J. David Bleich

Survey of Recent Halakhic Periodical Literature

CONSTRUCTIVE AGENCY IN RELIGIOUS DIVORCE: AN EXAMINATION OF *GET ZIKKUY*

The problem of the modern-day *agunah* resulting from the refusal of the husband to cooperate in the execution of a religious divorce on behalf of his wife despite the irreversible breakdown of their marriage has long plagued, and continues to plague, rabbinic decisors. Over the years, a series of proposals for remedying the situation has been advanced, examined, debated and, for the most part, rejected because of compelling halakhic objections. Some few proposals involving antenuptual agreements of one form or another have been adopted in some circles but remain the subject of controversy. For reasons that are difficult to identify, proposals that have been advanced for antenuptual agreements to which no halakhic objections have been voiced have yet to gain universal endorsement and hence have not been implemented.

Within recent years a small number of individuals have donned the mantle of authority and have assumed upon themselves responsibility for permitting wives of recalcitrant husbands to remarry on the basis of halakhic considerations rejected as spurious by recognized halakhic authorities. The expedient of *kiddushei ta'ut*, i.e., annulment of the marriage *ab initio*, was addressed in this column in the Fall, 1998 issue of *Tradition*. Some have also sought to resolve the problem by invoking the concept of *get zikkuy*, i.e., a *get* executed by the *bet din* on its own motion, contrary to the expressed desire of the husband, on the grounds that an act performed for the benefit of another does not require that party's consent.

Unfortunately, this expedient falls far short of halakhic acceptability. The attempt to resolve the *agunah* problem in this fashion can, at best, be described as an endeavor based upon misunderstanding and misap-

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This paper was originally presented at the Eleventh Biennial International Conference on Jewish Law, Zutphen, The Netherlands, July 25, 2000, and appears in the Proceedings of that conference.

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plication of halakhic concepts and precedents. Nevertheless, those who have an interest in Halakhah and in the halakhic process undoubtedly wish to understand the underlying principles and why they do or do not serve as a basis for ameliorating the plight of the *agunah*. Such an understanding requires elucidation of the difficult and complex halakhic concept of *zekhiyyah* and its ramifications.

I. THE PRINCIPLE OF *ZEKHIYYAH* IN JEWISH LAW

A. Third Party Beneficiaries

"*Zekhiyyah*" as an operative legal concept is unique to Jewish law. Translation of "*zekhiyyah*" as "constructive agency" is somewhat misleading in that the translation implies adoption of one of two competing theses advanced as descriptive hypotheses upon which the biblical institution may rest. Those competing hypotheses will be discussed at a later point. Nevertheless, putting aside the question of the legal rationale that actually serves as the formal cause of the halakhic institution of *zikkuy*, the term "constructive agency" effectively and accurately describes its *telos* or final cause, i.e., the operational effect of employing the halakhic construct known as *zekhiyyah*.[1]

The term "constructive agency" is unknown in legal parlance. Indeed, in describing the operation of other legal systems, the term would be akin to an oxymoron. Agency, in other legal systems, requires designation, or at least a presumption of actual intent, on the part of the principal. Other legal systems may indeed recognize a principle of implied agency, e.g., a situation in which an employee routinely conducts business on behalf of his employer, but that is because the circumstances give rise to the presumption that the employee acts with the knowledge and authority of the employer and hence the implication is that the employer actually intends the employee to serve as his agent. The crucial distinction between implied agency and constructive agency is that in instances of implied agency the principal is presumed to have had prior intent to create the agency whereas constructive agency implies neither intent nor prior cognition of *any* kind on the part of the principal.

The legal construct most clearly akin to that of constructive agency, and one that for certain purposes achieves the same effect, is that of a third party beneficiary. To the extent that such claims are recognized, the rights of third party beneficiaries arise as a construct of contract law.

And it is precisely because the concept arises in contract law that some other legal systems have had difficulty acknowledging such rights. The enforceability of a contract hinges upon privity between the contracting parties. Applying conventional legal principles, two parties cannot by contract create rights in a third person when there is no privity of contract between them and the third party. Accordingly, in some jurisdictions it became necessary to enact statutes in favor of certain classes of beneficiaries, such as beneficiaries of insurance policies or mortgages. In other jurisdictions courts give effect to such contracts by finding a fictitious "privity" or "trust" relationship or by ruling that the claim of a third party may properly be recognized in equity if not in law.[1]

The earliest recognition of the rights of a third person to sue as a beneficiary of a contract to which that person was not a party was in a 1677 decision by the King's Bench in *Dutton v. Poole*.[3] A father sought to sell wood to raise a dowry for his daughter. The elder son, who wanted to inherit the wood, promised the father to pay the daughter £1,000 if the father would refrain from selling the wood. Upon failure of the son to pay the agreed-upon sum, the daughter brought suit. The son sought to have the case dismissed on the grounds that "the action ought not to be brought by the daughter but by the father... for the promise was made to the father, and the daughter is neither privy nor interested in the consideration."[4] The Court rejected that argument but without necessarily affirming the standing of all third party beneficiaries. Instead, the Court found that consideration for a promise may be given by a third person, i.e., that a party (in this case the daughter) may be a promisee of the one who will be benefitted by dependence on the contract and yet not be the one who gave the consideration. In effect, such a promisee is not a third-party beneficiary; he or she is the direct beneficiary of the party who gave the consideration. Privity is established by the fact that the promise is directed to the promisee. Hence the only problem is whether consideration can move from a person and it was only this point that was settled in the affirmative in *Dutton*.

Even that limited recognition of the rights of third party beneficiaries was rejected in 1861 in *Tweddle v. Anthenson* with the observation that the promisee cannot bring an action unless the consideration moved from him.[5] In 1915, in denying recovery to a third party in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, one of the Lords declared the notion that "only a person who is a party to a contract can sue on it to be a fundamental principle of the law of England."[6] That principle was reaffirmed by the House of Lords as recently as 1968 in a

decision handed down in *Beswick v. Beswick.*[7] In some subsequent cases, British courts, although upholding this rule in principle, have recognized a cause of action based upon an expanded notion of the concept of trust. Thus, for example, if A promises B that he will pay a sum of money to C, the promisee, B, may be regarded as holding the claim against A, the promisor, as trustee for C.[8]

American courts, for the most part, have upheld rights of third part beneficiaries. As early as 1825, in *Farley v. Cleveland,*[9] a New York court ruled that the promisee need not himself provide consideration. Since the major case in this area, *Lawrence v. Fox,*[10] was decided by the New York Court of Appeals in 1859, two years before *Tweddle v. Anthenson*, it may be fair to say that American courts adopted the doctrine announced in *Dutton v. Poole* before its reversal in *Tweddle* and in later decisions declined to follow *Tweddle* in reversing American precedents.[11]

In *Lawrence*, the New York court went beyond the principle enunciated in *Farley* in ruling that not only may consideration be provided by the beneficiary himself, but that the beneficiary may recover even though he is not the promisee. The principle developed in *Lawrence* was gradually accepted by other states as well, although Massachusetts did not generally permit recovery by contract beneficiaries until 1979.[12] Although the pioneer in the development of this legal doctrine, New York did not explicitly abandon the requirement of a family relationship between a donee beneficiary and the promisor until 1985.[13] *Restatement Second* §302 limits the right to an "intended beneficiary"as opposed to an "incidental beneficiary" described in *Restatement Second* §315.

The rights of third party beneficiaries do not present a similar issue in Jewish law for the simple reason that the issue is one of contract and because Jewish law, strictly speaking, does not recognize the enforceability of contracts *qua* contracts. That is to say that Jewish law does not distinguish contracts from promises. Hence, words of contract do not generate legal obligations any more so than do words of promise. Certainly, moral obligations of greater or lesser degree can arise from such undertakings but moral obligations are not enforceable in the manner of legally valid undertakings. But, of course, Jewish legal practice does employ and validate contracts. The enigma is resolved upon recognition that contracts are valid and enforceable in Jewish law only if entered into pursuant to *kinyan*, a formal act usually in the form of delivering a *suddar* or "kerchief." Technically, the purpose of *kinyan* is not to generate an obligation but to effect a conveyance. Transfer of title to any property, real or personal, requires an appropriate act of *kinyan.* The *kinyan* giving

effect to a contract also represents a conveyance, *viz.*, conveyance of a *shi'bud ha-guf*, i.e., a lien *in personam*. A personal servitude represents a circumscribed property interest just as title to a slave represents a virtually unlimited property interest. A lien against property flows from the servitude by virtue of the doctrine that a person's property serves as his surety. The conveyance of a servitude *in personam* makes it possible to seize property in the event of non-performance on the contract. Absent valid reconveyance of a lien *in personam*, no cause of action can arise. Thus, in effect, contracts are reduced to conveyances.

A contract providing for a third party beneficiary is, in effect, a conveyance by the promisor of a lien *in personam* directly to the beneficiary. There is no problem arising from lack of privity because, since the contract is not really a contract but a conveyance, there could not be a requirement of privity. Furthermore, the question of passing of consideration by the promisee, who is really a stranger to the contract *cum* conveyance, does not present the same problem as it does in other legal systems because consideration is not required to give effect to alienation of property or to generate a property interest in another party.[14] Hence, Jewish law does not require consideration in order to generate a binding contract. But it does require *kinyan*. *Kinyan* on the part of the promisee, who is really a stranger to the transaction, is efficacious on behalf of the beneficiary through operation of the principle of *zekhiyyah*, herein defined as constructive agency.

B. *Zekhiyyah* as an Operative Principle

The Gemara, *Kiddushin* 42a, derives the principle of *zekhiyyah* from the biblical verse describing the apportionment of the Land of Israel: "And you shall take one prince from each tribe to take possession of the land" (Numbers 34:18).[15] The function of the designated princes was to take title and to apportion the land among the members of each tribe. The ordinary principles of agency do not seem to provide a legal basis for effecting those ends since, even assuming that there was formal appointment by the populace of the princes as agents, there were also minors among those entitled to receive parcels of property and a minor lacks legal capacity to appoint an agent. That problem is resolved by the talmudic formulation of the notion of *zekhiyyah* as a biblical institution enabling an individual to act on behalf of another provided that the act redounds entirely to the latter's benefit.[16]

The simplest explanation of the theory underlying the principle of *zekhiyyah* is that it represents a form of agency[17] based upon the pre-

sumption that every person desires the unmitigated benefit accruing through operation of *zekhiyyah*, i.e., "we are witnesses" (*anan sahadi*) to the fact that, had the beneficiary been consulted he would happily have authorized the agent to act on his behalf[18] (and hence the principle of *zekhiyyah* may aptly be termed "constructive agency"). Alternatively, *zekhiyyah* may be understood as tantamount to agency simply by operation of law (*gezeirat ha-katuv*), i.e., the legal system itself, in appropriate circumstances, authorizes any person to act as an agent for another.[19] Among the authorities who propound a theory of agency in explaining *zekhiyyah*, some maintain that, in addition to serving as the agent of the beneficiary, the person performing the act of *zekhiyyah* also serves as an agent of the benefactor.[20] Other authorities maintain that *zekhiyyah* is a completely novel legal institution entirely distinct from the notion of agency,[21] at least in theory if not in effect.[22]

Perhaps the most obvious application of the principle of *zekhiyyah* is with regard to taking title to abandoned property on behalf of another individual. For example, a man may chance upon an abandoned piece of jewelry that he deems to be appropriate for his wife. If, while picking up the jewelry, the husband declares, "I take title to this jewelry on behalf of my wife," title immediately vests in his wife and the husband cannot subsequently claim title for himself, as would be the case in other legal systems. Title vests in the wife immediately despite the fact that at no time did the wife appoint her husband as an agent to act on her behalf in taking title to chance findings and at no time did the husband enter into a contract with his wife to do so. Historically, a concept essentially analogous to *zekhiyyah* appears in the principle of international law that provided that a subject may seize newly discovered territory in the name of his sovereign. Thus, for example, Sir Walter Raleigh laid claim to what was to become Virginia in the name of Queen Elizabeth I of England and the Queen thereby acquired sovereign rights. Sovereignty, however, is not to be equated with ordinary property interests. No concept analogous to *zekhiyyah* is found in any area of domestic common law.

II. *ZEKHIYYAH* OF A *GET* ON BEHALF OF A WIFE

The principle of *zekhiyyah* is operative only when the act redounds to the unmitigated benefit of the beneficiary, e.g., acquisition of property that is *res nullius* or performance of *kinyan* in property that is to vest as a gift.[23] Thus, in ordinary circumstances, *zekhiyyah* is of no avail in accept-

ance of a bill of divorce on behalf of a wife because, although delivery of the bill of divorce effects a release from marital bonds and engenders capacity to contract another marriage, divorce also serves to extinguish the husband's marital obligations with the result that the wife no longer has a claim for support and maintenance and loses other marital benefits as well.[24] Even if it is known that the wife despises her husband, the benefit to her is not unmitigated. Hence no unauthorized person is empowered to accept a bill of divorce on her behalf.

The Gemara, *Yevamot* 118b, questions whether *zekhiyyah* may effectively be employed in executing a divorce in situations of marital discord in which the wife has actively sought a divorce. The Gemara's conclusion is apparently in the negative. However, some authorities[25] maintain that the Gemara leaves the question unresolved. Accordingly, those authorities rule that, if a divorce is executed on the basis of *zekhiyyah* in instances of marital discord in which the wife has demanded a divorce, it serves to engender a state of doubt, i.e., the validity of the divorce is doubtful, and hence the wife finds herself having the indeterminate status of a woman who is "doubtfully married, doubtfully divorced."

A wife's announced desire, or even persistent demand, that the husband grant her a divorce does not suffice to render the divorce an unmitigated benefit or an absolute *zekhut*. The Palestinian Talmud, *Gittin* 6:1, explains that the principle of *zekhiyyah* cannot be invoked in such cases because the *get* must be a benefit to the wife at the moment of its acceptance on her behalf. Thus, even if the wife had previously demanded a *get*, she may have undergone a change of heart and have been in a different frame of mind at the time of its delivery. Subsequent reiteration of her earlier expressed desire to be divorced is not sufficient to establish that her frame of mind was constant throughout the intervening period.

The Gemara, *Yevamot* 118b, similarly questions whether a divorce executed on the basis of *zekhiyyah* is valid when it is motivated by the husband's desire to release his wife from the requirement of levirate marriage (*yibbum*). The situation discussed involved a childless and gravely ill husband. Since there always exists a possibility of recovery, and recognizing that in the event of the husband's recovery the divorce would not be to the wife's benefit, the Gemara outlines a procedure that calls for a conditional divorce to be effective only retroactively upon the death of the husband. The issue, according to Rashi, *ad locum*, and Rabbenu Nissim, *Gittin* 11b, is whether or not a woman might prefer levirate marriage to widowhood or, according to *Tosafot Yeshanim*, *ad locum*, whether the wife, in some particular situations,

may not actually desire her brother-in-law as a marriage partner. If she does prefer marriage to her brother-in-law to widowhood, the divorce is not at all to her benefit. The Gemara leaves the matter unresolved. Accordingly, Rambam, *Hilkhot Geirushin* 9:21, and *Shulhan Arukh, Even ha-Ezer* 145:10, rule that the *get* is of questionable validity. Consequently, in such situations, marriage to the brother-in-law is forbidden because marriage between a woman and her former husband's brother is biblically prohibited other than in the presence of an unequivocal levirate obligation but the wife nevertheless requires *halizah* in order to be free to contract a marriage with some other man. However, in our day, since levirate marriage is no longer practiced, many latter-day decisors rule that divorce under such circumstances is an unmitigated benefit.[26] That line of reasoning is particularly cogent if the brother-in-law is married since, subsequent to the edicts of Rabbenu Gershom, he can neither divorce his own wife against her will nor, according to many authorities, take a second wife even in fulfillment of the *mizvah* of *yibbum*.[27]

As noted by *Bet Yosef, Even ha-Ezer* 140, and *Shulhan Arukh, Even ha-Ezer* 140:5, some authorities maintain that *zekhiyyah* is operative with regard to a wife who has committed adultery. An adulteress is forbidden to consort with her husband, who does not have the option of condoning the adultery, and also forfeits any and all claims for further support and maintenance. Accordingly, those authorities regard divorce on behalf of an adulteress to be an unmitigated benefit. Other authorities, whose position is accepted by Rema, *ad locum*, maintain that *zekhiyyah* is of no avail even in such instances on the grounds that, although the divorce does not prejudice the wife's interests, it does not necessarily provide any benefit, particularly since she may have no desire to enter into another marital relationship. *Noda bi-Yehuda, Even ha-Ezer, Mahadura Kamma*, nos. 70 and 92, asserts that even in the case of an adulteress, divorce may be prejudicial to her interests since as a feme sole she may become subject to sexual harassment.

Nevertheless, Rema agrees that *zekhiyyah* may be employed to give effect to a divorce on behalf of a woman who has become an apostate and who "lives among the gentiles." In such a case it is presumed that the woman engages in adulterous sexual activity on an ongoing basis. Divorce, then, serves to rescue her from ongoing violations of the prohibition against adultery and, since she enjoys none of the legal or actual benefits of marriage, divorce, for such a woman, represents an absolute and unmitigated benefit.[28]

III. *ZEKHIYYAH* ON BEHALF OF A HUSBAND IN EXECUTING A *GET*

A. *ZAKHIN ME-ADAM*

Invocation of the principle of constructive agency in situations in which divorce is an unmitigated benefit for the husband is far more complex and of far more recent origin. The classic case involves a husband whose wife is mentally incompetent and hence cannot presently be divorced. The husband is prevented from marrying another woman by virtue of the edict of Rabbenu Gershom banning polygamy. The standard procedure in such cases is to grant a *hetter me'ah rabbanim*, i.e., dispensation to take a second wife, on the condition that the husband place the value of his mentally incompetent wife's *ketubah* in escrow, draft a bill of divorce and appoint an agent to deliver the instrument to his wife when and if she regains the requisite mental capacity to accept delivery of the *get*.[29]

In the eighteenth century, the scholars of Lissa, citing *Mishneh le-Melekh*, *Hilkhot Geirushin* 6:3, raised an objection to the validity of such divorces. *Mishneh le-Melekh* rules that a divorce effected by an agent designated under such circumstances is invalid because of the principle governing agency formulated by the Gemara, *Nazir* 12b, declaring that an agent can be designated to perform only such acts as the principal himself has the capacity to perform at the time of designation. In effect, the halakhic rules governing agency stipulate that the power of an agent can be no greater than that enjoyed by the principal at the inception of the agency. Put somewhat differently, a principal can authorize an agent to act in his stead, but only to perform an act that the principal might himself validly perform at the time that he grants authority to the agent to do so. Thus, declares the Gemara, an agent cannot be designated for the purpose of contracting a marriage with a woman who is already married at the time of the inception of the agency with the result that even if the woman subsequently became widowed or divorced the agent lacks capacity to act on behalf of the principal. Although some authorities disagree, *Mishneh le-Melekh* asserts that the agent has no authority to act on behalf of the principal even if the principal expressly stipulates that the agency is to become effective only upon the woman's attainment of capacity to contract a valid marriage. The husband could not himself execute a divorce of his mentally incompetent wife; hence, argued the scholars of Lissa, the husband has no power to appoint an agent to act on his behalf until such time as his wife's mental health is restored.

As recorded by *Markevet ha-Mishneh* (Frankfurt am Oder, 5611), *Hilkhot Geirushin* 6:3, the practice of appointing an agent to effect a divorce of this nature was defended by a certain scholar described as the aged chief rabbi of Krotoszyn. That authority advanced an argument asserting that the normative rule is that designation of an agent is valid even if the agency cannot be carried out at the time of designation. Moreover, he contended that, even if it is conceded that a bill of divorce executed under such circumstances could not be regarded as valid on the basis of the rules of agency, it would nevertheless be valid by operation of the principle of *zekhiyyah*. He argued that, in designating an agent, the husband has signified his desire to be divorced and has indicated that he regards severance of the marital bonds to be beneficial to him. Thus, designation of an agent, although ineffective in accomplishing its avowed purpose, is nevertheless evidence of a mental state that enables the agent to act, not on the basis of his designation as an agent, but on the basis of the principle of *zekhiyyah*. Moreover, the divorce is objectively beneficial to the husband since the *hetter me'ah rabbanim* is valid only during the period of his wife's mental incompetence. Thus, with the recovery of mental capacity by the first wife, the husband, in the absence of a divorce, would be in transgression of the ban of Rabbenu Gershom.

Markevet ha-Mishneh dismisses this view with the argument that *zekhiyyah* operates only as a principle of vesture of title (*zakhin le-adam*) but is of no avail as a means of giving effect to an attempt to divest an individual of property or of a privilege (*zakhin me-adam lo amrinan*). Probably the most obvious rationale underlying that distinction is that loss of any kind is, by definition, a disadvantage. On balance, the benefit of divestiture may outweigh the gain of continued possession; *zekhiyyah*, however, is operative only in situations of unmitigated benefit. *Teshuvot Hatam Sofer*, *Even ha-Ezer*, I, no. 11, s.v. *nahzor*, dismisses that contention with the observation that it is common practice[30] to invoke the principle of *zekhiyyah* in selling *hamez* belonging to others at the appropriate hour on the eve of Passover.

An alternative rationale for this distinction lies in the fact that although transfer of title does require *da'at* or intent, it does not always require the *da'at* or intent of the individual in whom title is vested. Thus, a minor, who by statute is regarded as lacking *da'at* or intellectual capacity for the requisite mental determination, can nevertheless be the beneficiary of a gratuitous transfer. In such instances the *da'at* or intent of the adult conveying title suffices (*da'at aheret makneh*).

Similarly, in cases of *zakhin le-adam*, the self-appointed agent need perform only the physical act of *kinyan*; the requisite mental act is supplied by the person conveying title. In contradistinction, divesture of title always requires *da'at* or intent on the part of the person transfering title. Accordingly, it has been argued that *zekhiyyah*, since it involves a self-designated agent, is available for physical acts but is not operative with regard to any act that requires a determinant mental state, e.g., conveyance of property or the granting of a *get*. This distinction is reflected in the comments of *Kezot he-Hoshen* 105:1.

The issue of whether the principle of *zekhiyyah* is operative only for the purpose of vesting title or whether it is applicable to alienation of title (*zakhin me-adam*) as well and the circumstances in which it may be invoked in order to do so is a matter of considerable controversy among latter-day authorities.[31] A number of latter-day authorities maintain that resolution of that question is directly contingent upon the nature of the principle of *zekhiyyah*. They assert that, if the principle of *zakhin me-adam* is tantamount to constructive agency, it is available in all instances of benefit in which explicit agency itself is operative. If, on the other hand, *zekhiyyah* is a novel legal construct, it may be regarded as limited to matters similar to the biblical paradigm of "each prince," i.e., to acquisition of title as was the case with regard to division and apportionment of the Land of Israel.[32]

R. Isaac Elchanan Spektor, in both his *Be'er Yizhak, Orah Hayyim*, no. 1 and his *Ein Yizhak, Even ha-Ezer*, no. 2, sec. 4 and no. 51, sec. 10, asserts that *zakhin me-adam* cannot serve to remedy defective agency. Thus, for example, if agency fails because of the principal's own lack of capacity to effect the desired end, the "agent" cannot give effect to his act on the basis of *zakhin me-adam*. R. Isaac Elchanan Spektor asserts that explicit appointment of an agent is tantamount to a declaration that the principal wishes to give effect to the specified act only through the instrumentality of agency and hence appointment of an agent constitutes a renunciation of any advantage that might accrue on the basis of *zakhin me-adam*.

Many latter-day scholars have refused to accept the concept of *zakhin me-adam* and to employ it in cases of divorce. In part, their position is based upon the comments of a highly respected authority, *Kezot he-Hoshen* 243:8, who completely dismisses the application of *zekhiyyah* in matters requiring a determinate mental state. Thus, for example, the editors of *Ozar ha-Poskim* (Jerusalem, 5707), *Even ha-Ezer* 1:10, sec. 70:31, cite *Kezot ha-Hoshen* as well as others who accepted his view and,

although declining to formulate a definitive position, conclude that one should not act in a manner contrary to that view.

That attitude notwithstanding, in the modern era the principle of *zakhin me-adam* was applied in the area of divorce by a noted scholar, R. Eliyahu Klatzkin of Lublin. In 1922, in the aftermath of World War I, Rabbi Klatzkin received a plea for help from R. Mordechai Horowitz of Zamosc in alleviating the plight of an *agunah*, a woman whose husband did not return from the war and was presumed to be dead but who lacked actual proof of his death. Mobilization of the Polish army took place in 1914. Conscripts from the surrounding area were brought to Zamosc. Recognizing the likelihood that not all of the soldiers would survive the armed conflict and concerned for the plight of their wives, Rabbi Horowitz, in accordance with sound halakhic practice, encouraged each of the soldiers to designate a scribe as his agent to draft a bill of divorce, witnesses to sign the instrument and yet another individual to serve as his agent for the delivery of the *get* to his wife. The purpose of that procedure was to make it possible to draft a bill of divorce at some future time in the unfortunate eventuality that the husband would fail to return from battle but that no satisfactory evidence that he was killed in action would be forthcoming. It subsequently transpired that one of the soldiers who followed the instructions of Rabbi Horowitz, a resident of Traningrad, failed to return and was presumed to have perished but there was no evidence substantiating his death. Unfortunately, the person designated by that soldier as his agent for the delivery of the *get* had also died in the early days of the war.[33]

R. Eliyahu Klatzkin, *Dvar Halakhah*, *milu'im*, no. 93, accepts the notion that in instances of a *hetter me'ah rabbanim* involving a mentally incompetent wife, a *get* can be drafted for the woman upon her recovery in reliance upon the principle of *zakhin me-adam*.[34] The problem is that, unlike instances involving a husband of a mentally incapacitated wife who has remarried on the basis of a *hetter me'ah rabbanim*, it is not immediately clear that, in the case confronting Rabbi Klatzkin, divorce would have been a benefit to the husband. Assuming that the husband was still alive—and, if not, the *get* would have been entirely superfluous—he might well still have anticipated and desired resumption of the marital relationship at some point. Rabbi Klatzkin counters that argument by developing a novel thesis to the effect that, since the husband failed to return to his wife for a period of several years after cessation of hostilities and had provided no information with regard to his whereabouts, the husband thereby forfeited his right to demand that his wife

fulfill any of her wifely duties and indeed he might be compelled by her to execute a *get*. In such circumstances, argues Rabbi Klatzkin, the marriage no longer represents a benefit of any kind to the husband and hence the divorce represents an unmitigated benefit.

In a subsequent case reported in his *Milu'ei Even*, no. 29, Rabbi Klatzkin went far beyond his original position.[35] The latter situation involved a woman abandoned by her husband immediately after their wedding and whose subsequent whereabouts were unknown. Two years after her husband's disappearance the woman entered into a second marriage. Unbeknown to the wife, prior to the marriage the young man had, on occasion, behaved in a deranged manner. The possibility existed that the groom's mental illness was of sufficient gravity to constitute an undisclosed "grave defect" that would serve to void the marriage. Hence, the validity of the marriage was a matter of doubt. If the first marriage was a nullity, no *get* would have been required. If, however, the first marriage was indeed valid, the second marriage was a nullity and constituted an adulterous relationship. Hence, as an adulteress, the woman was precluded from resuming a marital relationship with her first husband. Accordingly, argued Rabbi Klatzkin, the marital state no longer represented a benefit of any kind to the first husband. Consequently, Rabbi Klatzkin ruled that the principle of *zakhin me-adam* might be invoked in drafting and executing a *get* to ameliorate the plight of the *agunah*.

B. The Requirement that the Scribe and Witnesses Be Personally Instructed by the Husband

The additional barrier to be surmounted in this case lies in the fact that not only had the husband failed to designate an agent for delivery of the *get*, but unlike the earlier case in which only the agent for delivery of the *get* had died, the husband had not issued a face-to-face directive to the scribe to write the instrument on his behalf. The rule, as recorded in *Shulhan Arukh*, *Even ha-Ezer* 120:4, is that the scribe and witnesses must hear directly from the husband that he instructs them to draft and sign the *get*.[36] That provision reflects the requirement that a bill of divorce be written specifically on behalf of a particular husband and a particular wife. The halakhic presumption is that the requisite intent cannot be evoked unless the scribe and the witnesses actually hear the voice of the husband.[37] In the case of a husband who has absconded without issuing such instructions, it is of course impossible for the scribe or the witnesses to hear those instructions from the husband.

In deflecting that objection, Rabbi Klatzkin relies upon a previous ruling of an earlier scholar, R. Israel Hapstein, popularly known as the *Maggid* of Koznitz (Kozienice) recorded in the latter's *Bet Yisra'el.* A young man, a native of Chmielnik, married and established residence in Staszow. A year later the husband left home, apparently to seek his fortune, and was not heard from for a period of twelve years. Some eight years after his departure, a contingent of Prussian soldiers were quartered in Jewish homes in Staszow for a period of time. A number of soldiers were quartered in the home of the wife and during their stay the soldiers became aware of the husband's disappearance. Some time later, one of the soldiers who was then stationed in Warsaw wrote that he had identified the husband as one of a group of prisoners under his supervision. The wife sent her brother to Warsaw to search for her husband but to no avail. Later, the same soldier wrote once again to inform the wife that her husband had escaped and crossed over to the foreign army.

Shortly afterwards foreign soldiers passed through Staszow and remained in that city for a period of time. One of the soldiers conversed with the townspeople in Yiddish, a phenomenon that aroused a measure of curiosity. Upon closer scrutiny, one of the townspeople recognized the Yiddish-speaking soldier as a friend of his youth and as none other than the missing husband. Subsequently, other people, including his wife, claimed to recognize him. When confronted, he admitted only that he was a former resident of the area. As a test, some of the townspeople pointed to various women and asked with regard to each one whether the woman was his wife. Each time the soldier answered in the negative. Finally, they brought the abandoned wife and asked the same question. The soldier averted his face and refused to converse further in Yiddish but inquired in a foreign language after the welfare of the woman's sister. The matter was reported to the foreign officer in command of the soldiers who ordered two of his soldiers to examine the man in question in order to ascertain whether he was circumcised. Those soldiers claimed that he was not. Nevertheless, the townspeople persisted in demanding that the gentleman reveal the truth. Finally, on *Shabbat, erev Shevu'ot* 5559, shortly before leaving the city, the soldier acknowledged his identity and gave assurances that, if his wife would follow him to the next encampment, he would execute a *get.*

Toward the end of that summer a letter addressed to the rabbi and officers of the community was received from the earlier-mentioned foreign officer. In that letter the officer identified the missing husband and described him as a "Jewish apostate." The officer indicated that he was

writing at the behest of the soldier who was seriously ill and feared that he would never return home. He further reported that the soldier had expressed a desire to execute a *get* in order to enable his wife to seek another husband and had requested the officer to write to the Jewish community of Staszow to that effect. Later in the winter a second letter arrived. The soldiers had again approached the officer to ask if he had received any news from Staszow and if the divorce had been executed. Accordingly, the officer again requested that, if the communal officials had not already done so, they arrange the divorce without delay and inform him that the request had been honored. The officer's letter was countersigned in Hebrew script by the husband and bore the Hebrew signature of a witness. The communal leaders to whom the letter was addressed responded both with a letter to the officer requesting him to arrange for the soldier to present himself before the nearest rabbi and with an enclosed open letter soliciting the assistance of the local Jewish community. Seven weeks later a reply was received from the officer reporting that the letter of instruction arrived too late to be acted upon because the soldier had been shot and had died of his wounds immediately thereafter.

Of course, were the officer's letter to have been accepted as sufficient proof of the husband's death, no further action would have been required. Indeed, that issue is addressed in *Bet Yisra'el* but, for reasons beyond the scope of this discussion, the testimony regarding the husband's death was found to be inadequate. Nevertheless, since the husband had no issue, the *Maggid* of Koznitz as well as a number of renowned rabbinic scholars with whom he corresponded and whose responses are included in *Bet Yisra'el*, did require that, in addition to the execution of a *get* in accordance with the husband's original instructions, the wife undergo *halizah* because of the possibility that the husband had indeed died.

The major issue addressed in *Bet Yisra'el* is whether the letter sent by the foreign captain and countersigned by the husband served as a valid appointment of an agent for execution of a *get*. The letter could serve as the basis for such authorization only if it might be construed as a memorial of prior oral designation of a scribe and witnesses by the husband and, in addition, if it is agreed that oral designation of a scribe and witnesses is valid even if such designation takes place out of their earshot or, in the alternative, if the signature of the husband might itself be construed as designation of the scribe and witnesses and it is agreed that written authorization is equivalent to oral designation.[38] If written

authorization is sufficient, it is because the reading of the letter and of the husband's signature by the scribe and witnesses is regarded as tantamount to the scribe and witnesses having heard the husband's oral designation. Also addressed by *Bet Yisra'el* is the evidentiary problem of the officer's probity as well as the authenticity of the letter and its appended signatures.

Rabbi Klatzkin cites *Bet Yisra'el* as precedent for the position that the scribe and witnesses can effectively perform their functions specifically on behalf of the husband (*le-shemo*) and wife (*le-shemah*) even if they do not actually hear the husband's command and applies that principle to instances of self-designation predicated upon the principle of *zakhin me-adam*. In point of fact, however, the thrust of *Bet Yisra'el*'s own responsum is that the act of writing is comparable to physical gesticulation. The Mishnah, *Gittin* 67b, declares that designation of a scribe and witnesses may validly be accomplished on the basis of shaking of the head and the like. In effect, the Mishnah categorizes such physical gestures as "body language." The author of *Bet Yisra'el* equates penning a signature with body language which, in turn, is tantamount to speech. Thus, *Bet Yisra'el* does not assert that the written word is equivalent to the oral word but that the act of writing is a form of body language manifesting intent.

A responsum authored by R. Pinchas ha-Levi Horowitz, renowned as the author of the *Hafla'ah*, is incorporated by the *Maggid* of Koznitz in his *Bet Yisra'el*. *Bet Yisra'el* relies heavily upon *Hafla'ah* as a preeminent authority who endorsed his ruling. However, an examination of *Hafla'ah*'s responsum reveals that *Hafla'ah* regards equation of writing with body language to be a matter of doubt. *Hafla'ah* also assumes that the husband did indeed designate a scribe and witnesses orally and that the letter merely memorialized the antecedent oral designation. The validity of oral designation not actually heard by the scribe and witnesses is categorized by *Hafla'ah* as a matter of doubt. Nevertheless, he concurs in the *Maggid* of Koznitz's permissive ruling on the basis of a *sefek sefeika*, or "double doubt," i.e., although neither position, *viz.*, neither equation of writing with body language nor the validity of oral designation not heard by the scribe and witnesses, can be accepted unequivocally, nevertheless, each of those positions is sufficiently authoritative so that, in combination, the two considerations can be relied upon in practice.

Neither the reasoning of *Bet Yisra'el* nor the reasoning of *Hafla'ah* is applicable to the thesis propounded by Rabbi Klatzkin. Moreover, it is striking that nowhere in the entire collection of responsa presented by

Bet Yisra'el, numbering well over one hundred pages, is there the slightest hint that the problem of the unfortunate woman, whose plight each of the respondents sought to alleviate, could be remedited by application of the principle of *zakhin me-adam*. To this writer, that absence is not a fallacious *argumentum ex silentio* but palpable evidence of rejection of that potential solution.

The question of whether the principle of *zakhin me-adam* fails as an expedient in facilitating execution of a *get* by reason of the absence of a direct command by the husband to the scribe ordinarily mandated in order to fulfill the requirement of *le-shemah* is closely related to the issue of *kitvu u-tenu*, i.e., "write and give," a procedure in which the husband authorizes others to designate a scribe and witnesses on his behalf. The procedure of *kitvu u-tenu* is relied upon by many authorities in situations in which the husband is unable or unwilling to appear personally before the *bet din*. Other authorities, including *Hazon Ish*, *Even ha-Ezer*, no. 85, rule that such a procedure should never be relied upon. Ramban, *Gittin* 66b, and those early-day authorities who adopt his position maintain that a procedure of this nature is unacceptable because of the absence of what, to borrow a term from another area of law, may be termed "privity" between the husband and those subject to his directions.

If the rule that a husband cannot authorize others to designate a scribe and witnesses on his behalf reflects an irrebuttable principle of Halakhah to the effect that the quintessential nature of *le-shemah* requires an antecedent auditory event, it is obvious that a *get* cannot be valid on the basis of *zakhin me-adam* by virtue of the fact that the requirement of *le-shemah* requires a direct command. If, however, as some scholars have argued, the problem lies in the mind-set of the scribe and witnesses who, in the absence of a personally received oral directive are presumed to be less then fully convinced of the determination of the husband to give effect to the *get*, that consideration assuredly does not pertain in situations of *zakhin me-adam*. The very concept of *zekhiyyah* is predicated upon the principle that "we are witnesses" (*anan sahadi*) to the fact that the effect accomplished is firmly and resolutely desired by the person on whose behalf the *get* is performed. Although the underlying rationale is not elucidated by those authorities, apparently both the *Maggid* of Koznitz and *Hafla'ah* assumed the presumption of the absence of *le-shemah* to be blanket and irrebuttable in nature whereas R. Eliyahu Klatzkin seems to have regarded the presumption to be empirical and psychological in nature and hence not applicable in instances of *zakhin me-adam*.

C. Rejection of *Zakhin me-Adam* in the Execution of a *Get*

Problems even more anguishing than those faced by Rabbi Klatzkin following World War I arose in the wake of World War II. In the post-World War II period the tragedy was not that of a limited numbers of soldiers missing in action but of countless individuals who disappeared during the upheavals of the Holocaust but whose death could not be established by credible evidence. As a result many women became *agunot*. A remedy for the surviving wives in the form of a *get* executed in reliance upon the principle of *zakhin me-adam*, with Rabbi Klatzkin's rulings following World War I serving as a precedent, would certainly have been an enticing solution. It was precisely such a proposal that prompted an examination of Rabbi Klatzkin's earlier-advanced thesis by R. Israel Minzberg, *She'eirit Yisra'el*, *Even ha-Ezer*, no. 8, sec. 3.

Rabbi Minzberg curtly dismisses Rabbi Klatzkin's responsum with the comment: "Begging his pardon, he has committed to writing foolish and vacuous words that are inappropriate [even] for a person who knows and is familiar only with the outline of the topic." In demonstrating what he considers to be the untenability of Rabbi Klatzkin's thesis, Rabbi Minzberg points to the halakhic provisions governing situations in which the husband may be compelled to divorce his wife. In such cases, the husband may be coerced by means of physical force, if necessary, until he signals his acquiescence to execution of a *get* by stating verbally, "I so wish" (*Rozeh ani*). All instances in which physical duress is available as a remedy involve situations in which the wife is relieved of all further marital obligations. Hence, in all such cases, religious divorce can only redound the benefit of the husband by relieving him of all further financial obligations and by making it possible for him to enter into marriage with another woman. If so, queries Rabbi Mintzbeg, why is it necessary to go through the unpleasant process of applying physical force in order to obtain the husband's consent rather than simply executing the divorce by operation of the principle of *zakhin me-adam*? At the very minimum, the requirement for oral acquiescence in the form of "*Rozeh ani*" should indicate that the principle of *zakhin me-adam* is not operative in the face of a the husband's previously announced unwillingness to divorce his wife. Moreover, Rabbi Minzberg endeavors to show that the husband's declaration "*Rozeh ani*" is required even in cases in which he has not previously voiced a lack of willingness to divorce his wife.

Absence of a doctrine of *zakhin me-adam* with regard to divorce may be inferred from other talmudic provisions as well. As stated by the Gemara, *Gittin* 29a, the general rule is that an agent cannot appoint a sub-agent for execution of a *get*. The Gemara records a controversy with regard to whether an agent may designate a sub-agent with the specific authorization of the husband. The Gemara, *Gittin* 66b, records a further controversy with regard to whether a *bet din* that has been authorized to execute a *get* may delegate that authority. The normative rule is that such authority can never be delegated. Putting aside the operation of rules of agency, in appointing an agent for the purpose of executing a *get*, the husband has certainly evidenced his desire to be divorced from his wife. If so, why should others not have capacity to act on the husband's behalf on the basis of the principle of *zakhin me-adam*? The clear implication is that the principle of *zakhin me-adam* is of no avail in giving effect to an otherwise invalid divorce.

Rabbi Klatzkin, *Devarim Ahadim*, sec. 113, himself raises a similar objection. In the case of the classic *agunah*, *viz.*, a woman whose husband is missing and presumed dead, the Sages relaxed the rules of evidence and permitted remarriage on the basis of a single witness who testifies to the husband's demise. Why, questions Rabbi Klatzkin, did not the Sages simply advise execution of a *get* on the wife's behalf on the basis of *zakhin me-adam*? Moreover, it may be added, if, as Rabbi Klatzkin maintains, absence for an extended period of time effectively extinguishes the husband's marital privileges, invocation of the principle of *zakhin me-adam* in executing a *get* would eliminate the need for even a single witness and would effectively free many additional *agunot*. Rabbi Klatzkin responds that such a procedure would not be possible until such time as the husband has forfeited his marital prerogatives which, according to Rabbi Klatzkin, does not occur unless he is absent for a period of five years. The Sages, he claims, were concerned for the woman's welfare and did not want to compel her to wait such a long period of time. Rabbi Klatzkin also implies that the Sages did not wish the wife to be prohibited to a *kohen* as a divorcée. Moreover, Rabbi Klatzkin seems to suggest that the Sages feared that general and widespread reliance upon the expedient of *zakhin me-adam* in the case of a missing husband might lead to abuse of the principle by reliance upon *zakhin me-adam* in situations in which invocation of that principle is entirely inappropriate. Hence the Sages sought ways and means to establish a basis to substantiate the death of the husband in order to enable the wife to remarry as a widow.

Rabbi Minzberg further underscores the fact that the opinion of the *Maggid* of Koznitz does not serve as precedent for Rabbi Klatzkin's ruling. The situation addressed by the *Maggid* of Koznitz involved an apostate who, according to some authorities,[39] may be compelled to divorce his wife, and with whom, according to all authorities, continued marital relations are forbidden[40] and, moreover, in that instance, as certified by the military officer and evidenced by the husband's own signature, the husband orally requested that the officials of the Jewish community execute a *get* on his behalf.

In his *Dvar Halakhah*, sec. 93, Rabbi Klatzkin reports that he was consulted by the rabbi of Zamosc with regard to a woman whose husband had been conscripted at the beginning of World War I and who had not been heard from since that time. Before his induction into the army, the husband designated a scribe and witnesses to draft a *get* as well as an agent to deliver the *get* to his wife. Unfortunately, the agent died during the intervening period. Rabbi Klatzkin ruled that, in light of the husband's expressed desire to divorce his wife, a substitute agent could be empowered to act on behalf of the husband by virtue of the principle of *zekhiyyah*. In his *D'var Halakhah*, *milu'im*, no. 122, Rabbi Klatzkin presents a responsum authored by R. Meir Arak concurring in his ruling. Even so, Rabbi Klatzkin was willing to rely upon the sources that he cites in permitting execution of a *get* solely because of the existence of circumstantial evidence indicating that the husband had already died. Although the circumstantial evidence was not sufficiently strong to establish capacity to remarry as a widow and Rabbi Klatzkin was not willing to rely upon the principle of *zekhiyyah* in and of itself in order to validate a *get*, he was willing to permit remarriage on the basis of both factors in combination.

One of the sources upon which Rabbi Klatzkin relies is *Teshuvot Hatam Sofer*, *Even ha-Ezer*, I, no. 11 and *Even ha-Ezer*, II, no. 43. As noted earlier, in instances in which a woman becomes mentally incompetent and cannot be divorced, the edict of Rabbenu Gershom banning polygamy is suspended upon issuance of a dispensation signed by one hundred rabbinic authorities. In such cases, the procedure is to draft a *get* and to deposit it with an agent with instructions to deliver the *get* to the wife when she regains the requisite mental capacity. But since the husband could not himself divorce his wife because of her lack of mental capacity, how can he validly appoint an agent to do so even at some future time? *Hatam Sofer* resolves the problem by postulating that the "agent" does not act in the guise of an agent governed by rules of

agency. Rather, an attempt to appoint an agent, even if, in actuality, the appointment fails to establish agency because of some technical deficiency in the designation, is nevertheless conclusive evidence of the principal's desire. Consequently, argues *Hatam Sofer*, the designated individual may deliver the *get* to the wife upon her recovery by virtue of the principle of *zakhin me-adam*.

Rabbi Minzberg writes that application of *Hatam Sofer*'s line of reasoning is limited to circumstances in which it is certain that the divorce remains a benefit to the husband at the time of its execution. Otherwise, evidence that husband desired the *get* at an earlier time is not evidence that he continues to desire a divorce. Accordingly, *Hatam Sofer* himself declares that the agent may deliver the *get* to the wife upon her recovery only if the husband has remarried in the interim. In such cases it is certain that the *get* remains a benefit for the husband because, absent the *get*, upon recovery of his first wife, the husband, in remaining the consort of a second wife, is in violation of the edict promulgated by Rabbenu Gershom banning polygamy.[41] In all other cases, argues Rabbi Minzberg, there exists the definite possibility that, even if at one time the husband indicated a desire for divorce, he may have subsequently experienced a change of heart. If that did indeed occur, the *get* is no longer a benefit and cannot be regarded as valid on the basis of *zakhin me-adam*.

Rabbi Minzberg reports that Rabbi Klatzkin himself reconsidered and rejected his earlier rulings regarding the *agunah* issue and that, subsequent to his emigration to *Erez Yisra'el*, Rabbi Klatzkin requested that Rabbi Minzberg compose and publicize a responsum rebutting those rulings in order that they not be relied upon in future situations.

D. Spiritual Benefit as an Absolute Benefit

It has been argued by some that fulfillment of a halakhic obligation represents an absolute benefit and hence the principle of *zekhiyyah* can be invoked in such cases as a matter of course. The notion that spiritual benefit arising from fulfilling a halakhic obligation to execute a *get* in and of itself constitutes a benefit of a magnitude that renders the principle of *zekhiyyah* operative is asserted in a ruling recorded in *Teshuvot R. Eliyahu Mizrahi* (*Teshuvot ha-Re'em*), no. 87. The problem addressed in that responsum concerns a woman whose husband became an apostate. R. Eliyahu Mizrachi rules that a *get* may be accepted an her behalf even though there is no indication that she actually wishes to be divorced. Indeed, *zekhiyyah* is operative despite the talmudic presumption of "*Tav le-meitav tan du mi-le-meitav armelu*—Better to dwell as

two than to dwell alone." (*Bava Kamma* 110b). *Teshuvot ha-Re'em* declares that the divorce is a *zekhut* for the wife of an apostate in that it precludes the possibility of prohibited cohabitation with an apostate, who is treated as a gentile for such purposes, and also greatly diminishes the likelihood that the woman will be enticed to commit other transgressions. *Teshuvot ha-Re'em* regards those benefits to be of utmost significance and to constitute an "absolute benefit" in the sense that, compared to that benefit, the loss of any incidental mundane benefit she may derive from the marriage pales into insignificance. R. Eliyahu Mizrachi maintains that, in such situations, the principle of *zakhin le-adam* is applicable even if the wife refuses a *get* and professes a desire to remain married to the apostate.

In support of that conclusion, R. Eliyahu Mizrachi cites the comment of Rambam, *Hilkhot Geirushin* 2:20, explaining why a *get* executed under duress at the command of the *bet din* is valid. In certain limited circumstances, the *bet din* may, if necessary, compel a divorce by beating the husband, if necessary, until he declares, "*Rozeh ani* – I wish it." The conceptual problem is obvious: If, in the enumerated circumstances, the husband's voluntary acquiescence is not needed, why must he declare "*Rozeh ani*?" If, on the other hand, even in such circumstances the *get* must be the product of the husband's free will, how does a declaration made under physical duress satisfy that requirement? Rambam explains that every Jew, in his innermost being, wishes to do as the Torah commands. At times, however, he may fail to do so because his "evil inclination" gains mastery over him. The evil inclination is concerned only with sensual and mundane pleasure and is quite prepared to renounce such pleasure if the cost is a disproportionate degree of pain. In effect, pleasure and pain are antagonistic vector forces with the result that pain of a sufficient degree causes pleasure to dissipate. Thus, when a person is beaten to the point that his evil inclination is neutralized and he signifies his assent, it is the person's unimpeded "inner will" that is asserting itself. Accordingly, a *get* executed under such circumstances is a product of the husband's free will. Similarly, concludes R. Eliyahu Mizrachi, in the case of a woman married to an apostate, since separation from her husband is demanded by Halakhah, it is certainly a benefit for her to be divorced in order to be preserved from transgression.

R. David ha-Kohen of Corfu, *Teshuvot Redakh*, *bayit 9*, *heder* 12, raises an obvious objection to the comparison of the situation of the wife of an apostate to that of a recalcitrant husband. In the latter case, Halakhah demands that the husband declare "*Rozeh ani*," i.e., the per-

son's "evil inclination" must also signify acquiescence and, until such a mental state is reached, the *get* cannot be executed. In the case of a third party who accepts a *get* on behalf of the wife who wishes to remain married to her apostate husband there is no declaration of "*Rozeh ani*" and hence there is no evidence of the requisite mental state. Quite to the contrary of the conclusion of *Teshuvot ha-Re'em*, the requirement for a declaration of "*Rozeh ani*" establishes that "spiritual benefit" does not in and of itself constitute an absolute benefit; the requirement of "*Rozeh ani*" demonstrates that in its absence the mundane counterbenefit diminishes the spiritual benefit at least to the point that the principle of *zekhiyyah* is rendered inapplicable.

A Sephardic scholar, R. Moshe Raphael Bula, *Zekhut Mosheh*, no. 7, explains that *Teshuvot ha-Re'em* espouses the view of Rashba, *Kiddushin* 23a, who maintains that a third party may accept a bill of manumission on behalf of a slave even in face of the slave's announced refusal to be emancipated. Rashba maintains that acquiring both the status of a full-fledged Jew with regard to *mizvot* and the right to marry a Jewess constitutes an "absolute benefit" and is regarded in that light by all people. Hence the slave's protestations to the contrary are to be dismissed as an aberration. To this Rashba adds the observation that, were the slave physically present, his master could present him with the bill of manumission even against his will. Therefore, since emancipation is deemed an absolute benefit, other persons can similarly act on his behalf even against his desire. By the same token, maintains R. Eliyahu Mizrachi, since a woman can be divorced by delivery of a *get* directly to her even against her will, others can similarly act on her behalf in circumstances in which divorce constitutes an absolute benefit.

E. Consent of the Husband as an Absolute Requirement

Quite obviously, even *Zekhut Mosheh*'s elucidation of R. Eliyahu Mizrachi's line of reasoning does not serve to establish that *Teshuvot ha-Re'em* may be considered an authoritative precedent for executing a *get* on behalf of a husband on the basis of the principle of *zakhin me-adam*. It is abundantly clear that *Zekhut Mosheh*'s citation of Rashba in demonstrating that *zekhiyyah* is operative even against the announced wishes of the person "benefitted" thereby serves to demonstrate that *zekhiyyah* can be invoked contrary to the desire of the beneficiary only if the act in question is one that can in some manner be carried out without the beneficiary's consent. That is never the case with regard to a husband's role in execution of a *get*. Even in situations in which coercion of the husband is

halakhically mandated, the declaration "*Rozeh ani*" remains a requirement. Hence a divorce is never permissible on the basis of *zakhin me-adam* when such divorce is contrary to the husband's announced wishes.

Methodologically, it is readily demonstrable that any argument that might be formulated to establish the possibility of a divorce without the actual consent of the husband is doomed to failure. *Tosafot*, *Zevahim* 2a, observes that there must always be active intent to write a bill of divorce *le-shemah* because there is no situation whatsoever in which the wife is "*le-geirushin omedet*," i.e., in which dissolution of the relationship must be assumed as a foregone conclusion and hence the marriage is, as it were, "programmed" for divorce. That statement is problematic because there are circumstances in which a wife may demand a *get* and hence, in such situations, divorce is assured by virtue of prescription of law. Hence, at least in such cases, it would appear that *le-shemah* should not be a requirement. R. Akiva Eger, in a responsum appended to his *Drush ve-Hiddush*, vol. I,[42] observes that, even in instances in which the husband can be compelled to divorce his wife, the wife enjoys the option of foregoing that prerogative and hence, even in such circumstances, divorce is not a foregone conclusion.

However, the case of the wife of an apostate presents an additional complexity that challenges the statement of *Tosafot*. The identical complexity exists with regard to any other marriage in which the couple is not permitted to live as man and wife. The wife is not entitled to waive her "right" to a divorce and, indeed, both parties may be compelled by the *bet din* to cooperate in the execution of a *get*. Thus it would appear that, in instances in which cohabitation between the marriage partners is forbidden, the wife is indeed *le-geirushin omedet* and the *get* need not be explicitly drafted *le-shemah*. Yet, *Tosafot* declare that the *get* must be explicitly drafted *le-shemah* in all cases without exception. The explanation must be that, when the parties do not desire a *get* and duress must be applied by the *bet din* to effect the *get*, the marriage *qua* marriage cannot be categorized as "*omed le-geirushin*," i.e., dissolution of the marriage cannot be regarded as foregone and inevitable. If, however, acquiescence of the husband is redundant because of the feasibility of a third party acting on his behalf by operation of the principle of *zekhiyyah*, every such marriage would constitute an instance in which the woman is "about to be divorced" and positive intent of *le-shemah* in writing the bill of divorce would be unnecessary. But, since such intent is always required, it must be concluded that there is never a case in which actual consent of the husband is not required.

The question of executing a *get* without the consent or knowledge of the husband on the basis of the principle of *zakhin me-adam* arose again in 1957. The case involved four Yemenite women whose husbands became apostates to Islam and sought to force their wives to convert as well. The women and their children succeeded in escaping to Aden and from there made their way to Petach Tikvah. Since there was no way to obtain *gittin* from their husbands who remained in Yemen, the women became *agunot*. The then Chief Rabbi of Israel, Rabbi Isaac ha-Levi Herzog, sought a basis upon which to permit the women to remarry and sent his written examination of the issues to Rabbi Yechiel Ya'akov Weinberg with a request for the latter's response. That exchange of correspondence is published in Rabbi Weinberg's *Seridei Esh*, III, no. 25.

In the course of his discussion, Rabbi Herzog refers to the permissive view of Rabbi Klatzkin. He further writes that some time earlier a *bet din* in Italy had ruled that a *get* might be issued on behalf of a recalcitrant husband who refused to heed a decision of the *bet din* ordering him to execute a *get*. Rabbi Herzog reports that he sent a telegram to the Italian authorities admonishing them that should they persevere in carrying out their intention to issue such a *get*, any subsequent issue of the woman would be *mamzerim*.

Rabbi Weinberg dismisses the notion of invoking the principle of *zakhin me-adam* for this purpose and explicitly rejects the earlier-cited thesis of *Zekhut Mosheh* to the effect that spiritual benefit is regarded as an absolute benefit. Rabbi Weinberg cites the statement of the Gemara, *Ketubot* 11a, declaring that conversion to Judaism on the part of an adult who has already experienced the "taste of sin" is not an unmitigated benefit. The spiritual benefit attendant upon conversion is clearly not regarded as necessarily constituting an absolute benefit. Similarly, argues Rabbi Weinberg, the spiritual benefit that would accrue to the husband in alleviating the plight of an *agunah* by freeing her from the marital bonds does not represent an unmitigated benefit to the husband. Although, in the case of an apostate who abandoned his wife, divorce is in no way detrimental to the husband, it nevertheless does not represent a benefit in the positive sense. The principle of *zakhin me-adam*, contends Rabbi Weinberg, cannot be invoked other than in instances of a positive benefit that is unmitigated in nature.

In an addendum to his responsum, Rabbi Weinberg presents some support for Rabbi Klatzkin's novel view on the basis of the comments of *Petah ha-Bayit*, no. 21, sec. 6, who similarly maintains that a *get* can be *delivered* to a wife without consent of the husband in situations in which

zakhin me-adam is applicable. However, Rabbi Weinberg notes that *Petah ha-Bayit* makes no such statement with regard to the *writing* of the *get*, possibly because of the many authorities who maintain that the scribe must hear the directive to draft a *get* directly from the husband.

Rabbi Weinberg offers his own explanation of the position of the early-day authorities who require that the scribe hear the husband's directions to draft the *get* personally from the latter's mouth because of the requirement that the *get* be written *le-shemah*. Although the *get* must be written on behalf of a particular husband and for the specific purpose of divorcing his wife, it is far from clear why this cannot be accomplished without the scribe actually hearing the husband's directive. Rabbi Weinberg explains that since, in the normal course of events, a husband does not divorce his wife, a scribe is not ordinarily in a position to draft a *get* for purposes of divorce, i.e., such a document cannot be deemed to have been written specifically for the requisite purpose. It is only the declaration of intent on the part of the husband that renders the woman a candidate for divorce which, in turn, makes it possible for the scribe to write the bill of divorce *le-shemah*. Rabbi Weinberg maintains that, unless he hears directly from the husband or his agent, the scribe is uncertain with regard to the status of the document that he is writing because, although the husband may have announced his intention to others, he may nevertheless have changed his mind. A *get* written with that uncertainty, claims Rabbi Weinberg, is not written *le-shemah*.[43]

However, contends Rabbi Weinberg, if the *get* represents an unmitigated benefit for the husband there is no reason to suspect that he may have undergone a change of heart. Accordingly, maintains Rabbi Weinberg, in situations in which the *get* is an unmitigated benefit for the husband, all authorities would agree that it can be drafted *le-shemah* even if the scribe does not receive instructions directly from the husband.

IV. CONCLUSION

The rulings of the *Maggid* of Koznitz, R. Meir Arak and R. Eliyahu Klatzkin, whatever their merits, are not at all germane to the problem of the modern-day *agunah* and do not serve as precedent for the actions of those individuals who execute *gittin* on behalf of recalcitrant husbands. Those rulings provide no basis for a *get* executed on the basis of constructive agency (*get zikkuy*) even in the relatively rare situations in which the husband might legitimately be compelled by means of

physical force to authorize the execution of a *get*. A declaration of "*Rozeh ani*" on the part of the husband remains the *sine qua non* of the validity of any divorce executed in conformity with Jewish law. Each of the cited rulings of the *Maggid* of Koznitz, R. Meir Arak and R. Eliyahu Klatzkin involves a situation in which the husband, in one way or another, had signified his desire for the execution of a *get*. The issue in each of the cases was whether the existence of *gilluy da'at*, or signification of desire to execute a *get*, provided sufficient grounds to proceed with the execution of a *get* in the absence of the usual form of authorization. In none of those sources is there the slightest hint that signification of assent on the part of the husband may be dispensed with, much less so is there any intimation that a *get* can be executed in face of the husband's recalcitrance. Small wonder then that no recognized rabbinic authority has endorsed the expedient of *get zikkuy* as a remedy for the problem of the recalcitrant husband and not a few authorities have vociferously denounced such action as a charade that can only lead to increased instances of *mamzerut*.

NOTES

1. Indeed, this is essentially how R. Chaim Soloveichik categorizes *zekhiyyah* according to those authorities who do not regard *zekhiyyah* as a simple form of agency. See infra, note 21.
2. See Arthur L. Corbin, "Contract for the Benefit of Third Persons," *Yale Law Journal*, vol. 27, no. 8 (June, 1918), pp. 1008-1029.
3. 83 Eng. Rep. 523 (K.B. 1677).
4. *Id.*, at 523, 524.
5. 121 Eng. Rep. 762, 764 (Q.B. 1861)(Crompton, J.).
6. [1915] App. Cas. 847, 853 (H.L. 1915) (Lord Haldane).
7. [1968] App. Cas. 58 (H.L. 1867) (Lord Reid).
8. See E. Allan Farnsworth, *Contracts*, 3rd ed. (New York, 1999), p. 675, note 8.
9. 4 Com. 432 (N.Y. 1825), *aff'd*, 9 Com. 639 (N.Y. 1827).
10. 20 N.Y. 268 (1859). For an analysis of this case see Anthony Jon Waters, "The Property in the Promise: A Study of the Third Part Beneficiary Rule," *Harvard Law Review*, vol. 98, no. 6, (April, 1985), pp. 1109-1210.
11. For a study of the impact and influence of *Lawrence* see M.H. Hoefflich and E. Perelmutter, "The Anatomy of a Leading Case: *Lawrence v. Fox* in the Courts, the Casebooks and the Commentaries," *University of Michigan Journal of Law Reform*, vol. 21, no. 4 (Summer, 1988), pp. 721-744.
12. *Choate, Hall & Stewart v. SCA Serv. Inc.*, 378 Mass. 535, 392 N.E.2d 1045 (Mass. 1979).

13. *Fourth Ocean Putnam Corp v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 495 N.Y.S.2d 1, 485 N.E.2d 208 (N.Y. 1985).
14. The absence of a requirement for consideration in order to consummate transfer of title is evidenced by the fact that title may be transferred by means of other forms of *kinyan* as well, e.g., chattel may be transferred by "pulling" (*meshikhah*) or "lifting" (*hagbahah*) etc., and real property may be transferred by deed or *hazakah* (e.g., plowing a furrow in a field, the antecedent of livery of seisen in common law). Even *suddar* (delivery of a "kerchief") does not function as a symbolic "peppercorn" consideration since, according to one opinion recorded in the Gemara, the *suddar* is delivered by the person who alienates title rather than by the person coming into possession. Cf., Asher Gulak, *Yesodei ha-Mishpat ha-Ivri* (Berlin, 1922), II, 40ff. and Menachem Elon, "Contract," *Encyclopedia Judaica* (Jerusalem, 1992), V, 924f. Of course, *kesef*, i.e., payment of money, serves as a *kinyan* with regard to real property and, according to one opinion in the Gemara, for chattel as well.
15. For a discussion of the ramifications of this interpretive analysis of Numbers 34:18 see *Encyclopedia Talmudit*, XII (Jerusalem, 5727), 135-136.
16. For amplification of this point insofar as apportionment of the Land of Israel is concerned see *Encyclopedia Talmudit*, *ibid.*, p. 136 and p. 135, note 12.
17. For a list of authorities who subscribe to this view see *ibid.*, p. 136, note 13.
18. See *ibid.*, note 14.
19. See *ibid.*, note 17, p. 137 and *ibid.*, note 26. This thesis was developed by, and is primarily associated with, *Kezot he-Hoshen* 105:1.
20. See *ibid.*, p. 136, note 14.
21. See *ibid.*, p. 137 and sources cited *ibid.*, notes 18 and 24. *Kezot he-Hoshen* 105:1 and *Hiddushei ha-Rim, Gittin* 11b, categorize *zekhiyyah* according to those authorities as being in the nature of a "hand" (*mi-ta'am yad*), i.e. the benefactor's hand becomes, in effect, an extension of the hand of the beneficiary. R. Chaim Soloveichik, *Hiddushei ha-Grah al ha-Shas* (Jerusalem, 5729), p. 191, asserts that even according to these authorities, *zekhiyyah* is, in effect, a novel form of agency that is available even to minors who do not have capacity to appoint an agent. The position of R. Chaim is cited and discussed by R. Baruch Ber Leibowitz, *Birkat Sh'muel, Kiddushin*, nos. 10 and 15. Cf. *Imrei Binah, Hilkhot Gevi'at Hov*, no. 29, sec. 4 and Hiddushei R. Shimon Shkop, Gittin, no. 4.
22. See R. Chaim Halberstam, *Teshuvot Divrei Hayyim*, I, *Even ha-Ezer*, no. 87, who asserts that this notion of *zekhiyyah* is not at all applicable to divorce since there is no financial interest involved "for the wife is not [the chattel] of the husband." According to *Divrei Hayyim*, *zekhiyyah*, to be relevant with regard to divorce, must be in the guise of agency.
23. For citation of conflicting authorities with regard to the efficacy of *zekhiyyah* in situations of immediate benefit but of consequential results that are not beneficial see *Sedei Hemed, Kellalim, ma'arekhet zayin*, sec. 22 and *Encyclopedia Talmudit*, XII, 139, notes 40 and 41.

24. See *Encyclopedia Talmudit*, XII, 158 and sources cited *ibid.*, note 231.
25. Rabbenu Nissim, *Gittin*, 62b, cited by *Shulhan Arukh*, *Even ha-Ezer* 140:5, as "some say."
26. See sources cited in *Encyclopedia Talmudit*, XII, 162, notes 278 and 280.
27. For other situations of impending levirate obligation in which divorce may be an unmitigated benefit see *Encyclopedia Talmudit*, XII, 163.
28. For additional sources reflecting this controversy see *Encyclopedia Talmudit*, XII, 165f. See also sources cited in *Ozar ha-Poskim*, I (Jerusalem, 5707), *Even ha-Ezer* 1:10, sec. 73:2.
29. For a discussion of the purpose served by this practice and a survey of the authorities who required the procedure as well as of those who challenged the validity of such a *get* see *Ozar ha-Poskim*, I, *Even ha-Ezer* 1:10, sec. 72:30-35. See also, *infra*, note 40 and accompanying text.
30. Nevertheless, *Hatam Sofer*, *loc. cit.*, asserts that, the principle of *zekhiyyah* notwithstanding, a new bill of divorce must be drafted by the agent subsequent to the recovery of the wife because of a completely different consideration.
31. See, for example, *Zikhron Yonatan*, *Even ha-Ezer*, no. 2, sec. 57; *Hiddushei ha-Rim*, *Even ha-Ezer* 121; *Teshuvot Noda ba-She'arim*, no. 9; and *Teshuvot Roshi ba-Shamayim*, no. 16.
32. See *Encyclopedia Talmudit*, XII, 149-150 and accompanying notes as well as p. 167, notes 326 and 327.
33. Assuming that the agent need not personally hear the husband appointing him, that problem might have been obviated by naming multiple agents. See R. Malki'el Zvi Tennenbaum, *Teshuvot Divrei Malki'el*, IV, no. 156, who, in the case of soldiers conscripted in the army, advises appointing all inhabitants of a city as agents. R. Shiloh Rafael, *Torah she-be-'al Peh*, XI (5729), 128, reports that during World War II it was the practice of the Chief Rabbinate of Palestine to have soldiers designate "each of the residents of Jerusalem" as an agent. See, however, *infra*, pp. 56-60.
34. A letter authored by R. Yosef Shlomoh Shabbetai Horowitz, the chief rabbi of Zamosc, is also included in *Dvar Halakhah*. Rabbi Horowitz does not refer to the herein cited position of Rabbi Isaac Elchanan Spektor who maintains that designation of an agent is tantamount to disavowal of the advantages available through operation of *zakhin me-adam* but notes that, in the case presented for his consideration, the husband did not designate a specific agent, or even chose to avail himself of the expedient of agency, on his own accord but was simply acquiescing in the instructions of the rabbi. Hence, he argues, there is no reason to assume that the husband desired a particular agent to act on his behalf to the exclusion of others who might act in reliance upon the principle of *zakhin me-adam*.
35. This position is reiterated by Rabbi Klatzkin and applied in yet another case in his *Devarim Ahadim*, sec. 44.
36. For a survey of the various considerations involved and the differing opinions with regard to the validity of a *get* executed other than in this manner see *Encyclopedia Talmudit*, V (Jerusalem, 5753), 570-574.
37. For a fuller discussion of the rationale underlying this requirement see *infra*, p. 68-69.
38. That view is reiterated by R. Eliyahu Klatzkin in his *Devarim Ahadim*, sec. 44, in a discussion of another case in which there was no oral designation.

39. See Rema, *Even ha-Ezer* 154:1.
40. See R. Abraham of Regensberg cited in *Mordekhai, Yevamot*, sec. 108, and *Terumat ha-Deshen*, no. 219; see also *Matnot Kehunah, Va-Yikra Rabbah* 2:1 and *Shir-ha Shirim Rabbah* 4:20. Cf., however, *Mordekhai, Yevamot*, sec. 109; *Teshuvot Maharik*, no. 100, *Teshuvot Maharam Alshakar*, no. 43; and *Teshuvot Bet Yosef* (Jerusalem, 5720), *Dinei Gittin ve- Geirushin*, no. 14.
41. This is indeed the position of R. Menachem Mendel Krochmal, *Teshuvot Zemah Zedek*, no. 67, followed by *Bet Shmu'el, Even ha-Ezer* 1:23. There is however a considerable body of opinion that maintains that the husband, even without formally divorcing his first wife, may continue the second marital relationship without violating the edict of Rabbenu Gershom. See sources cited by *Pithei Teshuvah, Even ha-Ezer* 1:16 and *Ozar ha-Poskim, Even ha-Ezer* 1:10, sec. 72:17. Indeed, *Teshuvot R. Akiva Eger, Mahadura Tinyana*, no. 44, and *Divrei Yissaskhar*, no. 126, suggest that, if the first wife recovers, the husband may perhaps be permitted to live in a polygamous relationship with both wives. For a discussion of the conflicting opinions regarding the husband's obligation to divorce the first wife upon her recovery and of her obligation to accept a *get* see *Ozar ha-Poskim* 1:10, secs. 72:14 and 72:18.
42. See *Drush ve-Hiddush R. Akiva Eger* (Brooklyn, 5709), I, 182, s.v. *amnam*.
43. See also the explanations advanced by R. Eliezer Menachem Mann Shach, *Avi Ezri, Mahadura Kamma, Hilkhot Ishut* 3:18 and *Mahadura Hamisha'ah, Hilkhot Geirushin* 7:22; and R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 166.