires to create a situation of *kiddushei ketanah*. Consequently, conspirators would become disqualified from the time they enter into the conspiracy, which is perforce prior to the marriage itself.

A ban against counseling, encouraging or abetting *kiddushei ketanah* would have the effect of making it impossible for even a minimally God-fearing individual to suborn such an act in a misguided attempt to assist an allegedly aggrieved party. It may well be assumed that few such husbands are sufficiently knowledgeable or sufficiently self-confident to seriously entertain such a course of action without rabbinic counsel. Promulgation of such a ban would affectively bar such assistance.

The halakhically most potent aspect of the proposal is the extension of the ban to the father himself. No longer could he masquerade as a saint. But much more significant is an ancillary effect of the ban: No longer would a father be in the privileged position of having credibility to establish the marriage of his daughter simply on the basis of his own declaration. Upon promulgation of a communal ordinance rendering

such marriage illicit, the father, in announcing his act of *kiddushei ketanah*, *ipso facto* brands himself a transgressor. Halakhah denies any person credibility to declare himself an evil-doer. Accordingly, the father would no longer be in a position to establish his minor daughter's status as a married woman solely by means of his own declaration.

Even in tandem, these proposals might not seem to yield absolute protection. The possibility remains that a father, acting in an entirely independent manner, might, in violation of the ban, find a compliant male accomplice who would agree to present him with a ring in the presence of witnesses for the purpose of effecting a marriage with the former's minor daughter without in any way communicating with the witnesses beforehand. Witnesses who have not been given prior notice could not be disqualified for having transgressed the communal edict.[45] The likelihood of such an occurrence can be further minimized by including the groom in the ban. Of course, the possibility remains that both the father and the groom might be unconcerned with the transgression incurred in violating the ban. That potentiality can be remedied by implementing the first expedient, i.e., by antecedently causing the father to declare objects received in such circumstances to be *asur be-hana'ah*,[46] particularly if a *herem* is also pronounced against any person who agrees to serve as a member of a *bet din* for purposes of retroactively nullifying that *konam*.

There may indeed be unforeseen and uncontemplated future circumstances in which *kiddushei ketanah* might be entered into for entirely benevolent reasons. Moreover, some may be reluctant to effect a total ban of an institution explicitly sanctioned by the Torah. Those concerns might be accommodated by rendering the ban inoperative in situations in which prior dispensation is received from a designated official or communal body, e.g., the Israeli Supreme Rabbinic Court of Appeals, the *Bet Din* of Jerusalem's *Edah ha-Haredit* or, in the manner incorporated in the *herem* of Rabbenu Gershom concerning plural marriage, upon license of one hundred rabbinic scholars.

This writer knows full well that this proposal for obviating the possibility of *kiddushei ketanah* will be dismissed as utopian. It *is* indeed utopian in nature. Since the Jewish community lacks a central authority such a proposal cannot be implemented unless the required communal edict is promulgated on a local level in each and every community. Only in that manner could a disgruntled husband be prevented from achieving his desire by arranging such a marriage in a locale in which the prac-

tice has not been banned.[47] Implementation of the proposal is within the realm of halakhic possibility but would require the cooperative efforts of all segments within each community. Given the present splintered nature of the Jewish community even such *ad hoc* cooperation may be unachievable.

Those reflections merely underscore the state of halakhic as well as social impotence that exists simply because we lack prescience and fortitude in instituting a *kehillah* system similar to that which existed in virtually every city and hamlet in the Europe of days gone by. As a result we are condemned to live with many forms of social malaise, not because the problems are intractable, but because we refuse to establish the mechanism by which they might be ameliorated.

NOTES

1. 110 S. Ct. 1595, 108 L. Ed. 2d 876.
2. Trieste, in northeast Italy, is located on the Gulf of Trieste at the northeastern corner of the Adriatic Sea. The city was captured by the Venetians in 1202 but, seeking autonomy, it placed itself under the protection of Leopold III of Hapsburg in 1382. Leopold's overlordship gradually developed into Austrian sovereignty and, in time Trieste became the main port of the Austro-Hungarian Empire. Trieste was proclaimed an imperial free port in 1719 but was deprived of that privilege in 1891. The city was given to Italy after World War I in reward for Italian alliance with the Triple Entente. Trieste was seized by the Germans in 1943. The peace treaty with Italy signed in 1947 created the Free Territory of Trieste. That status proved to be untenable and the territory was subsequently divided between Yugoslavia and Italy and Italy agreed to maintain the city as a free port.

   There is evidence of a Jewish settlement in Trieste as early as 1236 but an official Jewish community was not established until 1746. Despite a basic counter-Reformation commitment to a confessionably uniform state, Maria Teresa granted exceptions when prodded by political and economic considerations. The corporate statute establishing a Jewish community in Trieste was approved by Maria Theresa in 1746. Later, in 1771, insisting upon payment of the sum of 1,000 gold ducats, against the advice of her own officials who counseled acceptance of a lesser sum, she issued a *Privilegio* defining and extending the rights of Jewish individuals to live, work and worship in Trieste and a *Statuto* concerning the functioning of the Jewish community. The status of the Jews of Trieste was superior to that of members of other Jewish communities tolerated within the Hapsburg Empire. They were not required to pay ongoing taxes in return for toleration, were not required to distinguish themselves from other

inhabitants in dress or appearance, were permitted to engage in virtually any commercial activity and were permitted to own real estate. Her son, Joseph II, issued a series of edicts of toleration in 1781 designed to integrate Jews within Hapsburg civil society. Nevertheless, the Jews of Trieste continued to enjoy an unusual legal status within the Hapsburg Empire.

3. See Lois C. Dubin, *The Port Jews of Habsburg Trieste* (Stamford, 1999), p. 175.
4. See *ibid*., p. 176.
5. His full name seems to have been Abram (or Abraham) Eliezer ben Zevi Levi. R. Abraham Eliezer was the scion of a distinguished Italian rabbinic family. He was born in Jerusalem but lived for a time in Livorno. R. Abraham Eliezer served as chief rabbi of Trieste from 1802 until his death in 1825.

   That R. Abraham Eliezer turned to *Hatam Sofer* for guidance rather than to a Sephardic scholar may be attributed to one or more factors: 1) Italian Jewry was culturally and ritually distinct from other oriental communities; 2) he assumed that the problem was endemic throughout the Hapsburg empire and that, for that reason, *Hatam Sofer* would share his concern; and 3) cross-cultural influences were strong in Trieste as evidenced by the fact that in 1800 two of the city's four synagogues followed the Ashkenazic rite.
6. *Hatam Sofer* was Chief Rabbi of Mattersdorf from 1797 until 1806 at which time he became Chief Rabbi of Pressburg, also within the Austro-Hungarian Empire, where he remained until his death in 1839.
7. Thus, as will be shown later, R. Eleazar Fleckles, *Teshuvah me-Ahavah*, no. 117, writing in 1797, vigorously denied that any such problem ever arose in Prague.
8. A second and roughly contemporaneous *cause celébre* which seems to have dissipated its own accord would not have lent itself to any halakhic resolution. Many of the details of precisely how that affair evolved are somewhat unclear but are skillfully and plausibly reconstructed by Dubin, *Port Jews of Habsburg Trieste*, pp. 185-192. The protagonist was Benedetto Frizzi, a forty-two year old physician and Enlightenment scholar, probably best know as the author of a six-volume Italian work entitled *Dissertazione di polizia medica sul Pentateuco* (Dissertation on Public Medical Regulation in the Pentateuch). In July of 1798 he requested permission from the Hapsburg authorities to enter into a "purely civil marriage" with Relle Morschene. The problem lay in the fact that Frizzi was a *kohen* and his fiancée had been divorced from her first husband, Lucio Luzzatto, who was coincidentally none other than the brother of Elia Moise Luzzatto, the gentlemen responsible for the vexing morass described by R. Abraham Eliezer.

   Frizzi presented two arguments, one patently without substance in Jewish law and one disingenuous. Referring to Montesquieu's distinction between "repudiation" and "divorce" developed in his *The Spirit of the Laws*, XVI:15, Frizzi contended that biblical law forbids a *kohen* to marry only a woman who has been "sent forth" or "repudiated" by her husband; the prohibition against marrying a woman "divorced" either by mutual consent or pursuant to the wife's initiative, he asserted, is the product of rabbinic misinterpretation of Scripture based upon "unpardonable ignorance."

He further contended that Judaism provides for the equivalent of civil marriage without rabbinic "public formalities" by which he may have meant a relationship in the nature of common law marriage. Frizzi's reference to marriage without a ring by means of a contract (*kiddushei shtar*) is not at all apropos since *shtar* is one of the three biblically recognized modes of entering into a marriage. His representation that Judaism sanctions unions without benefit of *huppah* is erroneous. The transgression is compounded in the case of a *kohen* who enters into such a relationship with a divorced woman. The only grain of truth reflected in Frizzi's position is Rambam's view, *Hilkhot Issurei Bi'ah* 17:2, that cohabitation between a *kohen* and a divorcée pursuant to a valid marriage carries with it a more severe penalty than an extra-marital liaison.

Since the Civil Code provided only for solemnization of marriage by a clergyman, Frizzi apparently demanded that the communal authorities sanction a marriage ceremony in which no ring would be given but which would quality as a perfectly valid "civil marriage" in the eyes of Jewish law. The Hapsburg authorities seem to have accepted that argument and in March, 1800 instructed the communal officials to "handle this petition according to Mosaic law." The officials responded that with the death of Rabbi Tedesco the community could not properly deal with the matter until a successor would be appointed. That did not occur until 1802. In the interim, in March, 1800, Relle found herself to be pregnant. There is no record of any marriage ceremony but the couple continued to live together, first in Trieste and later in Frizzi's native Ostiano in Lombardy, where both died four days apart in 1844.

9. See *Port Jews of Habsburg Trieste*, pp. 176-183.
10. Cf., Mordecai Samuel Ghirondi and Chananel Neppi , *Toldot Gedolei Yisra'el u-Ge'onei Italyah* (Trieste, 1853), p. 274, who give his name as R. Nathan Raphael Ashkenazi. Two letters addressed to R. Eleazer Fleckles and published in the latter's *Teshuvah me-Ahavah*, I, no. 117, bear the signature Raphael Nathan ben Isaac Ashkenazi.
11. See *Port Jews of Habsburg Trieste*, p. 281, note 12. R. Eleazar Fleckles' response is published in *Teshuvah me-Ahavah*, I, no. 117.
12. Rabbi Tedesco consulted not only rabbinic colleagues but also the former bishop of Trieste who later became Archbishop of Vienna, Count Sigismond Hohenwart, with whom he had an abiding friendship. The bishop not only offered moral support but also proffered tactical advice in arguing his case before Hapsburg officials. See *Port Jews of Habsburg Trieste*, p. 183.
13. See *Port Jews of Habsburg Trieste*, p. 178.
14. *Loc. cit.* Ghirondi and Neppi, p. 276, report that Rabbi Tedesco's premature demise was caused by "a wicked Israelite who sought to compel him to act contrary to the laws of the Torah in a matter of divorce and marriage. Because he did not wish to transgress the law of Moses in order to hearken to the voice of this oppressor he took to bed and died of great aggravation. God took revenge on his behalf, for all the men and women who caused the death of the Rabbi, of blessed memory, died a horrible death."
15. See *Port Jews of Habsburg Trieste*, p. 183.

16. Such a *takkanah* was in fact promulgated in Alexandria and other Egyptian communities in 1901 by R. Eliyahu Chazan, R. Refa'el Aharon ben Shimon and the Ashkenazic rabbi, R. Aharon Mendel ha-Kohen. See R. Refa'el Aharon ben Shimon, *Nahar Mizrayim* (Jerusalem, 5758), II, *Even ha-Ezer*, pp. 370-375 and *idem*, *U-Mazur Dvash* (Jerusalem, 5672), *Even ha-Ezer*, no. 6, pp. 111b-113a. Egypt, at that time, was a center of trade and commerce and, in reliance upon the law of their own nationality, visiting foreigners were apparently entering into clandestine marriages and later abandoning their wives. The *takkanah* instituted various safeguards and expropriated the ring used to solemnize a marriage celebrated in violation of that *takkanah*. The validity of an earlier *takkanah* of such nature enacted in a Sephardic community in 1766 was one facet of a question addressed to R. Moshe Galanti, *Teshuvot Berakh Mosheh* (Livorno, 5569), no. 33. The text of the *takkanah* is presented by the interlocutor; however, the question of the efficacy of the *takkanah* seems to have been ignored in *Berakh Mosheh*'s response.

    A *takkanah* invoking the power of *hefker bet din* was proposed, and perhaps later promulgated, by other Sephardic authorities in 1865, 1873 and 1908 in a number of communities in southern France. France, like the Hapsburg Empire, did not recognize civil marriage. However, unlike the situation in Trieste, rabbinic authorities were not forced to accede to the effect of civil law in such matters. Nevertheless, there was apparently some fear that, if the marriage was of no effect in civil law, a husband might abandon his wife and leave her an *agunah*. Hence, some rabbinic scholars thought it wise to devise an expedient that would serve to render any marriage that was invalid in civil law a nullity in Jewish law as well. The expedient was to declare any ring used to effect a marriage in such circumstances *res nullius*. Texts of such proposed *takkanot* are published in R. Chaim Pellagi, *Teshuvot Hayyim ve-Shalom*, II, no. 26; R. Eliyahu Chazan, *Teshuvot Ta'alumot Lev*, I, *Even ha-Ezer*, no. 14 and *Ziknei Yerushalayim*, pp. 80ff; and R. Chaim Bleich, *Kevod Ya'akov*, a collection of responsa published by Jacob Akrish (Izmir, 5642), no. 15, pp. 67a-68a. An 1884 endorsement by eleven Palestinian Sephardic authorities of a similar proposal by R. Chaim Allayah for promulgation of such a *takhanah* in Talmisan, in the vicinity of Valence, is published in R. Jacob Saul Eyashar, *Simhah le-Ish* (Jerusalem, 5753), no. 19. Apparently no action was taken at that time since the same problem was placed before R. Chaim Bleich, an emissary from Palestine, some twenty-four years later by the same chief rabbi of Talmisan.

    Both *Simhah le-Ish*, nos. 14 and 20, as well as R. Ovadiah Hedaya, *Yaskil Avdi*, III, *Even ha-Ezer*, no. 6, *se'if* 2, secs. 19-23, in agreement with *Hatam Sofer*, emphasize that such a *takhanah* is of no avail if the marriage has been consummated. Cf., however, *Ta'alumot Lev*, I, *Even ha-Ezer*, no. 14. See *infra*, note 26 and accompanying text.

17. The power of *hefker bet din*, or "expropriation by the court," is similar to the power of eminent domain but is exercised by a central rabbinic authority rather than by the sovereign. Moreover, it is not invoked against an individual on an *ad hoc* basis but by means of rabbinic legislation applicable to all members of the community. For a general survey of opinions regarding the

nature and ambit of *hefker bet din* see *Encyclopedia Talmudit*, V, 95-110. For a survey of authorities who sanction employment of *hefker bet din* as a means of nullifying marriages solemnized in violation of a communal edict see the references cited by Abraham Chaim Freimann, *Seder Kiddushin u-Nisu'in* (Jerusalem, 5725) throughout that work and *u-Mazur Dvash*, *Even ha-Ezer*, no. 6. See also latter-day authorities both pro and con cited by *Yaskil Avdi*, III, *Even ha-Ezer*, no. 6, *se'if 2.*

18. See also *Teshuvot Rivash*, no. 399 and Rambam as cited by *Nemukei Yosef*, *Yevamot* 89b. That position is also attributed to Ramban by R. Shimon ben Zemah Duran, *Tashbaz*, II, no. 5. See also *Tashbaz*, I, no. 133 and *idem*, *Yakhin u-Bo'az*, II, no. 20. A similar view is expressed by *Teshuvot Rivash*, no. 199 and by *Teshuvot ha-Rosh*, *klal* 35, no. 1 and *klal* 43, no. 8. For further analysis of Rosh's position see R. Shne'ur Zalman of Lublin, *Teshuvot Torat Hesed*, II, no. 20. For conflicting views regarding Rambam's position see *Encyclopedia Talmudit*, X, 107, note 126.
19. See also *Teshuvot ha-Rashba*, I, no. 1, 163 and no. 1,186, as well as *Teshuvot ha-Rashba ha-Meyuhasot le-ha-Ramban*, no. 125 and no. 142. Cf., however, *Teshuvot ha-Rashba*, I, no. 551. For further analysis of Rashba's position see *Knesset ha-Gedolah*, *Even ha-Ezer* 28, *Hagahot Bet Yosef*, sec. 36 and R. Chaim David Chazan, *Teshuvot Nediv Lev*, *Even ha-Ezer*, no. 8.
20. See also *Terumat ha-Deshen*, *Pesakim*, no. 253, cited by *Darkei Mosheh*, *Hoshen Mishpat* 2:1 and *Sema*, *Hoshen Mishpat* 2:11. See also Rema, *Even ha-Ezer* 28:21, who declines to rely upon *hefker bet din* for nullification of a marriage without benefit of a *get.* Cf., *U-Mazur Dvash*, no. 6, p. 109a, who questions the authenticity of that gloss.
21. Cf., however, *Teshuvot Ta'alumot Lev*, I, *Even ha-Ezer*, no. 14, and *Ziknei Yerushalayim*, pp. 80 ff., who assert that *hefker bet din* may be invoked in any locale when the residents join the *bet din* in exercising that power. In effect, *Ta'alumot Lev* argues that Rabbenu Tam asserts that, although only a *bet din* of the stature of R. Ami and R. Asi has discretion to invoke *hefker bet din*, nevertheless a comparable power is vested in society itself and that such authority may be exercised by any local community. Cf., however, Rema, *Hoshen Mishpat* 2:1. The identical thesis was later developed at great length by a Sephardic scholar, R. Chaim Bleich, *Kevod Ya'akov*, no. 15, pp. 43b-45a and 60a. R. Chaim Bleich, pp. 45b-47a, stresses that this power cannot be invoked by the townspeople without the sanction of the prominent local scholar.

    R. Chaim Bleich, pp. 52a-54a, develops the argument that according to Rashbam and Ritva, *Bava Batra* 48b, who maintain that *hefker bet din* cannot be invoked when the direct effect would be retroactively to nullify an otherwise biblically valid marriage, it may be the case as well that *hefker bet din* also cannot be invoked to nullify such marriage at the moment of its inception. Accordingly, he advises, p. 54a, that the wedding ring be expropriated, not simultaneously with its transfer to the bride, but a moment before such transfer. He further argues, pp. 54a-56a, that, if expropriation takes place before transfer of the ring to the bride at a time when any person may take title to the ring, even

Rabbenu Tam would agree that any communal *bet din* may exercise the power of *hefker bet din*. That argument is based upon the contention that Rabbenu Tam maintains that it is only expropriation involving "loss to one and gain to another" (*peseida le-hai u-revaha le-hai*) that is limited to a *bet din* comparable in stature to that of R. Ami and R. Asi but that even a local *bet din* is authorized to engage in expropriation not resulting in the direct enrichment of another person. Expropriation of a ring at the time of its transfer gives rise to a situation in which only the bride can acquire title; expropriation a moment before transfer of the ring, he argues, creates a situation in which any person may seize the ring. It may, however, be argued that no such moment exists: at the very moment of transfer only the bride can benefit; a split second earlier title should logically revest in the groom. Later expropriation retroactive to a moment before transfer also results in a situation in which only the bride will acquire title.

22. For fuller discussions of this issue see *Encyclopedia Talmudit*, X, 106-107 and *Seder Kiddushin u-Nisu'in* (Jerusalem, 5705), pp. 66-80, 113-114 and 385-386.
23. Cf., however, the conflicting position of R. Shimon ben Zemah Duran, *Tashbaz*, I, no. 133, cited *infra*, note 38.
24. Cf., Rosh, *Kiddushin* 2:31. See also *Tosafot*, *Hullin* 4b, s.v. *muttar*.
25. See also *Avnei Milu'im* 28:2 and cf. his parallel analysis of an edict regarding *lifnim mi-shurat ha-din* in such circumstances.
26. Cf., however, the Sephardic scholar R. Chaim Bleich, *Sha'arei Rahamim*, II (Jerusalem, 5662), ed. R. Rahamim Joseph Franko, no. 16, who contends that, in such circumstances, there is no reason to surmise that the couple cohabit for the purpose of effecting a valid marriage. He bases that contention upon three considerations: 1) The parties must be ignorant either of the efficacy of the expropriation or of the possibility of contracting a marriage by means of cohabitation since, if otherwise, why did they not avoid transgressing the *herem* twice, rather than once, by omitting transfer of a ring and entering into marriage solely by cohabitation. 2) The halakhic presumption that a person does not engage in an act of fornication when the sexual act can be rendered legitimate by performance of the act for purposes of effecting a marriage does not apply to transgressors. 3) Since the act of cohabitation for the purpose of effecting marriage is, in this instance, itself a violation of the *herem*, there is no reason to assume that the parties prefer violation of the *herem* to the transgression of fornication. See also R. Eliyahu Chazan, *Neveh Shalom*, p. 49b. See R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, nos. 74-75 and II, no. 19, who, based upon *Teshuvot Rivash*, no. 6 and other authorities, adopts a similar position. See also *Iggerot Mosheh*, *Even ha-Ezer*, IV, nos. 42 and 46. Cf., however, R. Yosef Eliyahu Henkin, *Peirusha Ivra*, no. 3, who understands the halakhic presumption in an entirely different manner and espouses a position at variance from these authorities.

    See also R. Rahamim Joseph Franko, *Sha'arei Rahamim*, II, no. 17, who contests the position of R. Chaim Bleich and *Na'eh Meshiv*, I,no. 8, p.

28, who rebuts the argument of *Neveh Shalom*. See also R. Ya'akov Moshe Toledano, *Yam ha-Gadol*, no. 74; *Yaskil Avdi*, III, *Even ha-Ezer*, no. 6, *se'if* 2, sec. 22; and *Ozar ha-Poskim*, *Even ha-Ezer* 28:21, note 113, sec. 8.

27. The problem arises from the understanding of the Gemara's discussion reflected in the comments of *Tosafot*, *Ketubot* 3a and it is presumably *Tosafot*'s position that *Hatam Sofer*'s thesis serves to illuminate. The analysis of that discussion presented by Rashi, *Ketubot* 3a and *Gittin* 33a, as well as by Ramban and Re'ah as cited by *Shitah Mekubbezet*, *Ketubot* 3a, obviates this problem. *Tosafot*'s position can also be explained in a manner quite different from that of *Hatam Sofer* upon comparison with *Tosafot*'s own comment, *Bava Batra* 48b, s.v. *teimah*.
28. Rashi's comment follows the talmudic interpretation formulated in *Ketubot* 37b and *Arakhin* 6b. Ramban, in his *Mishpat ha-Herem*, acknowledges the validity of the talmudic interpretation and presents his comments as a non-contradictory elucidation of the plain meaning of the verse. See Ramban, *Commentary on the Bible*, Leviticus 27:29 and *idem*, *Mishpat ha-Herem*, published in *Teshuvot ha-Rashba ha-Meyuhasot le-ha-Ramban*, no 285 and in a lengthier version in *Kol Bo*, no. 148. The latter version is reprinted as an appendix to *Hiddushei ha-Ramban* (Jerusalem, 5668) I, 38a-39a.
29. In *Teshuvot Hatam Sofer*, *Even ha-Ezer*, no. 109, s.v. *u-pe'er rum ma'aloto*, *Hatam Sofer* describes the edict as creating a situation such that it is "as if she absorbs [the husband's semen] from the air" (*ke'ilu koletato min ha-avir*).
30. The identical thesis is reflected in a gloss of *Hatam Sofer* on *Magen Avraham*, *Orah Hayyim* 39:4. The Gemara, *Gittin* 46b, includes informers among the persons who are disqualified from writing *tefillin* scrolls. *Bet Yosef* questions the basis for that disqualification, particularly in the case of an informer who causes financial loss to another for his own benefit.

    Hatam Sofer addresses that issue by citing a question raised by *Tosafot Yom Tov*, *Niddah* 7:4. The Gemara records a controversy among the Sages with regard to the validity of the conversion of the Samaritans. Yet the Mishnah, *Niddah* 7:4, definitively declares that Samaritans are not subject to forms of defilement attendant only upon Jews. If their conversion was valid, queries *Tosafot Yom Tov*, by what authority did the Sages decree that they be treated as gentiles? *Tosafot Yom Tov* opines that the Mishnah's ruling is the result of acceptance of the view that the conversation of the Samaritans was invalid.

    Hatam Sofer is not willing to accept that explanation. *Hatam Sofer* resolves the problem raised by *Tosafot Yom Tov by* asserting the claim that the people of Israel has the power to exclude the rebellious from the community of Israel and cause them to revert to their earlier status as non-Jews. *Hatam Sofer* concludes his comment with the citation of Ezra 10:8: "Whosoever shall not come within three days according to the counsel of the chiefs and elders, all his property shall be expropriated and he shall be separated from the community of the exile." *Hatam Sofer* understands the final phrase of that verse as a declaration that the offending individuals were to be deprived of identity and status as Jews and effectively rendered non-Jew for all purposes. Read together with his comment in *Teshuvot Hatam*

Sofer, *Hatam Sofer*'s citation of Ezra 10:8 must be understood only as evidence of the existence of such authority, not as a citation of the locus of the Scriptural source granting such power. As presented by *Teshuvot Hatam Sofer*, the biblical source conveying such authority is Leviticus 27:23 which grants the community, and hence its sovereign, who exercises the authority of the populace, the power to impose forfeiture of life and body upon miscreants. In transforming the marital act into an act of fornication, the Sages expropriated a portion of the body; in rendering Samaritans and those who failed to heed Ezra's command gentiles, they effected an even more drastic result by means of expropriation, i.e., they effectively severed the genealogical link between those individuals and their progenitors.

Hatam Sofer's thesis also serves to resolve a similar problem with regard to the status of members of the lost Ten Tribes. The Gemara, *Yevamot* 17a, records the opinion of Samuel who, citing the verse "They have deal treacherously against God, for they have begotten strange children "(*Hosea* 5:7), asserts that the Ten Tribes were punished by the authorities of that generation by being deprived of their status as Jews. *Hatam Sofer*'s thesis provides a basis for the authority to act in that manner.

31. Cf., however, *Teshuvot ha-Rashba*, I, no. 551.

Hatam Sofer's basic thesis, i.e., that extrastatutory capital or corporal punishment cannot be administered by a local *bet din*, is certainly contradicted by the many authorities who sanctioned imposition of such punishment during the medieval period even in situations in which the malefactor could not be categorized as a *rodef*. See the many examples cited by S. Assaf, *Ha-Onshin Aharei Hatimat ha-Talmud* (Jerusalem, 5682). *Hayyim ve-Shalom*, II, no. 26, and R. Chaim Bleich, pp. 56a-61b, argue that any local *bet din* may impose extrastatutory punishment if they deem it necessary to do so in order to stem further transgression and accordingly they argue the wedding ring may be confiscated by any local *bet din* by way of punishment if the purpose is to prevent future infractions (*le-migdar milta*). *Teshuvot Sha'ar Efrayim*, no. 72, maintains that such power may be invoked only if the infraction is common (*shekhiah*). Cf., however, *Shulhan Arukh* and Rema, *Hoshen Mishpat* 2:1. See particularly *Teshuvot ha-Rosh*, *klal* 17, no. 8.

32. Cf., however, *Tosafot ha-Rosh*, *klal* 35, no. 1, who in discussing an edict of a local *bet din*, apparently affirms the power of such a *bet din* to nullify even marriage entered into by an act of cohabitation. See also *Ozar ha-Poskim* 28:21, sec. 5, for citation of both supporting and conflicting sources.

33. In a seminal discussion of proprietary interests in *issurei hana'ah*, *Mahaneh Efrayim*, *Hilkhot Zekhiyah u-Matanah*, no. 4, asserts that Rashba's position is contradicted by Rabbenu Nissim, *Nedarim* 47a. Rabbenu Nissim maintains that a person who has been denied benefit from certain property by reason of *konam* may nevertheless acquire such property for purposes of conveying it to another or for use in satisfying a creditor. If so, an item prohibited to the bride by reason of *konam* remains an object of at least limited value to her and hence may be used to effect a marriage. See also R. Menachem Mendel Schneerson, *Teshuvot Zemah Zedek*, *Even ha-Ezer*, no. 110 as well as *Teshuvot Rivash*, no. 401 and *Shulhan Arukh*, *Orah*

Hayyim 686:3. Cf., however, *Bet David*, no. 5, who argues that an item of value used to effect a marriage must be comparable in nature to the silver used by Abraham to purchase the field of Ephron, i.e., it must be of value not only in the sense that it can be transferred to others but must be licitly usable by the recipient for any purpose.

R. Meir Simchah ha-Kohen of Dvinsk, *Or Sameah*, *Hilkhot Ishut* 56:1, asserts that Rashba's assumption that renunciation of benefit from a wedding ring presented in such circumstances invalidates the marriage is a matter of dispute among early-day authorities. The issue is whether the bride, or a party designated by her, must receive an object of value or whether divestment of an object of value on the part of the groom in return for the bride plighting her troth is sufficient to effect a valid marriage. The classic example of such a phenomenon is that of a bride who directs the groom to cast an object of value into the sea in return for which she will become his wife. Rashba himself, *Kiddushin* 8b, maintains that the marriage is invalid because neither the bride nor her designee has received a benefit; other early-day authorities, including Ramban cited by Rabbenu Nissim *ad locum*, maintain that the financial detriment sustained by the groom through divestment of an object of value is sufficient to generate a valid marriage.

In the situation addressed by Rashba in his responsum, i.e., conveyance to the bride of an object from which she is forbidden to derive benefit, the item conveyed is intrinsically an object of value to all others including the groom. It ceases to be an object of value to the bride only upon her acceptance of the object for the purpose of marriage. If the marriage is not valid it is because the bride will never be able to derive benefit from that object; the groom, however, has divested himself of an object of value in return for marriage. According to the authorities who disagree with Rashba with regard to marriage effected by casting an object of value into the sea, argues *Or Sameah*, the bride who accepts from the groom an object that is of value to him has entered into a valid marriage despite her inability to benefit from the object. In light of the controversy among early-day authorities, Rema, *Even ha-Ezer* 30:11, rules that a bride's acquiescence to marriage in return for casting a ring into the sea creates a *safek* or doubtful marriage. See also *Erekh Shai*, *Even ha-Ezer* 25:21.

A position at variance from that of *Or Sameah* and *Mahaneh Efrayim* is formulated by R. Kalman Isaac Kadishewitz, *Toldot Yizhak*, no. 45. *Toldot Yizhak* asserts that Rashba's view with regard to the invalidity of a marriage effected by presentation to the bride of an object from which she has renounced benefit would be accepted by all authorities. In the case of a bride who directs the groom to cast the ring into the sea, the marriage, argues *Toldot Yizhak*, is not effected in exchange for the ring itself, but in exchange for the pleasure derived by the bride from the casting of the ring into the sea by the groom at her behest. Since she does not receive the actual ring, it is understood by all concerned that the marriage is effected in consideration of the pleasure derived from the groom's compliance with her directive rather than in return for the ring. In contradistinction, a bride who accepts a ring from which she cannot benefit is ostensibly plighting her

troth in return for the ring itself rather than in return for the pleasure of the groom's divestment at her behest. Similarly, she ostensibly enters into marriage in return for the full value of the ring rather than in return for the lesser value of its limited use as an object to be given to others or for use in satisfying a creditor. See *Ozar ha-Poskim*, *Even ha-Ezer* 28:21, note 114, sec. 1.

33a. Cf., *Teshuvot Ta'alumot Lev*, I, *Even ha-Ezer*, no. 14, who comments that institution of such a practice may be feasible in a city of learned people but is unrealistic insofar as common people are concerned. See also R. Eliyahu Klatzkin, *Dvar Eliyahu*, no. 55.

34. As analyzed by *Hatam Sofer*, an attempt was made to have the ring become *res nullius* by employment of another expedient as well. Apparently, the edict was promulgated and accepted by the populace at a public forum at which each person declared any item of value utilized in a manner banned by the edict to be *res nullius*. *Hatam Sofer* objected to the expedient for two reasons: 1) The item declared *res nullius* was not known and was not specified. Since the object could not be identified and was undetermined at the time of the pronouncement, the pronouncement failed because of the principle of *ein bereirah*. In essence, the principle of *ein bereirah* provides that determinancy cannot be retroactively conveyed upon an act that is indeterminate at the time of its performance. 2) Renunciation of title is not effective with regard to subsequently acquired property.

Moreover, the expedient would have been of no avail with regard to persons who reached the age of halakhic capacity subsequent to that event. Although R. Abraham Eliezer indicated his intention of convening such a forum for the purpose of repeating the procedure on an annual basis, *Hatam Sofer* pointed out that it would be totally ineffective with regard to a non-resident who might contract a marriage in Trieste.

35. Cf., however, *Teshuvot Ra'anah*, no. 68 and R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv*, *Mahadura Telita'a*, II, no. 157. The reference is probably to the immediately preceding responsum, *Teshuvot Maharit*, II, *Even ha-Ezer*, no. 39, s.v. *ve-im banu la-hush*. In that responsum Maharit cites *Teshuvot Maharshakh*, II, no. 1, who espoused that position and comments that he has already analyzed that view at length. In his earlier discussion, *Teshuvot Maharit*, I, no. 138, s.v. *ela she-yesh le-gamgem*, he endeavors to rebut that position. See also *Kezot ha-Hoshen* 52:1, who refutes Maharit's arguments against the position of *Maharshakh*. See also *Netivot ha-Mishpat* and *Meshovev Netivot*, *ad locum*. See also *Netivot ha-Mishpat*, *Mahadura Batra*, ed. David Metzger (Jerusalem, 5750), *ad locum*.

36. Cf., however, *Teshuvot Maharashdam*, *Even ha-Ezer*, no. 21. *Sho'el u-Meshiv* presents an intriguing argument in confirming Maharshakh's position regarding the validity of a marriage witnessed in contravention of a *herem*. Were the marriage invalid, argues *Sho'el u-Meshiv*, the witnesses would not have violated the *herem* since the *herem* applies only to witnessing a valid marriage. Hence the *herem* must have the effect of generating a transgression and disqualifying the witnesses only upon their having effected a valid marriage.

37. See also *Teshuvot Maharshakh*, III, no. 1. Commenting upon *Maharshakh*, R. Joshua Handali, *Shenei ha-Me'orot ha-Gedolim*: *Pnei Yehoshu'a*, II, no.

16, s.v. *u-mikol makom zehu davka*, asserts that his point is valid only if the language of the *herem* refers to "witnesses who will be present at the marriage" but that if the *herem* specifies "all witnesses who are present at the *giving* of the [ring for] marriage" the marriage is invalid. See *Ozar ha-Poskim* 42:5, sec. 4, note 1. That position presumably reflects the consideration that the witnesses become disqualified as the groom begins to present the ring to the bride. Hence they are already disqualified at the moment of her acceptance.

38. *Hatam Sofer* writes that, on the basis of the language of the proposed edict, it is evident that the intent was to disqualify witnesses who had no intention of transgressing the edict and therefore could not be categorized as evildoers. Thus, the effect of the edict would be to disqualify all witnesses in any and all circumstances. *Hatam Sofer* rigorously objects and contends that the community has no power to disqualify the testimony of qualified witnesses with regard to matters of religious law. See also *Teshuvot ha-Rashba*, I, no. 573 and *Zion le-Mishpat*, p. 52a.

    In point of fact, R. Simon ben Zemah Duran, *Tashbaz*, I, no. 133, notes that the Sages did ordain that certain classes of individuals be disqualified from serving as witnesses. *Tashbaz* then appears to assert that any community can validly enact an ordinance similarly disqualifying classes of individuals from serving as witnesses, as indicated by *Mordekhai*, *Sanhedrin*, sec. 699. According to the view of *Tashbaz*, a community could decree that, under any and all circumstances, a person present at a ceremony of a stipulated nature would, *ipso facto*, be disqualified from serving as a witness. That view is assumed as a matter of course by R. Solomon ben Shimon Duran, *Teshuvot ha-Rashbash*, no. 111, s.v. *u-me-mah*. There is indeed a significant dispute with regard to whether a marriage contracted in the presence of rabbinically disqualified witnesses is void on the basis of the principle "Everyone who betroths does so subject to the acquiescence of the Sages" or whether the marriage is biblically valid and requires a *get* for its dissolution. See Rambam, *Hilkhot Ishut* 4:6 and *Maggid Mishneh*, *ad locum*, as well as *Bet Shmu'el*, *Even ha-Ezer* 43:19. See also sources cited in *Ozar ha-Poskim* 42:5, sec. 46. However, while whether or not such power was in fact exercised may be a matter of controversy, the Sages unquestionably had the power to disqualify classes of individuals from serving as attesting witnesses at a marriage. The mechanism for doing so is confiscation of the wedding ring when the marriage is celebrated in the presence of such attesting witnesses.

    See also *Nahar Mizrayim*, II, *Even ha-Ezer*, p. 373 and *U-Mazur Dvash*, no. 6, p. 11b. *U-Mazur Dvash*, apparently in direct contradiction of *Hatam Sofer*'s view, asserts that a person has the authority to disqualify otherwise qualified witnesses even with regard to religious or ritual acts and hence claims that the community, as an aggregate of individuals, enjoys the same power.

39. Moreover, *Hatam Sofer* found that the expedient failed because of a technical defect. Each person declared that the item used to solemnize the marriage illicitly would be *res nullius* with regard to all persons save the groom. Preventing the groom from recovering the item used in the ceremony served no purpose whatsoever but did effectively render his renunci-

ation of title nugatory. Pronouncing property to be *res nullius* extinguishes the proprietor's title only if any and all persons are granted license to acquire title; an attempt to abandon property in favor of some person, or persons, but not in favor of others, is of no halakhic consequence. That defect, however, could have been remedied by insisting upon an unqualified declaration of abandonment.

40. Thus, the assertion of Samuel D. Goitein, *A Mediterranean Society*, III: *The Family* (Berkeley, 1978), pp. 76-79, that marriage of minors was a rare occurrence, is neither novel nor suprising.
41. Details of this incident were reported in the *JTA Daily News Bulletin*, May 16, 1995, p. 1; June 28, 1995, p. 1; and July 13, 1995, p. 3. Subsequently, in response to a civil suit brought against him, the father submitted an affidavit declaring that the marriage did not in fact take place. See *The Jewish Press*, September 3, 1995, p. 82. Discussion of the father's credibility to recant, particularly under conditions of financial duress, is beyond the scope of this discussion.
42. Several respected rabbinic authorities, including among others R. Moshe Sternbuch and R. Zalman Nechemiah Goldberg, have authored responsa in which, on the basis of a variety of considerations, they conclude that, in the case under discussion, the father's declaration lacks probity. A letter to that effect by R. Samuel ha-Levi Woszner has also been circulated. To date, those responsa have not been published and hence have not been reviewed by other scholars. In any event, those responsa relate to the specific facts of the case in question and are not necessarily germane to situations that may arise in the future. The opinions of a number of other rabbinic scholars were assembled by R. Raphael Evers of Amsterdam and published in his *Teshuvot Ve-Shav ve-Ripe*. Contrary to reports in the media, R. Shlomoh Zalman Auerbach, in a brief letter, a copy of which is in the possession of this writer, expressed doubt with regard to the status of the child. R. Menasheh Klein's responsum affirming the validity of the father's credibility appears in his *Mishneh Halakhot*, *Mahahura Tinyana*, IV, nos. 50-61. A survey of the pertinent halakhic issues was presented by R. Chaim Malinowitz, "Kiddushei Ketana—Betrothal of a Minor: A Halachic Discussion" in the *Journal of Halacha and Contemporary Society*, no. XXX (Fall, 1995), pp. 6-24.
43. The formula employed must specify that the object becomes forbidden only upon presentation because objects not yet in existence can be prohibited only at such time as they come into existence. See *Shulhan Arukh*, *Yoreh De'ah* 204:4. See also *Teshuvot Mabit*, II, no. 104, who explains that such declarations are comparable to prohibiting "a tree for its fruit or an animal for its young" since the person from whom benefit is prohibited is in existence.
44. Extending the ban to encompass even agreement to serve as a witness is designed to overcome the previously-cited objection of *Teshuvot Maharit*, II, *Even ha-Ezer*, no. 40. Cf., R. Joshua Handali, *Shenei ha-Me'orot ha-Gedolim*, cited *supra*, note 27. As previously indicated, R. Joshua Handali cogently notes that persons who witness a marriage in violation of a *herem* become disqualified only upon completion of that act if the *herem* is

directed against "witnesses who will be present at the marriage," i.e., if the *herem* is made applicable specifically to persons who witness *a marriage* which by definition does not exist until it becomes effective. However, if the *herem* is broadened to include "all witnesses who are present at the giving of the [ring for] marriage" the marriage is invalid since the transgression is already incurred in the act of witnessing the *giving* of the ring at the moment of the inception of that act at which time the marriage is not yet effective.

45. See *Teshuvot Maharit*, I, no 138; *Kenesset ha-Gedolah Hagahot Bet Yosef*, sec. 55; *Teshuvot Maharshakh* no. 19; *Teshuvot Berakh Mosheh*, no. 33; *Teshuvot Olat Shmu'el*, no. 5; *Mishpat Zedek*, III, no. 6; *Teshuvot Kerem Shlomoh*, no. 24, as well as sources cited in *Ozar ha-Poskim*, *Even ha-Ezer* 42:5, note 45, sec. 6. *Teshuvot Maharhash*, no. 42, opines that witnesses who erroneously believe that violation of the *herem* is warranted in order to forestall malevolent conduct do not become disqualified.

    However, the author of *Knesset ha-Gedolah*, in his *Teshuvot Edut be-Ya'akov*, asserts that the witnesses have no credibility to claim that they were not knowingly present for purposes of witnessing a marriage. That position is puzzling since, in light of the witnesses' presumption of innocence (*hezkat kashrut*), their presence should be deemed to be inadvertent unless there is evidence to the contrary. Cf., *Shai le-Moreh*, no. 20.

    R. Isaac Abulafia, *Teshuvot Pnei Yizhak*, I, no. 16, asserts that failure on the part of the witnesses to flee immediately upon becoming aware of the fact that a marriage was taking place serves to disqualify them. In apparent contradiction to that view, Maharit comments that "a person does not rule over his eyes or his ear," thereby indicating that witnesses may well have no opportunity to avoid observation of the transfer of the wedding ring.

    A number of authorities, including R. Israel Meir Mizrachi, *Teshuvot Pri ha-Arez*, III, no. 2, p. 27b; *Asher le-Shlomoh*, no. 2, p. 11b; *Battei Kehunah*, I, no. 4; and *Teshuvot Va-Yikra Avraham*, no. 6, apparently maintain that a broadly formulated *herem* can serve to disqualify even inadvertent transgressors from serving as witnesses. See *Ozar ha-Poskim*, *Even ha-Ezer* 42:5, note 45, sec.6.

46. As noted earlier, *Hatam Sofer* declares that once an ordinance is enacted requiring young women to declare a *konam* with regard to a wedding ring presented to them, they have no credibility to claim that they have transgressed the ordinance by failing to do so and, moreover, even if it can be independently established that they did fail to pronounce a *konam*, the marriage is invalid because the witnesses must assume that a *konam* was pronounced and hence they must presume the presentation of the ring to be of no effect. The identical consideration would apply to acceptance of a ring by a father on behalf of a minor daughter in violation of a communal edict requiring him to declare such objects to be *asur be-hana'ah*.

47. R. Chaim Bleich, pp. 63a-67a, marshals evidence demonstrating that local authorities have the power to enact *takkanot* that become binding upon strangers entering their jurisdiction. He further considers the question of whether it is necessary explicitly to make the *takkanah* binding upon non-

residents or whether such intention is inherently implied. Although he inclines to the view that every such *takkanah* should be construed as extending to non-residents who appear in the city, he counsels that, in order to eliminate any doubt, such a provision should be explicitly incorporated in the *takkanah*. See also sources cited in *Ozar ha-Poskim*, *Even ha-Ezer* 42:5, note 45, sec. 8.