

J. Jean Ajdler
33 Bellariastrasse
8002 Zurich
Switzerland

Letter to the editor.

Concerns: Conditional marriage to prevent suffering.

1. Introduction

I was always surprised by the fact that the practice of conditional marriage in order to avoid problems of Igun because of Halitzah refusal, which had been so much discussed and so frequent during the history from the fifteenth century until the nineteenth century, had apparently disappeared. I had ascribed this reality to the medical improvements and to the acculturation of the Jewish society, which diminish the frequency of the occurrence of the problem. Nevertheless the Great War 1940-1945 and the different wars in Israel have certainly created problems of Igun because some women were waiting for the delivery of a Halitzah from an unique minor brother, an unique absent brother whose fate was indefinite, an unique brother made prisoner, whose fate was undetermined. Furthermore there still remains, despite the medical progress, the possibility of a unique brother incapable of giving a Halitzah and finally there is the case of one or several brothers blackmailing the widow and requiring a great amount in order to perform the Halitzah. In fact the problem of the Halitzah was still raised during the twentieth century: to the best of my knowledge and without restriction,

1. Rabbi Eliahu Bekhor Hazan (1848 – 1908) in responsa Ta'aloumot Lev III (Alexandria 1903) n° 48 about the situation when the localization of the brother "yavam" is unknown, suggested, if two famous rabbis endorsed the project, to rely on the lenient rulings of Rabbi Akiba Eger, Ezekhiel Landau and Moses Sofer, in problematic countries, in order to avoid suffering and transgression.
2. Rabbi David Tsvi Hofman (1843 - 1921) in responsa Melamed le Hoil III (1926) n° 51, addressed to the chief rabbi of Belgrade, who wanted to adopt a general condition according which, in any case when a widow would fall to her brother in law (the yavam), the marriage would not have been contracted, was not ready to accept a general rule, which would completely suppress the Halitzah. However, if the most important rabbis of the time agree, he would support a rule allowing those who want it, to give conditional kiddushin. The condition would be the following: if the husband dies without descendants and the brother refuses to give the Halitzah within a year and the rabbi of the community sets down in writing a certificate that he did not succeed to induce the yavam to give a Halitzah within this delay, then, and only then, would the kiddushin be retroactively nullified. The procedure should be optimal, inspired by the procedure of Noda bi-yehuda and Hatam Sofer. Therefore the condition should imperatively be repeated before the seclusion (yihud) even if according to the present rules of etiquette, it seems difficult to repeat the conditions at the beginning of the wedding night. His master, Rabbi Moses Schik (1807 – 1879), had already accepted this slight adaptation.
3. In Alger, they used the following additional clause, printed in the Ketubah formulary, under the signatories of the actual Ketubah:

אנחנו עדים חתומים מטה, בפנינו נעשו סדורי קדושי האשה על ידי בעלה, הנזכרים למעלה ועל זה התנאי ששמענו מפיו: אם אשאר אחר זרע של קיימא, קדושין אלו יהיו קדושין ואם לא אשאר אחר זרע של קיימא, קדושין אלו יהיו בטלין מעיקרן ואם אשאר אחר זרע של קיימא, קדושין אלו יהיו קדושין וחתמנו בזמן ובמקום הנזכרים לפני ככתובה זו.

The witnesses of the Ketubah, were signing again under this clause.

These arrangements seem to have been valid in Algeria, after the war under the chief rabbi M. Eisenbath. It was probably a reaction to the widespread acute and insolvable problem of blackmailing. The solution was radical and it was exactly what Rabbi David Tsvi Hofman wanted to avoid. The solution suppressed any Halitzah and even affected marriages which were not concerned at all, when the wife or the yavam predecease the husband. It was the price of the simplicity of the condition.

4. Finally I want to mention the publication in 1966 by Mossad ha Rav Kook of the book "T'nai be nissuin ou be get" by Rabbi Eliezer Berkovitz (1908 – 1992). Despite the polemic created by Rabbi Menahem Casher (1895 – 1983) and his effort to prevent the publication of the book, it represents the best and most comprehensive study ever written on the whole subject. Of special interest for the present paper: pp. 25 – 51.

2. The paper.

1. In view of the elements of the introduction, it seems very difficult to imagine that the proeminent rabbis consulted by the family and their counsellors could only deplore the absence of any solution. It rather seems that it was a political position.
2. Although I have no formal proof, it seems to me that the marriage of a groom having a unique and very young brother was also a not unknown problem and its solution by the same principle of a conditional marriage was familiar in the past. The main merit of Rabbi Avital was to accept performing this conditional marriage in a hostile rabbinic entourage.
3. As we already saw, the repetition of the clause before the beginning of the wedding night in addition to its reading before the first seclusion after Nissuin, is redundant. Rabbi Moshe Schik and Rabbi Hofmann agreed to renounce it in order to observe the rules of etiquette.
4. Rabbi Moshe Sofer, in justifying the principle of this conditional marriage wrote in Responsa Hatam Sofer, Even ha Ezer II n°68:

...שזה שייך בחשש נדרים ומומים וכיוצא בו. אבל הכא שכל עיקרה לא באתה אלא להתנות להציל עצמה מזיקה, למאי ניהוש לדברים שאין הדעת סובלתן. ומכל מקום לחומרא בעלמא אנו אומרים ומפרשים בשעת התנאי שיהיו כל הבעילות בעילת זנות בביטול התנאי, שאין כאן בית מיחוש כלל.

Hatam Sofer accepted thus that the woman will never renounce the condition and therefore all the precautions are superfluous. The groom has not the capacity to denounce the clause (beside the opinion of Noda bi-Yehuda, see the complementary opinions of Rabad and Rashba in Kessef Mishneh and Lehem Mishneh on Rambam, Ishut 7 ; 23)¹. Even if he had the capacity, he could not marry definitively his spouse by intercourse because this must happen before witnesses duly appointed to this effect. Therefore the oath that we let the groom take by security (Leravha de milta) is in fact a redundant and problematic oath. Indeed all the idea that he could marry her definitively through intercourse and so nullify and bypass the initial conditions is pure phantasm. I suppose that Rav Amital emulated the procedure and the contract of Hatam Sofer as close as possible in order to avoid any criticism of his possible opponents.

5. The complete Shtar p. 253.

I did not grasp the interest of this chapter as we had already a detailed description of the procedure. I had thought that the authors were adding in annex the translation of

¹ This reference was not mentioned by any classical author in this discussion.

the original shtar as it appears in Hatam Sofer I ; 111. But this is not the case as the condition 5 has been adapted to the present case.

By the way, the original shtar of Hatam Sofer would have given a much better protection to the wife, until effective Halizah. Indeed the birth of child was not yet a complete guarantee

6. Shevua hamurah al daat rabim (page 255) translated by « with the knowledge of rabim ». There is here a confusion between shevuah be rabim and shevuah al daat rabim (see Rambam, hilkhot Shevuot 6; 8 and 9). We speak here about an oath which can be opened only with the agreement of rabim. Thus such an oath cannot be opened. Because of the secrecy of the procedure, the oath was certainly not taken with the knowledge of rabim, but before witnesses and « al daat rabim ».
7. This problem represents a concern in the Israeli army where most young married recruits have not yet a child. If a recruit dies childless, his wife must get a Halitzah and the process can last many years if the yavam is very young. It seems indispensable that the almonership establishes a model of simplified conditional marriage, meeting the halakhic requirements but avoiding unnecessary redundances.
8. Similarly the Israeli army faces more worrying problems: the disappearing, kidnapping or taking of prisoners by the enemy, with in all these cases a complete ignorance of the fate of the soldier involving terrible problems of iggun and suffering. It is the obligation of the rabbinic almonership to find an a priori solution. The Conditional divorce used in the army of David is not practicable today. Therefore only a conditional marriage or remarriage (according to the solution of Ben Ish Hai quoted in the paper) could help. The condition could be that if the soldier does not come back home before a delay of one year after his disappearing or at least one year after the end of a formal war, the conditional marriage would never have taken place. This solution would be stronger on halakhic level than problematic rulings a posteriori for example after the wreck of an israeli submarine). Great challenges of creativity are still facing the Israeli military almonership.
Takanah 7 should avoid, in the case of the decease of the soldier the iggun of the widow until the minor yavan becomes adult.
Takanah 8 should avoid, in the case of disappearing of a soldier and lack of information about his fate, the permanent iggun of his wife.