LEVIRATE MARRIAGE IN THE STATE OF ISRAEL

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restoration of the oriental and Sephardic traditions. In time, this became an explicit ideological-political stance under the motto *le'achzir atara l'eyoshna*. I suggest that Rabbi Yossef endeavors to restore the golden age of the Bashi sages in Jerusalem, chief among them Rabbi Elyashar, at the twilight of the Ottoman period.

I. **Introduction**

This study examines levirate marriages as they are treated in official rabbinical judicial systems in Israel and, particularly the manner in which judicial traditions of various ethnic groups, represented by their leading rabbis, coped with the intensive encounter between the traditions that took place in Israel, and how they reacted to the various challenges involving the establishment of the State of Israel.

The levirate marriage, a *Halachic* subject in the area of family law, is still the object of unresolved controversy between the various ethnic groups. In Biblical law, a matrimonial relationship is established between a widow whose husband died without having had children and the brother of the deceased who is obligated to marry her. This is the levirate act. If the brother-in-law refuses to perform the levirate commandment, he is obligated to sever the matrimonial connection between himself and the widow by a ceremony called *chalitza*. The legal bases of the levirate marriage and of *chalitza* were laid in the *Mishnah* and the *Talmud*, and the fundamental controversy whether it is the levirate commandment or *chalitza* that takes precedence, which has significant legal implications, goes back to these earliest times. Over the years the practice evolved in a manner characteristic of the *Halacha*, splitting along the ethnic lines of various judicial traditions.

In general, it can be said that the *Ashkenazi* tradition was most considerate of women, the oriental tradition was least so, and the *Sefhardic* somewhere in the middle. Since the 1840s, the various ethnic groups have had intensive and growing interactions with each other in the Land of Israel, while the power balance between them continually changing. The process culminated shortly after the establishment of the State of Israel, with the return of hundreds of thousands of Jews from
Ashkenazi communities that have been destroyed in the Holocaust, hundreds of thousands of Jews from ancient and intact communities from the east, from the Maghreb (the “West”), and from the Balkans. The rabbinical system, which had jurisdiction over family matters, had to cope with the multiplicity and variety of traditions that were not suited for a legal system in a modern state, and with the fact that in some of the traditions the extent of harm to women was particularly high.

The establishment of the state was a significant turning point. In 1950, the Sephardic tradition, under the leadership of Rabbi Uziel, joined the Ashkenazi tradition led by Rabbi Herzog, and together they enacted within the framework of the Chief Rabbinical Council a set of regulations known as “The Jerusalem Ban.” As part of this legislation, the Ashkenazi model regarding levirate marriages was imposed on members of all the communities in Israel. The negative reactions were quick to follow. A young and at the time anonymous sage, Rabbi Ovadia Yossef, marked the beginning of the opposition by displaying unqualified loyalty to the oriental tradition. In a verdict given in the Rabbinical Court of Petach Tikva, to be discussed later in detail, he severely criticized Rabbi Uziel for his regard for considerations of national character; in the process, Rabbi Yossef dropped heavy hints about Rabbi Uziel’s subservience to the Ashkenazi tradition and self-disparagement before it. Eventually, when Rabbi Yossef achieved a position of power as Chief Rabbi and Chief of the Rabbinical Courts in Tel Aviv, and finally as Chief Rabbi of Israel and the President of the great Rabbinical Courts of Appeals, he began applying his views and reviving the old tradition under the motto of leachzir atara le’yoshna, in other words, restoring the authority of oriental and Sephardic Jewish tradition in Halachic matters to its original status before its subordination to Ashkenazi tradition.

The object of this study is the Halachic work of leading figures in the rabbinical courts. The Rabbis carried out this work with total commitment to the various accepted Halachic methods of inquiry and deduction, and never outside them. The heart of the Halachic method is the basic assumption that old sources do not become obviated, on the contrary – they are held in higher regard than later sources. Therefore, the Halachic method accumulates all its previous layers, and contrary to what is customary in modern secular legal systems, it does not reject the old on
favor of the new. Although full compliance with this requirement is almost impossible in practical terms, with the exception of sages of extraordinary ability, like Rabbi Yossef, Halacha sages are committed to all the sources and endeavor to achieve this type of inclusion, so that collectively they do accomplish an almost complete coverage of all the layers and periods. It follows that any scholarly study of contemporary Halacha sages cannot limit itself to whatever is explicitly stated by them but must also account for the layers that served as their foundation and source.

Assembling all the Halachic sources that preceded the rulings of rabbis since the establishment of the State of Israel as an integral part of this study would be practically impossible within the scope of a single article. Indeed, this study is possible only in the wake of several others dealing with levirate marriages in various places and at different times, and investigating the related community aspects in particular. The present study differs from previous ones discussing levirate marriages in rabbinical rulings in the State of Israel precisely by being able to absorb and draw on these studies.

The first to research this topic was B.Z. Eliash,1 who explored the effects of the encounter between different communities on rabbinical rulings in Israel in several areas, including levirate marriages. In this, as in other matters, he discussed the various decisions of Israeli rabbis but did not examine the layers of Halacha that preceded these rulings and were related to them. Nor did he distinguish in any way between Sephardic and oriental traditions, and limited himself to a most general distinction between the Ashkenazi tradition and the group of all the non-Ashkenazi traditions. According to Eliash, disagreements between rabbis in the area of family law, including levirate marriages, can be explained in light of the struggle between the melting pot outlook that was dominant in Israel in its early days and the preservation of ethnic uniqueness championed by Rabbi Yossef. In his view, a similar phenomenon was taking place in the US at the same time and served as the source of inspiration for the Israeli one. This argument is clearly outside the Halacha, suited for the type of scientific inquiry that is foreign to the rabbinical-Halachic discussion.

1 Ben Zion Eliash, "Ethnic Pluralism or Melting Pot" (1983) 18 Is.L.R. 348.
A more comprehensive view is presented in Rabbi Arusy’s dissertation on the ethnic aspects of rabbinical rulings in Israel. Rabbi Arusy addressed the issue of levirate marriages in some detail as part of his argument with Eliash and criticism of some of his statements. Unlike Eliash, Arusy appears to be completely immersed in the Halachic discussion and all his arguments belong to this intellectual framework. For example, he does not examine any argument that is outside the Halacha, not even the melting pot argument put forward by Eliash, but repeats again and again Rabbi Yossef’s claim about the Ashkenazi takeover and Rabbi Uziel’s submissiveness. The discussion about the Halacha sources that served the polemicizing rabbis is conducted according to the rabbinical method and lacking the qualities of scientific research such as an examination of the sources according to the circumstances of time and place. Therefore, and because of Rabbi Arusy’s current status as Chief Rabbi of Kiryat Ono and member of the Chief Rabbinical Council, I will discuss his statements together with those of other contributors to the Halacha, who form the object of my research, and not as part of the scientific-research realm, to which the present study belongs.

My research approach is that the positions of the rabbis are rooted primarily in their Halachic viewpoints, which were shaped by their individual ethnic traditions, a complex that must be studied by scientific research methods. I believe that the melting pot category is too narrow, and even if it can be found elsewhere, it does not reflect the roots of the conflict but to a great extent its outcome. It seems that in the case of levirate marriages there are several extra-Halachic factors that projected, affected, and guided the positions of various sages, which I discuss in the article. I first confronted the topic of levirate marriages in a comprehensive article that examined the protection of women’s marital status against the background of the ethnic convergence in Israel. Since then, much

2 Rasson Arusy, “Halachic Decision – Making Regarding Conflict of Laws due to inter-Communal Differences” Faculty of Law, Ph.D. Thesis, Submitted to the Senate of Tel Aviv University, 1987.

3 Elimelech Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities” (1998) 7 Pitlim 273–347 [in Hebrew]. Part of the Halachic sources in the area of levirate marriages since the establishment of the State of Israel, which form the starting and end points of this
new research has been completed, which extended both the breadth and depth of knowledge in the area. Moreover, new source material has been made public since then, which shed light on some of the positions taken in the past. This article examines again the issue of levirate marriages in the State of Israel in a broader context than that of my previous study. It appears that the consequences of the polemic extend beyond the topic of levirate marriages, and even beyond the broader area of family law. And if the reader will use the results and insights gained from this study to illuminate ideological and political issues involving Rabbi Yossef, I think this will not amount to an unjustified leap.

I begin by presenting the issue of levirate marriages as it was born and shaped over generations and as it appeared in the eyes of Halacha sages, representatives of the various ethnic traditions in the State of Israel.

Legal Foundations of the Levirate Commandment

The source of the levirate commandment is in the Bible. Literally, the matrimonial relation between the widow and her brother-in-law is meant to be fully realized. It is precisely the brother-in-law’s refusal to bring the widow to his house as his all-purpose wife that draws, in the Bible, the consequence known as chalitza, in which he is publicly reprimanded.

study, have been discussed in the first article and have been incorporated anew in this presentation.

4 Elimelech Westreich, “Legal Activity by the Chief Rabbis in the Period of the British Mandate,” in Avi Sagi and Dov Schwartz, eds. A Hundred Years of Religious Zionism, Vol. 2: Historical Aspects (Ramat Gan, Bar Ilan University Press, 2003), 83–129; This research enables to compare between the legal activity of the Chief Rabbis Uziel and Herzog at the era of the mandate and the era of the State of Israel and reach important insights. See also my research, “Levirate Marriage and Chalitza in the Official Courts in the Land of Israel at the End of the Ottoman Empire” (in preparation). This research is important to the understanding of the roots of Rabbi Yossef and the background of Rabbi Uziel See also, Elimelech Westreich, Changes in the Women’s Status in Jewish Law: A Journey Through Traditions (Jerusalem, Magnes Press, 2002). This book deals with the legal foundations of the levirate commandment as well as the encounter between ethnic groups that took place on this issue in the 14th to the 16th centuries; Elimelech Westreich, “The Levirate Commandment and the Rebellious Woman in North Africa and Spain,” in Aharon Barak and Menashe Shava, ed. Mincha L’Izchak, A Collection of Articles in Honor of the Octogenarian Judge Itzhak Shilo (Tel Aviv, Israeli Bar Association, 1999) 145–166; Elimelech Westreich, “Rabbi Haim David Halevi: Between Rabbi Ovadia Yossef and Rabbi Uziel” in Zvi Zohar and Avi Sagi, eds. Studies in the Legal and Religious Thought of R. Haim David Halevi (forthcoming).
However, in the period of chaz"al (the Sages), it has been questioned whether it was feasible for the levirate link to be consummated as a complete matrimonial relationship. In the Mishnah, Tanaim (the scholars of the Mishnah Era) were divided on whether the levirate commandment should take precedence and whether this matrimonial link was intended for full realization, or whether it was chalitza that had precedence and the levirate link was intended primarily for severance and completion. In his time, when there was no bona fide intention of fulfilling the commandment, chalitza took precedence in contradiction to the literal meaning of the Bible. This controversy continued in the period of the Amoraim and the Geonim and the pendulum swung from side to side without an unambiguous decision. Some sages gave preference to the levirate commandment, other to chalitza, and there is no evidence of social traditions forming around this subject.

In the middle ages, the question of precedence between the two commandments became a central issue around which several traditions and sub-tradition formed in Islamic and Christian lands, not without connection to their environments. Communities in purely middle eastern lands such as Yemen, Iraq, Persia, the Land of Israel, and parts of Syria (the oriental communities), as well as in the Maghreb (the western communities) regarded the levirate commandment as one of foremost importance and believed that the matrimonial link between the widow and the brother-in-law was intended first and foremost for consummation. Thus, the question was framed accordingly, and any obstacle or impediment in the way to realizing the objective was rejected or set aside. By contrast, the Ashkenazi tradition in western and central Europe was shaped in a purely Christian environment. Toward the end of the 13th century the Ashkenazi tradition already preferred chalitza and regarded

5 Mishnah, Becoroth, 1, 7.
6 Abba Shaul, a Tana in the third generation, even feared that performing the levirate commandment out of an extraneous motive was tantamount to incest. Jerusalem Talmud, Yevamoth, ch. 1, p. 1.
8 Westreich, supra n. 3, at 276–277.
the levirate link as one intended for severance by means of the *chalitza*; the question of the levirate link was framed, therefore, in a way that facilitated its severance and not its realization. In the space between these two traditions the *Sephardic* tradition was formed on the Iberian Peninsula, a land that had been fundamentally Islamic for many centuries, after which it was re-conquered by the Christians. The *Sephardic* tradition adopted in principle the position of the oriental tradition, which preferred the levirate marriage. However, it moderated the extent to which the *Halachic* system was obligated to the levirate commandment, and in the presence of various other factors and considerations, it agreed to restrict and limit levirate marriages and to prefer *chalitza* instead. As the *Sephardic* tradition regarding levirate marriages (like *Sephardic* traditions in many other areas) spread along the shores of the Mediterranean, it continued to deepen its tendency to take the middle ground. By the end of the Ottoman era it became the dominant tradition in Jerusalem and in the Land of Israel among the rabbinical elite.

The controversy about the precedence of the levirate commandment or of *chalitza* has many consequences in other areas of the relationship between the widow and her brother-in-law. For example, if the levirate commandment takes precedence, the widow who refuses the levirate marriage does not receive any support from the legal system and her brother-in-law will not be required to perform *chalitza*. Furthermore, her refusal to accept the levirate marriage triggers severe legal penalties, most important of which is her being labeled a rebellious woman, with its serious financial consequences. But if the position is taken that *chalitza* has precedence, the widow's refusal to marry her brother-in-law does not result in her being labeled a rebellious woman; there are other consequences as well, to be discussed below.

In principle, the *chalitza* is the means to sever the levirate link and allow the widow to marry someone else. The ritual of the *chalitza* is purely legal and similar to the *get*, which is given to a divorced woman. The

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similarities are in the requirement that the man has to agree to perform the chalitza and that a chalitza coerced against the man’s wishes is considered invalid. Forcing an unwilling brother-in-law to perform chalitza is possible only in the existence of a cause from a short list of causes similar to the ones that can be adduced in order to force a get. Nevertheless, the seriousness of the causes required to force chalitza is not quite the same as that required to force a get, for two reasons: (1) the rule that a misleading chalitza is still a valid one, and (2) the rule that the child of a widow who hasn’t performed chalitza and of another man is not a mamzer (bastard). According to Talmud law, which became Halacha, a misleading chalitza is valid, that is, it is permitted to mislead the brother-in-law and to promise him favors in return for performing the chalitza, and later not to honor the promises without compromising the validity of the chalitza. The situation is different when it comes to a get, which in similar circumstances would be considered invalid and the divorce annulled. This rule signaled to the system that the severity applied in cases of chalitza was not the same as in cases of get, and that in other matters related to coercing chalitza it was possible to employ greater flexibility. The second rule that reduced the seriousness of a forced chalitza was that a child borne by the widow to another man without first obtaining chalitza was not considered to be a mamzer, not even according to the opinion of the Sages that preferred the levirate on chalitza. And one of the main factors in the excessive severity with which the Halacha views coercing a husband to issue a get is the fear that if the get is not lawful the woman remains married and the child borne to her from another man will be considered a mamzer.

But even this important matter in the area of levirate marriages and chalitza remained quite fluid and given to various formulations depending on different ethnic traditions. The oriental tradition, which unequivocally preferred the levirate marriage over chalitza treated chalitza as being very close to get and the signals that originated with the special rules stated for chalitza were received in a limited and local way. The Ashkenazi tradition increased greatly the gap between chalitza and get. An extreme expression of this was the position of Rabbi Asher b. Yechiel (Rosh) and

12 Westreich, Changes in the Women's Status in Jewish Law, supra n. 4 at 190–196.
other Ashkenazi sages who decreed that it was always necessary to force the brother-in-law to perform chalitza and the levirate marriage was not allowed under any circumstances. Rashi’s position was close to that of Rosh and stated that chalitza should be coerced in all cases in which the widow declared that she didn’t like the brother-in-law and therefore refused to carry out the levirate marriage.13 More moderate trends in the Ashkenazi tradition allowed direct coercion only in cases in which the brother-in-law was married; if he was single they did not directly force him but exerted milder pressures.14 In any case, the Ashkenazi position, which preferred chalitza, led to an entire complex of regulations that supported the chalitza and the widow in her refusal to perform the levirate marriage. The Sephardic/Mediterranean tradition followed a middle ground in this matter also. The basic rule was that the brother-in-law ought not be forced to perform chalitza, and a widow who refused was declared a rebellious woman. Nevertheless, under certain circumstances the widow was not required to accept the levirate marriage and it was even possible to force the brother-in-law to perform chalitza. This was most likely to happen if the brother-in-law was already married and the wife had received a monogamy clause and oath in her Ketubbah.15

The encounter between the different traditions in a given time and place carried a great potential for friction and even confrontation. The positions of the various ethnic groups in an encounter of this type, as well as the results, are likely to change depending on various factors:16 the extent of tolerance present in each tradition toward the others; what they believe is acceptable interference with the other traditions; the vigor of each tradition and its ability and will to impose its concepts on other traditions. In addition, there are the objective conditions of a given place and the stand of the local authority and of the society at large.

A dramatic encounter took place in Israel between the various ethnic

13 Katz, supra n. 7 at 138–140.
14 Westreich, Changes in the Women’s Status in Jewish Law, supra n. 4 at 127–132.
16 Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3 at 290–304.
traditions shortly after the establishment of the state, at a time when the *Ashkenazim* reached the peak of their power. Most of the political, administrative, military, economic, and local power was at the time in the hands of the secular part of the *Ashkenazim*, which represented the majority of the population in the country. Religion and its institutions, and particularly the rabbinical courts, retained a real presence in the state, and this domain was also under the exclusive control of the *Ashkenazim*. Furthermore, large portions of the dominant secular population and of its leaders, which belonged to the radical left, would have gladly removed entirely the religious presence in the area of family law. It was reasonable to assume that if these circles acceded to compromise and allow any say to the *Halacha* in family law, as for example in the issue of levirate marriages, this would be at most according to the *Ashkenazi* model that was familiar to them from their countries of origin and less offensive to women. We examine below the way in which these factors, which placed the *Ashkenazi Halachic* tradition in a position of decisive influence, gained expression in the matter of levirate marriages.

II. *Ashkenazi Dominance*

A. *Rabbi Yitzchak Herzog: Ashkenazi Dominance at its Peak*

The prominent representative of the *Ashkenazi* ethnic group in the early days of the state was Chief Rabbi Itzhak Isaac Herzog. He began his tenure in 1936 after serving as Chief Rabbi of Great Britain. In addition to his exceptional Torah scholarship, he had a broad general education, especially in the natural sciences and the law. It was his dream to turn Jewish law into the law of the future State of Israel. Until then, he made great efforts to improve the rabbinical court system and to adapt the Jewish law to the needs of the current time and place. It is in this light that we must regard his vigorous efforts to apply the *Ashkenazi* norms to members of all the ethnic groups in the principal matters having to do with women’s marital status. In a ruling issued together with Rabbi Uziel, which decreed that the custom of Israeli courts is not to divorce a woman against her will and to impose the *Ban of Rabbi Gershom* on the husband, he forced his
opinion on the court system. The two rabbis also determined that Israeli rabbincal courts would not follow the ruling of Rabbi Eliahu Mizrachi, which allowed the husband to deposit a get and Ketubbah and thereby exempt himself from his responsibilities toward his wife without a serious cause. Rabbi Herzog’s efforts to persuade British Mandatory legislators to apply the offense of bigamy established by the criminal law to members of all communities bore fruit toward the end of the Mandatory period. Finally, he shared with Rabbi Uziel the leadership of the Council that enacted the Jerusalem Ban, which among others, prohibited any man in Israel to marry two women.

His attitude toward levirate marriage is more complex. Although he helped to erode the oriental and Sephardic norms in this area, there is no doubt that Rabbi Herzog intended first and foremost to protect the widow who became subject to levirate marriage and to expand her rights so that she could no longer be extorted by her brother-in-law. Under Rabbi Herzog’s initiative, the first body of legislation was enacted already during the British Mandate and the matter of levirate marriages was one of the three issues addressed. It was decreed that:

The brother-in-law must pay alimony to the widow from the day a ruling has been handed down by a qualified court, that is, a court sanctioned by the Chief Rabbinate of Israel, that he should perform chalitza and until he actually does so.

This decree produced a most modest change in the existing rules of Halacha. There was no intervention in the matrimonial relations, and nothing of the existing Halacha was changed regarding the relationship

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17 Westreich, “Legal Activity by the Chief Rabbis in the Period of the British Mandate,” supra n. 4 at 99–103.
18 Ibid., at .
19 Westreich, supra n. 3 at 308–314.
21 Ibid., at 123.
between the widow and the brother-in-law or in the preference of levirate marriages over chalitza in the Sephardic and oriental traditions. The decree said only that if a court of the Chief Rabbinate issues a ruling ordering a brother-in-law to perform chalitza, he is immediately obligated to also provide alimony to the widow. This intent is clear in the version promulgated in the end, in which a court ruling ordering chalitza is a condition for the obligation to pay alimony. This intent is less obvious in the version submitted initially, which said: “In case the brother-in-law refuses to perform chalitza, as he is obligated to do according to the laws of our holy Torah...” In this formulation there is no explicit requirement for a court ruling ordering chalitza.

In explanations of the decree Rabbi Herzog wrote that it did not produce an actual change in the existing law since “in our opinion this is how we should rule by virtue of the existing law and equity.” The need for the decree was created only by the fact that some views in the Halacha do not impose alimony in these circumstances; Rabbi Herzog with Rabbi Uziel wanted to establish this practice as an absolute rule, “and from now on thus shall rule all courts in our holy land of Israel.” Most likely, the position that forces brothers-in-law who refuse the chalitza to pay alimony was born in an Ashkenazi environment, in which the commandment of the chalitza takes precedence over levirate marriage. But as Freiman showed, it was also accepted among Sephardic and oriental judges in Israel, in the Balkans, in Egypt, and in Babylon. Rabbi Herzog’s initiative to impose alimony on a brother-in-law who was ordered by the court to perform chalitza but refused to do so was not an open or strident attempt impose norms originating in the Ashkenazi legal tradition on the Sephardic and oriental communities, and there was certainly no attempt to harm in any way the family patterns and matrimonial relations that arise from

22 Ibid., at 114.
23 Ibid., at 125.
24 Ibid.
25 Indeed, in the explanatory letter to the regulations, which was disseminated among rabbis in Israel, Rabbi Herzog based his argument explicitly only on the codex Aruch Hashulchan, was written in Russia at the end of the 19th century.
the levirate relationship. Rabbi Herzog wanted merely to address the problem “found, regretfully, among us, whereby daughters of Israel are abandoned (agunot) because they are refused chalitza, and the suffering and injustice are very great.”

But to protect the widow from economic pressure on the part of her brother-in-law it was necessary first to overcome the inheritance hurdle. According to Torah law, a woman does not inherit her husband but is entitled to the amount specified in her Ketubbah as well as to room and board expenses from her husband’s estate. The extent of the justice or injustice of this arrangement depends on the amount that appears in the Ketubbah. There were periods in the history of the Halacha when this amount was higher than half the value of the estate. In the 1930s, as a result of the great depression and of the inflation that followed, the values of the Ketubbot dropped considerably and did not approach amounts that a widow could have received according to the secular laws in force in the Land of Israel. Therefore, Jewish women preferred most of the time to exercise their rights according to the secular law and refused to divide their husbands’ estates by Torah law. Women acted in a similar way in cases in which matters of inheritance were brought before rabbinical courts following their agreement to litigate there. Rabbinical judges were forced to rule in these matters according to the secular law and not according to the Halacha, unless the widow renounced her rights under the civil law and agreed that the inheritance be divided according to Torah law. It is most likely that rabbinical judges did not accept to the arrangements of the secular law and did not regard it as a Halachically legitimate arrangement. Whatever they did, followed from constraints and pressures of the secular law they could not withstand.

Matters were different when it came to levirate marriage. In this case, the widow had to go to the rabbinical court to obtain chalitza. This allowed her brother-in-law, the legal heir according to Torah law, to demand the division of the estate according to the Halacha in return for chalitza. The court, which recognized the widow as the heir only because of its dependence on her agreement to have the case heard by the rabbinical court and because of the constraints of civil law, could now ask the widow to acquiesce in the Torah inheritance laws as a condition of ordering the brother-in-law to perform chalitza. In the Ashkenazi tradition it was
customary to make this connection between chalitza and inheritance, and the custom and rule in the communities was to strike a compromise between the widow and the brother-in-law who agreed to perform chalitza in return for monetary concessions on the part of the widow. Nevertheless, the Ashkenazi tradition, which always favored chalitza over levirate marriage, did not give the brother-in-law unlimited bargaining space, and above a certain sum it pressed him to perform chalitza. By contrast, the Sephardic and oriental traditions, which favored levirate marriage over chalitza, did not make use of compromise in the area of the inheritance in order to force the brother-in-law to perform chalitza. How is the official rabbinical court to act in the case of a Sephardic or oriental brother-in-law who must perform chalitza by law while his brother’s widow insists on her right to inherit her husband according to the civil law? Should it compel the brother-in-law to perform chalitza according to law and the Sephardic or oriental traditions, impose on him immediately alimony according to the decree of the Chief Rabbinate of 1944, and only then address the inheritance conflict? Or should it suspend debating the chalitza issue altogether until the widow agrees to accept the authority of the court in matters of inheritance as well and agrees to divide the estate according to Torah law?

Just such a case came before the Great Rabbinical Court of Appeals in 1945, shortly after the enactment of the regulation regarding levirate marriages. The judges were Rabbis Uziel (President), Herzog, and Kalmas. The facts were as follows: a Sephardic worker at a potash plant died without having had children and the widow obtained her portion of the inheritance according to the civil law. She then sued her brother-in-law in civil court requesting chalitza and, if he refused, alimony according to the enactment of the Chief Rabbinate. The brother-in-law, who was married to a woman before whom he took an oath not to marry another, a father of children, and apparently without the economic means needed to maintain two wives, refused arguing that he desired to fulfill the levirate commandment. He also demanded that the widow return the portion of the inheritance that she obtained in contradiction to Torah law. The Great Rabbinical Court ruled that under the circumstances the brother-in-law must be forced to perform chalitza because he was married and lacking economic means – following the opinion of Rabbi Izchak b. Shashe.
(Ribash) and Rabbi Yossef Karo in his famous responsum.27 An additional argument was that the purity of the brother-in-law’s motives was questionable, and very likely he had no intention of performing the commandment but was rather interested in obtaining property and funds. Nevertheless, the Court rejected the widow’s demand that the brother-in-law should be first obliged to perform chalitza according to the Sephardic legal tradition and to pay alimony based on the Chief Rabbinate’s enactment. The Court ruled that the widow must adjudicate her portion of the inheritance according to Torah law and agree to return the portion she obtained in excess of Torah law through the civil law, and only then will the court force the brother-in-law to perform chalitza. The Court thereby further diminished the regulation of the Chief Rabbinate of 1944 and placed it at the periphery of the efforts to advance the marital status of widows subjects to levirate marriage.

The decision was published in an anthology edited by Zerach Warhaftig. It is impossible to determine from this publication who wrote the decision and whether it was a collaborative effort of all the judges, even though one is inclined to attribute it to Rabbi Uziel who was the President of the session. In recent years many of Rabbi Herzog’s writings have been published, among them early correspondence he held with the other judges participating in the quorum of this case.28 These documents leave no doubt that the decision and the main points of the argument are Rabbi Herzog’s. It is also clear that despite Rabbi Herzog’s concern for widows, he didn’t try at this point to instigate a change in the Sephardic and oriental legal traditions in matters of levirate marriage and chalitza. Nor did he try to apply to them the views of the Ashkenazi tradition regarding the relation between chalitza and the extent of the brother-in-law’s right of inheritance. He wrote explicitly: “As to the matter at hand, there is no room to talk about the regulations of Ashkenazi sages since these regulations do not

27 Res. Beit Yossef, Ibum VeChalitza, Ch. 2.
28 Rabbi Isaac Herzog, Rulings and Writings – Vol 8: Dine Even Ha’Ezer, (Jerusalem, Mosad Harav Kook, 1996) 1283. The identification of the cases is certain because of the many unique details mentioned in the two sources, as for example the fact that the deceased worked at the potash firm, the presence of the mother, and many other items. Especially striking is the identity between the reasons provided by Rabbi Herzog and those that appear in the decision.
oblige the oriental communities.” In his final position, when he favored the inheritance laws of the Torah over the interests of the widow whose demand for *chalitza* was justified beyond question, he upheld the *Sephardic* jurisprudence.

His reluctance to apply *Ashkenazi* norms to *Sephardic* and oriental Jews in matters of levirate marriage was reflected in a responsum to a sage29 “as to whether one should allow levirate marriages to members of the Yemenite community in Israel given that they were accustomed to carry out the levirate marriage in Yemen.” The name of the sage asking the question is not mentioned, but I believe he was *Ashkenazi*. Most of the answer addresses another issue related to levirate marriages – the extent to which witnesses are required to validate the levirate marriage. Regarding the question itself, whether to allow Yemenites to perform the levirate marriage in Israel, he answered briefly and unambiguously: “He shall perform the levirate marriage according to the law and custom of our brothers from Yemen.” He went further and brought evidence to the effect that Yemenites should be allowed to continue their tradition without challenge, “for even in Russia, where all Jews were used not to perform the levirate marriage, the sage Great Rabbi from Lamza, ruled in a responsum that a brother-in-law and widow who desire intensely to perform the levirate commandment should do so, then so much more in a case such as this one involving people from Yemen who believe that the levirate commandment takes precedence.”

A sharp change occurred soon after the establishment of the state of Israel. In 1950 Rabbis Herzog and Uziel convened a council of rabbis in Jerusalem, which enacted the regulation known as the Jerusalem Ban. The regulation addressed several important matters of family law, including the prohibition of bigamy, which was applied to members of all ethnic groups in Israel. But the most important change was the decree instructing members of all ethnic groups, including the *Sephardic* and oriental ones, to prefer *chalitza* over levirate marriage, and establishing that the levirate marriage is to be allowed only in special cases following the agreement of both Chief Rabbis. This is what the ordinance said:

29 Res., Heichal Itzchak, Even Ha’Ezer 2, 75.
In the majority of Jewish communities as well as in the Ashkenazi community in Israel it has been accepted that the commandment of the chalitza has precedence over the levirate commandment, and even when both the brother-in-law and the widow desire a levirate marriage they are not allowed to consummate it. And when the man is already married to another woman, it is the custom in all places not to allow the levirate marriage... We hereby entirely prohibit the levirate commandment for the citizens of Israel and for those who are to come and settle here in the future, and we mandate chalitza...\(^{30}\)

The authors' initial argument was that in most Jewish communities the commandment of the chalitza had precedence. This assumption is not self-evident and requires scrupulous examination. If the legislators referred to the situation at the time the rules of the Jerusalem Ban were enacted, they were certainly right (even after the Holocaust, the majority of Jews were of Ashkenazi origin). But one cannot simply assume that throughout Jewish history chalitza was preferred over levirate marriage. In any case, the fact does not serve as a Halachic reason to change and uproot the long tradition of Sephardic and oriental Jews in an area where the controversy dates back to the days of the Mishnah.\(^{31}\) And indeed, the authors needed two additional arguments to justify such a radical change:

And it is obvious in our times that the deceased husbands' brothers do not perform the levirate marriage in order to observe the commandment, and because for the sake of peace and unity within the State of Israel there should be one law and not two.

The legislators assumed that most brothers who observed the levirate commandment did so for extraneous reasons, such as the beauty or wealth


\(^{31}\) For a critique of the factual basis of the introduction to this new rule, see also Rabbi Arusy, below.
of the widow. The argument of the absence of pure intention is internal to the Halacha, and is one of the old building blocks in the dilemma between levirate marriage and chalitza. An additional argument is the desire to maintain the unity of the Halacha and to prevent a situation in which two laws are being observed. This argument has a general character that reflects Halachic policy and is not specifically related to the issue of levirate marriage and chalitza. In the Halacha it belongs to the category “do not form factions” (lo titgodedu) which is closely related to the meeting of communities and traditions in the 15th and 16th centuries in Europe and the Ottoman Empire. However, this injunction was meant primarily to settle ritual not legal matters, and in the central documents of the Halacha there is no “do not form factions” category with respect to legal issues. The third argument, peace and unity among Jews in the State of Israel, is extraneous to the Halacha and appears to result from the adoption of nationalist aspirations toward uniformity within the people. I am not aware of such considerations in the Halacha. Even at the time when the Chasidut was coming into being, when differentiating customs were being established, there was criticism of the authority to create new customs, but the resulting division was not discussed as one that would harm the unity of the Jewish people. This argument appears to be clearly foreign to the protection of the women’s marital status, which is generally characterized by a multiplicity of traditions and a variety of positions. It seems that this argument was inspired by Rabbi Uziel, as shown below, who absorbed the essential values of the Zionist movement.

The change in the order of precedence of levirate marriage and chalitza was accompanied by a regulation that imposed on the brother-in-law the obligation to perform chalitza. The regulation did not specify the penalty imposed on brothers-in-law who refused to do so, which meant that it was impossible to directly and physically coerce a brother-in-law to perform chalitza, as for example, jailing him, nor was it possible to coerce him

33 Ibid. See the examples quoted in that work.
34 See, for example, the critical letter of Rabbi Katzenellenbogen of the Brisk community to Rabbi Levi Yitzhak of Berditchev quoted in Mordechai Wilensky, The Hassidic-Mitinagdai Polinics (Jerusalem, Bialik Institute, 1970) Part 1, at 122–131.
indirectly, by such methods as were used in the past, like the ban. I also doubt that the rabbis who enacted the Jerusalem Ban intended to impose on the brothers-in-law penalties of the type known as harchaka d’Rabbeinu Tam (a shunning of the man by the community).35

The change in the Halacha had immediate and important consequences. A widow was no longer declared rebellious if she refused a levirate marriage and was not subject to the sanctions imposed on rebellious women. Primarily, she did not lose her Ketubbah and the attendant financial rights. Another important provision of the law was the imposition of alimony payments on the brother-in-law until he consented to perform the chalitza, a right not granted to widows who refused the levirate marriage in the Sephardic and oriental traditions.

This regulation was intended to have an immediate impact on the relationship between brothers-in-law and widows regarding the inheritance of the brother/husband. In the case of the potash worker, Rabbi Herzog and the other members of the Great Rabbinical Court of Appeals demanded that the widow renounce her right to inherit according to the civil law as a condition for compelling the brother-in-law to perform chalitza. Now, in addition to imposing the obligation to perform chalitza, it has been decreed that the brother-in-law must pay alimony to the widow, which meant that the obligation was in force as soon as the levirate relationship was established and did not require a court ruling as a condition to oblige paying alimony to the widow. The result was that the brother-in-law was obligated to both chalitza and alimony independently of the manner in which the conflict between him and the widow regarding the inheritance was settled.

Writings of Rabbi Herzog that were published recently indicate that this was his interpretation of the regulation and what he intended by

35 A penalty of this type is possible in principle in Israel as of 1995 following Section 6 of the Rabbinical Courts Judgment Law (Obeying Divorce Verdicts) 1995, 48 SH 139, which permits the court to issue a restraining order against someone who was required to perform chalitza for his brother’s widow. The law allows the restraining order to impose heavy sanctions on the person who refuses to comply with the court order, such as loss of the right to leave the country, prohibition of plying a trade that is regulated by the Halacha, prohibition of running a business that requires permission by Halachic procedures, and the like. See ibid., Section 2, for a list of sanctions.
The writings are part of Halachic negotiations he conducted with Rabbi Uziel in the following levirate case that was appealed to them: a man of the Kurdish community had died, leaving a widow in a levirate situation and five brothers, the oldest of whom was married, a father of children, and old by comparison to the widow. The widow turned to the civil court to obtain her portion of her husband’s estate and received half of a piece of land that he had owned. The oldest brother demanded to consummate the levirate according to the custom of their community and agreed to perform chalitza only if the widow followed Torah law in the matter of the inheritance, that is, returned half the lot and received only the amount specified in her Ketubbah. The widow refused to be satisfied with the amount of the Ketubbah, which was only 30 Israeli Lira, insisted on her right to receive her portion of the inheritance in accordance with the civil law, and demanded chalitza and alimony. The regional Rabbinical Court ordered to widow to return half the lot and refused to order the payment of alimony fearing that if the brother-in-law agreed to perform chalitza as a result, it would be a coerced chalitza and not valid. The discussion focused around the issue that had already been addressed in the case of the potash worker: will the court act in the matter of levirate marriage and chalitza as required by the Halacha despite the fact that the widow received a portion of the inheritance in contradiction to Torah law? Or will it demand that the widow first renounce her rights based on the civil law and only then act in the matter of the levirate marriage according to the rules of the Halacha? A second tier of the discussion addressed itself to the question whether, for the case at hand, the brother-in-law should be ordered to perform chalitza or accept his demand to carry out the levirate commandment according to the custom of his community.

Rabbi Herzog wrote two pamphlets in which he presented his view and responded to Rabbi Uziel’s reservations. To the question whether or not the brother-in-law should be forced to perform chalitza he gave a determined affirmative answer; there was no need to fear that the chalitza would be considered coerced and therefore invalid, at least not as a result
of the imposition of alimony on the brother-in-law. He also had a few alternative arguments, first among them being:

And most important is that it has already been accepted in the [Jerusalem] Ban that in Israel one must perform chalitza and not the levirate marriage, and there is no reason to fear in these cases to coerce the chalitza. Indeed, it should not be regarded as coercion, since we have ordained already and the ordinance has been enacted that when the court rules to force him to perform chalitza and he refuses he is obligated to pay alimony. And since there is already such an ordinance that has become law, there is no need for us to appease him, since he is obligated to this by law and this is not a coercion that would undermine the appropriateness of the chalitza.37

It is clear that Rabbi Herzog viewed the Jerusalem Ban as an ordinance of great consequence, which altered completely the law that had applied beforehand to Sephardic and oriental Jews.

Other arguments adduced by Rabbi Herzog were the classical ones prevalent for many generations in Sephardic jurisprudence, including that of the Land of Israel toward the end of the Ottoman Empire: the brother-in-law is married; there is a great age difference between him and the widow; he has children and therefore the “be fruitful and multiply” commandment has been fulfilled; and it is not clear that his actions are truly motivated by a desire to fulfill the commandment. There is no doubt that the 19th century sages of Jerusalem, foremost among them Rabbi Elyashar, would have also ruled in this case that the brother-in-law should perform chalitza, and were he to refuse they would have pressured him indirectly by means of harchaka d’Rabbeinu Tam.

The difference is that in this case the widow took possession of a portion of the estate in contradiction to Torah law, and the question posed to the court was whether to demand the return of the inheritance before the court acceded to her demand for chalitza. In the similar case of the potash

37 Ibid., at 1292.

worker, Rabbi Herzog himself requested that the widow first return the portion of the inheritance she had obtained in contradiction to Torah law. The regional court acted the same way in the current case and ordered the widow to return the portion of the inheritance that she received under the civil court order as a condition for ordering the chalitza, and refused to grant the alimony payments before this order was carried out. It appears that Rabbi Uziel’s position was close to that of the regional court, or at least this is what transpires from Rabbi Herzog’s second response to it. Here Rabbi Herzog changed his opinion radically from the one he had held in the case of the potash worker, and ruled that the controversy regarding the inheritance is parallel to that concerning the levirate marriage and that the widow should not be required to return the inheritance she obtained by virtue of the civil law as a condition for ordering the brother-in-law to perform chalitza and pay alimony.

It is beyond the scope of this article to discuss in detail Rabbi Herzog’s position because it touches on a broad controversy among sages and rabbis in the Land of Israel about amendments necessary to the Halachic laws of inheritance as a condition for extending the judicial authority of rabbinical courts in these matters. It is sufficient to say that Rabbi Herzog took a broad view here of both existing and desirable statutes concerning the inheritance of widows, taking into account considerations of legal policy as well as high politics in the relationship between religion and state in the new State of Israel. It was clear to him that “all who know the situation as it stands know that were this the situation in the time of the Talmudic Sages they would have corrected it.” Thus, the civil law settlements regarding the inheritance of widows were in principle suitable even if they were not reached by ways and means that the Halacha considered legitimate. And the fact that they were the result of civil legislation did not disqualify them because the principle of dina de’malchuta dina (the authority of the law of the land is a binding law) could possibly be applied here despite the great problems posed by using this rule in cases of inheritance, and law what’s more, in a Jewish state. Rabbi Herzog even tried to legitimize the widow’s obtaining a part of the inheritance according

to the civil law based on the *Halacha* principle that recognized the validity of a custom, especially regarding marriage, whereby the principle is that anyone marrying a woman according to local custom is marrying her.

Beyond these justifications that belong in the realm of personal law, Rabbi Herzog extended the discussion to the political sphere of the relations between religion and state on the one hand, and between the religious Zionists and the ultra orthodox on the other. He attacked the latter harshly and called them “known zealots, hot headed and small minded,” who opposed any correction and change, and instilled fear in rabbis who belonged in principle to the Zionist sect but were wary of the zealots lest they be labeled a Sadducee court. He also feared greatly the leftist anti-religious forces holding the key positions in the political arena, that “they may, God forbid, abolish the authority of the Torah with regard to marriage and divorce in Israel according to the law of Moses and Israel.” These forces were liable to use any means at their disposal to eviscerate the religious judicial system, including the sad story of “the young widow, abandoned and despondent,” like the one in the case being discussed here. Therefore, he recommended acting according to the rule *chacham einav be’rosho* (the wise man has eyes in his head), preserve what was important, and not create a pretext that could be used to abolish the authority of the rabbinical courts altogether. An ultimatum to the widow to return the portion of the inheritance that she was awarded by virtue of the civil law did not rank with the principal matters, and justifications could be found within the *Halacha* for her to retain the inheritance, as shown above.

Rabbi Herzog went farther and emphasized that even if the coerced *chalitza* did not conform to the law, judges had no reason to worry about it, because one had to distinguish carefully between *chalitza* and *get*. The *Halachic* system feared imposing a coerced *get* or even imposing an obligation without coercion because a *get* of this type was invalid, and resulted in someone’s wife living with another man and in her children being *mamzerim* (bastards). Many sources compared *get* and *chalitza*, which resulted in great reluctance to coerce or obligate to perform *chalitza* lest it was considered to be a coerced *chalitza* and therefore not valid. In this pamphlet, Rabbi Herzog clearly established that concerning coercion and obligation, illegal *chalitza* was different in essence from illegal *get*. *Chalitza*, even if it was forced upon the brother-in-law illegally, was proper
and did not compromise the widow’s marriage to another man nor the legitimacy of the children she may give birth to. This was in contrast with an illegally coerced get, where there was reason to fear that the children may be considered mamzerim and the possibility that a married woman may be living with another man. Thus, the court had great freedom to exercise its discretion and to follow a deserving and desirable policy.

Rabbi Herzog described his own feelings about the matter in unambiguous language: “What can I do that my heart feels pity for the widow (especially in our days), a great pity, and it may be possible to challenge my fitness to rule in the cases of widows”39 (my emphasis E.W.). His final recommendation was that despite everything it was best to seek a compromise and to persuade the widow to concede a portion of the inheritance in favor of only one brother according to the inheritance rules of the Halacha. I do not know Rabbi Herzog’s final decision, as the final and complete ruling was not published, but what he wrote in the pamphlet expresses the clear and determined opinion that every brother-in-law, Ashkenazi, Sephardic, or oriental, can be coerced to perform chalitza by virtue of the Jerusalem Ban, and can be forced to pay alimony to the widow if he refused to do so, even if the widow obtained her inheritance not according to Torah law.

From Rabbi Herzog’s point of view, this domineering approach appeared well rooted in Ashkenazi tradition whenever it encountered members of other communities. The Rosh in Spain at the beginning of the 14th century, and Rabbi Mintz in Italy, in the second half of the 15th century, acted similarly. Both believed in the absolute preference of the Ashkenazi tradition when it came to the protection of women’s marital rights. Their first encounter with other traditions came late in his life, after his outlook had been consolidated, and they believed that the patterns developed in Ashkenaz should be imposed on other communities as well.40 Rabbi Herzog acted in an environment in which the Ashkenazi community was numerically superior and enjoyed a dominant position in Halachic matters.

39 Ibid., at 1291.
40 For Rosh see Westreich, Changes in the Women’s Status in Jewish law, supra n. 4, at 190–196. For Rabbi Mintz see, ibid., at 202–208.
Nevertheless, the application of the Ashkenazi norms to all ethnic groups in the State of Israel by Rabbi Herzog was not part of the medieval phenomenon of Ashkenazi imperialism.\textsuperscript{41} Decisions and documents discussed above show clearly that until the establishment of the State Rabbi Herzog allowed other ethnic groups to follow their traditions and that his intervention in their legal traditions was minimal. It seems that Rabbi Herzog was driven mainly by fear of the anti-religious left that gained much strength following the establishment of the State. He realized that the political power in the Jewish community was in the hands of the Zionist movement, which was predominantly secular, and contained many factions with anti-religious tendencies. The Zionist movement and its leaders were likely to accept, under duress, the religious marriage laws as long as they coincided with the family models they knew and had absorbed in East Europe. It is difficult to imagine that they would have accepted a model that involved severe erosion of the marital status of women, as is the case in the tradition of the oriental communities.

The element of Ashkenazi imperialism therefore played a secondary role and explains only why Rabbi Herzog did not hesitate to impose the Ashkenazi tradition once he reached the conclusion that it was important to do so.

In later years, the Jerusalem Ban was applied \textit{de facto}, if not \textit{de iure}, in a ruling of the High Rabbinical Court, with three Ashkenazi judges (Elyashiv, A. Goldsmith, and S. Israeli) ruling in a case involving a Sephardic couple:

Indeed, the custom in all courts in Israel is not to permit levirate marriages, even if both parties desire it. In any case, this custom is not preferable to what Rabbi Moshe Isserlis (Rama) wrote: “even if both of them desire a levirate marriage they are not allowed to perform it – in any case, if the deceased husband’s brother agrees to the levirate marriage he is not forced to perform chalitza”.\textsuperscript{42}

\textsuperscript{41} Westreich, \textit{ibid.}, at 199–230. My argument in “Protection of the Marital Status,” \textit{supra} n. 3, at 316–317, must be reconsidered.

\textsuperscript{42} Appeal 1970/26, 8 P. D. R. (Rabbinical Verdicts), 193.
The three rabbis, among the greatest sages of Halacha, who were among the pillars of the Rabbinical Court throughout its existence, agreed that it was no longer allowed to perform levirate marriages in Israel following the Jerusalem Ban, and they established the rule, according to the general instruction of Rama concerning Ashkenazi Jews. But the judges referenced customs established in the courts as the legal basis for preferring chalitza over levirate marriages, not the directive of the Chief Rabbinate. There is no doubt that this substitution of the legal basis was not accidental, at least not as far as rabbis Elyashiv and Goldsmith, who were both ultra orthodox Jews, were concerned. Indeed, in a homogeneous and cohesive community of learned people, whose members belong to a specific and long-standing tradition, the tradition of the courts can act as the basis of influential decisions. But the Rabbinical Court was a relatively new institution, served by judges of varying outlooks, belonging to a variety of traditions. In such a loose assembly, if a judge does not agree with an argument and dares not toe the official line, the argument of judicial custom collapses. This is particularly so if the dissenter can base his argument on a tradition of Israeli Rabbinical courts that precedes the current Rabbinical Court. When the position of Rabbi Yossef is discussed later, it will appear that this is precisely what he did to challenge and reject the directive of the Chief Rabbinate regarding the preference of chalitza over levirate marriage.

B. Retreat of Tel-Aviv Ashkenazi Rabbinical Court Judges

The Ashkenazi position that de facto supported the Chief Rabbinate’s decree but based it on custom did not hold out for long. Not without a connection to Rabbi Yossef’s determined view regarding the illegitimacy of abolishing the oriental tradition and to the elevation of his status upon his election as Chief Rabbi of Israel, three heads of Ashkenazi courts in Tel Aviv recognized the levirate custom that was prevalent in the Yemenite community.

43 For the attitude of many judges toward the ordinance of the Chief Rabbinate as a result of their ultra orthodox, non-Zionist outlook see Ben Zion Eliash, “The Limited Influence of Israel Rabbinical Enactments on the Israeli Rabbinical Courts” (1981–1983) 10–11 Diné Israel 177, at 202. [in Hebrew].
In a question addressed to Rabbi Yossef, Chief Rabbi of Israel and President of the Great Rabbinical Court of Appeals, three senior heads of Ashkenazi courts in Tel Aviv, Chief Rabbi of Tel-Aviv Yedidya Frankel, Rabbi Werner, and Rabbi Tene, presented before him the following case as quoted in Rabbi Yossef’s answer:

Regarding the brother-in-law Avraham Sharabbi, who wants to perform a levirate marriage with his sister-in-law, Mrs. Juliet Sharabbi, whose husband died without offspring: the widow agrees to the court’s decision to perform the levirate marriage. And given that they are both from oriental communities, who accepted the injunction of Rambam and of the author of Shulchan Aruch who ruled that the levirate commandment takes precedence.

I assume that the brother-in-law was not married, otherwise it would be difficult to believe that the Ashkenazi judges would have ignored such a circumstance in view of fact that there are Sephardic sources that reject the levirate marriage and prefer chalitza in these cases. The decision of the three senior judges was that because of the oriental origin of the couple, it was correct to act according to the opinion of Rambam and Rabbi Karo, representatives of the Sephardic and oriental traditions, and to prefer the levirate marriage over chalitza. This position is surprising in its absolute opposition to the Jerusalem Ban, which had been alive and well for some 25 years, and which prohibited the levirate marriage and preferred chalitza. Although we have seen already that senior Ashkenazi rabbis in the High Rabbinical Court have ignored the Jerusalem Ban regarding levirate marriages, in practice they rejected the levirate marriage and ordered chalitza based on judicial custom. In this case, the Tel Aviv judges mentioned explicitly the Chief Rabbinate regulation prohibiting levirate marriages, but they were also well aware of the fact

44 The request was made in 1974. The Chief Rabbis were elected in 1973.
45 The file number in the Rabbinical Court is 1974/11949, but the matter was published only in Rabbi Yossef’s responsum. See below.
46 The question was: “A new regulation was issued by the Chief Rabbinate of Israel on 21
that the question was addressed to one who while in office in their city used to allow and even encourage levirate marriages to members of the oriental community.

As we shall see, Rabbi Yossef received the recommendation enthusiastically and approved the levirate marriage. From this point, the theoretical doctrine became practical Halacha, this time not merely by a Sephardic or oriental sage struggling on behalf of the oriental community's tradition, but adopted by three of the senior Ashkenazi judges who have been central figures in the rabbinical court system for decades.47

III. The Sephardic Tradition Approaching the Ashkenazi One

A. Introduction

The Jerusalem Ban is a clear expression of Ashkenazi dominance, but also, partially at least, of internal Sephardic processes striving to adopt the Ashkenazi model as part of broad outlook intent upon improving the status of women. The Sephardic community became the dominant one in the Land of Israel during the 16th century, following the arrival of many Spanish exiles. Halacha sages of Sephardic origin, among them giants like Rabbi Yosef Karo, achieved a Sephardic rule of the rabbinical and Halachic world that lasted for hundreds of years, until the twilight of the Ottoman Empire. During all these years there was close connection between Jerusalem and large Jewish centers in the Middle East and the Balkans, especially the communities in Istanbul, Saloniki, and Izmir. As in other Sephardic centers, the rabbinical elite in Jerusalem, was supported by a well-formed community with its unique social and cultural patterns, foremost among them the Ladino language.

47 There is no indication as to why the Ashkenazi rabbis acted in a manner that was inconsistent with the dominant Ashkenazi trend. This topic should be investigated separately.
As shown above, the Sephardic tradition took a middle road in the matter of levirate marriages, between the Ashkenazi and the oriental-Talmudic traditions. On the one hand, it held that levirate marriages had precedence over chalitza, but on the other it was willing to restrict this rule in certain cases, for example when the brother-in-law was already married. This position was related to the fact that in the matter of polygamy as well – another issue having to do with the marital status of women – the Sephardic tradition was actually quite close to the Ashkenazi one. Members of the Sephardic community routinely added a condition to the Ketubbah and took an oath that forbade them to marry more than one woman. Moreover, in the matter of divorcing a woman against her will, the Sephardic tradition also took the middle road, as various factions in their midst adopted The Ban of Rabbenu Gershom, while in other places men obligated themselves in this respect in the Ketubbah or by an oath. This is not directly related to levirate marriages, but it is characteristic of a general trend of departure from the oriental-Talmudic positions, which expose women to severe injury to their marital status, and approaching a position, well entrenched in the Ashkenazi tradition, which is more protective of women.

This basic readiness to accept norms that are more protective of women was complemented by strong western currents that made themselves felt toward the end of the 19th and the beginning of the 20th century in Ottoman Europe, and made a strong impression on the Sephardic environment. Western ideas exerted their influence on the population in the Balkans and throughout the Ottoman Empire to grant greater rights to women and to adopt modern ideas. One of the most poignant expressions of these ideas was nationalism. But these trends did not seem to have left their mark on the rabbinical leadership in Jerusalem at the end of the 19th century. I believe this was the result of the advanced age of the most prominent rabbis, especially those who served in the positions of Chacham Bashi and as heads of the judicial system, all in their seventies.

The first Chacham Bashi who had to face the challenge of modernism was Rabbi Yakov Meir, who achieved this position in 1906, at the age of 50, but was deposed a year later as a result of internal conflicts within the Sephardic community and of strong opposition to him on the part of conservative circles. This sage showed great openness to modernity in a
variety of areas, including Jewish nationalism and the revival of the Hebrew language. He also appeared unenthusiastic about perpetuating levirate marriages without imposing some limitations. I infer this from what he said in the course of a conversation with Prof. SD Goitein in the 1920s. According to Rabbi Meir, levirate marriages were barely being performed, even among non-Ashkenazi communities, because most of the time the brothers-in-law were married and the Halacha enjoined them to perform chalitza.\footnote{Shelomo Dov Goitein, \textit{The Yemenites – History, Communal Organization, Spiritual Life – Selected Studies}, ed. Menachem Ben Sasson (Jerusalem, 1983) 306.} It is possible to wonder about this statement and even challenge its factual truth, but it does reflect at least the attitude and outlook of Rabbi Meir, who wished to marginalize levirate marriages and not perform the in practice. At the time of his conversations with Prof. Goitein, Rabbi Meir was serving once again in a leadership position among the rabbis, but this time not as Chacham Bashi, who stands alone at the top of the pyramid, but as Chief Sephardic Rabbi, serving together with a most influential Chief Ashkenazi Rabbi Kook. In this function, Rabbi Meir took no initiatives to improve the status of women. This may have been the result of the fact that he was greatly advanced in age, having lived through many hardships and frustrations, and perhaps also because his dominant partner, Rabbi Kook, showed no interest in regulations aimed at improving the status of women, indeed on one occasion even opposed vigorously the enactment of a regulation concerning levirate marriages.

B. Rabbi Uziel: Complete Adoption of the Ashkenazi Tradition

Rabbi Uziel, heir to Rabbi Yaakov Meir at the Chief Rabbinate, was the Sephardic rabbi who took it upon himself to lead the Sephardic community into the modern world as it was coming into being in the Land of Israel. He was born in 1880 in Jerusalem to one of the most privileged Sephardic families. His father, Rabbi Yosef Raphael Uziel, was the head of one of the courts in the official rabbinical judicial system. His mother was the descendant of the grand Chazan family that produced many rabbis. His mother’s grandfather was Rabbi Chaim David Chazan, who served as Rishon Le’Zion and Chacham Bashi in Jerusalem between 1861–1869.
His father, Rabbi Raphael Yosef Chazan, one of the greatest Sephardic Halacha sages at the first third of the 19th century, also served as Rishon Le'Zion in Jerusalem, and was previously Chief Rabbi of Izmir and the author of important books on the Halacha. Rabbis Eliahu Chazan of Alexandria and Y.M. Chazan of Rome, exceptional figures in the world of the Halacha in the second half of the 19th century were cousins of his maternal grandfather. Already in 1902, at the age of 32, Rabbi Uziel began to serve as the rabbi of the Jewish community of Jaffa, side by side with Rabbi A.Y. Kook. After World War I, in 1921, he went to Saloniki where he became Chief Rabbi of that large Jewish community. In 1923 he returned to serve as rabbi of Jaffa and Tel-Aviv, the first Jewish city with a growing Jewish population. In 1939, after the death of Rabbi Yaakov Meir, he was elevated Rishon Le-Zion and Chief Sephardic Rabbi, and served in this capacity, at the side of Rabbi Herzog, until 1953. Rabbi Uziel was a central figure in the rabbinical world in general, and particularly in the Sephardic one, and the last outstanding representative of the historic Sephardic community that ruled in the Land of Israel until the rise of Zionism and the establishment of the Chief Rabbinate.

Rabbi Uziel supported wholeheartedly the enactment of the Jerusalem Ban in 1950 and the complete rejection of levirate marriages except in special cases that received the approval of both Chief Rabbis. He was in complete agreement with Rabbi Herzog regarding the Jerusalem Ban, and it seems that it was Rabbi Uziel who was the instigator and driving force behind these regulations. This is what transpires from Rabbi Herzog’s writings about the entire body of legislation: “Regarding the ordinances proposed by the most highly honored spiritual friend of mine, Rabbi B.Z. Uziel.”49 And again, speaking about the ordinance with regard to levirate marriages he said: “It is right for us to decree in this ban for all residents of the land to act according to those who reject levirate marriages, as proposed by my most honorable and sage friend, may he live a long life, and according to his clear-sighted arguments. And there is one more reason in his view, which ought not be revealed in public in this generation.”50

49 Rabbi Herzog, supra n. 20, at 159.
50 Ibid., at 160.
In Rabbi Uziel's early judicial activity there are no traces of his tendency for a total rejection of levirate marriages. The Chief Rabbinate's enactment of 1944, which imposed alimony payments on a brother-in-law who refused to perform chalitza, crystallized a common rule into an absolute norm without exception.\(^51\) In fact, in the case of the potash worker the Great Rabbinical Court, in a quorum headed by Rabbi Uziel, rejected the demand of a widow who had obtained her inheritance rights under the civil law and then requested that the Court impose alimony on her brother-in-law. The Court demanded that she first litigate her inheritance rights according to Torah law, which is generally not to her advantage.

Rabbi Uziel expressed a more conventional view in a responsum from 1936,\(^52\) while he was serving as the Chief Rabbi of Tel Aviv. He was asked by the great sage, Rabbi M. Kasher, whether a brother-in-law and widow who wished to be united in a levirate marriage should be prevented from doing so. There is no question that the two were young Ashkenazim who had immigrated to Israel and asked to perform the levirate commandment in contradiction to the Ashkenazi tradition that rejected it entirely, even if both parties desired it. In his responsum, Rabbi Uziel raised a variety of claims and arguments, among them the claim that there was a requirement to show purity of intention and motive even among Mishnah sages who preferred the levirate commandment over chalitza. According to the same sages, said Rabbi Uziel, the commandment of the chalitza was not merely a lesser alternative to be used in cases of refusal to perform the levirate commandment, but a commandment in its own right, of equal standing with the levirate commandment. Rabbi Uziel also established that the Land of Israel was as much an Ashkenazi environment as it was a Sephardic and oriental one, and therefore the Ashkenazim must follow their own judicial tradition, and that abbi Karo’s rule in Shulchan Aruch should not be applied to them. His final conclusion was that the levirate marriage of the Ashkenazi couple should be opposed, and that it should be allowed only in special and exceptional cases, having to do primarily with the situation of the widow asking to perform the levirate marriage.

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51 See ibid., at 125
52 Res. Mishpetei Uziel, (Tel Aviv, 5798 [1938]) Part 2, ch. 83
Rabbi Uziel stated the above with respect to an Ashkenazi couple, not a Sephardic or oriental one, so his answer does not indicate a tendency to restrict levirate marriages for these communities. However, in the course of the entire responsum he does not mention even once that the couple in question is Ashkenazi, which creates the impression that his opinion applies to everyone, without exception. Was Rabbi Uziel sowing here the seeds that would eventually bring him to the complete rejection of levirate marriages in the Jerusalem Ban? This is what Rabbi Ovadia Yossef believed, when he challenged this responsum: “And it can be seen here that it was his intention to rule in a similar way regarding the Sephardic Jews, and the end proved the beginning when he acquiesced in the complete abolishment of the levirate commandment.” Indeed, it is here that Rabbi Uziel states his presumption that even according to other rabbis the intention to perform the levirate commandment must be for the sake of the commandment and not for any extraneous reasons, and thereby prepared the theoretical ground for the abolishment of the levirate marriage. Now there was only one more step left: to determine that in these days brothers-in-law and widows no longer intend to perform the levirate marriage for the sake of the commandment. This step was taken at the time the Jerusalem Ban was enacted, when the rabbis cited as one of the central arguments that “nowadays they don’t intend to perform the commandment.”

The question has been asked to what extent was Rabbi Uziel a leader of the Sephardic community who attempted to effect changes in its tradition? Or was he rather a lone revolutionary in the area of the protection of women’s marital status, disengaged from his tradition and community? We will investigate first two other significant issues that touch upon the basis of the women’s marital status, and examine the meaning of the change effected by Rabbis Uziel together with Herzog. One issue is polygamy, which was also addressed in the Jerusalem Ban, which decreed that it is prohibited for a man of any community to marry more than one woman. This regulation did not represent a revolution in the Sephardic legal and social tradition as it did for the oriental traditions.

For many generations, Sephardic Jews all over their Diaspora have been accustomed to adding a clause and oath to the Ketubbah that prohibited polygamy. Legislating a regulation of a public nature did not change the judicial situation in any significant way but based it on a different legal foundation, a more solid one. It appears that the regulation was intended primarily for members of the oriental ethnic groups where bigamy was practiced without reservations or limitations.54

Yet another issue that was settled by Rabbi Uziel was the prohibition against divorcing a woman against her will. In a ruling he handed down in the Great Rabbinical Court of Appeals, together with Rabbi Herzog, he decreed that the Ban of Rabbenu Gershom, which prohibits divorcing a woman against her will, applies to Sephardic and oriental Jews as well.55 Moreover, he rejected the ruling of Rabbi Eliahu Mizrachi that allowed a husband to deposit a get and the Ketubbah with the court and thereby free himself from any responsibility toward his wife if he claimed that she had become loathsome to him.56 Using the legal system and court customs, Rabbi Uziel applied the Ashkenazi norms to all the other ethnic groups, while emphasizing that it is a mistake to think that Sephardic and oriental sages were not concerned with the welfare of women in their communities. Even in this case, the change he brought about was not extreme as far as the Sephardic community was concerned. Already in the 14th century, Rabbi Nissim of Gerona, in northern Spain, ruled that according to some the Ban of Rabbenu Gershom, has spread to Spain as well. This tradition was common in various Spanish communities, even if not in all. Simultaneously, in many Sephardic communities there was a custom to add a clause and oath in the Ketubbah that prohibited the husband from divorcing his wife against her will. It was found that the prohibition against forced divorce had strong roots in the Sephardic tradition. By contrast, we find no traces of actual obstacles to forced divorce in the oriental traditions, and it was only the amount of money specified

55 Westreich, supra n 17.
56 Westreich, supra n. 18.
in the *Ketubbah* that provided any protection for women against arbitrary divorce.

Matters are different when it comes to levirate marriage. To appreciate the extent of the change that the Jerusalem Ban represented, it is edifying to consider the position of the Sephardic ruling in Jerusalem at the twilight of the Ottoman Empire. I have treated this topic in detail elsewhere, so I describe here only the essentials. The official courts in Jerusalem, and among them the Chacham Bashi, were under the complete control of the Sephardic community. They were asked to rule in matters of levirate marriages relatively rarely. In their rulings, the rabbis and judges, first and foremost Rabbi Elyashar, the most outstanding rabbinical personality of the period, point toward the following principles. Levirate marriages were indeed common at this time, and in cases in which both parties agreed to it there was no obstacle to carry out the commandment and the court did not interfere. In cases in which there was conflict between the parties (the brother-in-law, the widow, the brother-in-law’s wife, or the other brothers-in-law) the court did intervene, but acceded to force the brother-in-law to perform *chalitza* only if the widow had a solid cause. The most important among these were the brother-in-law’s lack of financial means, his being married, extraneous motives and insincerity, or the refusal of the widow for reasons of loathsomeness. Only a combination of these, and primarily the brother-in-law’s lack of financial means and the fact that the levirate marriage would result in bigamy, produced a ruling that forced him to perform *chalitza*. There is no doubt, therefore, that regarding levirate marriages the Jerusalem Ban represented a drastic change in Sephardic jurisprudence. Nevertheless, it is possible to find indirect expressions of anti-levirate attitudes in a Sephardic environment close to Rabbi Uziel in the words of Rabbi Yaakov Meir, who served as Chacham Bashi for a short while and was named Rishon Le’Zion and the first Chief Sephardic Rabbi.57

In the matter of levirate marriages, as in other matters mentioned above, Rabbi Uziel adopted positions that favored women and at the same time contributed to unity among various ethnic groups by following the

57 Goitein, *supra* n. 48.
Ashkenazi tradition. But what is the ration between these three factors: improvement of the women’s status, national unity, and subordination to the Ashkenazi position. In Rabbi Uziel’s writings the national unity factor is mentioned openly and explicitly, and in my previous study I assumed this factor to be the principal one behind his position in the levirate question. This consideration, mentioned in his Halachic writings with unusual frequency, is not an ordinary consideration in a Halachic environment.58 But this still does not explanation satisfactorily why Rabbi Uziel chose the Ashkenazi and not the oriental model as the basis for national unity. Was Rabbi Yossef correct in accusing him of humbly capitulating to Ashkenazi dominance?

It seems to me now that the women’s status was also a factor of great importance in Rabbi Uziel’s spiritual world, which was the reason for his choosing the Ashkenazi model as the basis for the national norm. Given than in the matter of levirate marriages, as in the two other matters (polygamy and forced divorce) the Ashkenazi tradition was more favorable to women; it was chosen to serve as the basis for the unified norm. This view is buttressed by Rabbi Uziel’s opinion in an area in family law in which the Ashkenazi tradition was less favorable to women than the Sephardic or the oriental ones: the addition of a clause in the kidushin as a tool for solving the problem of abandoning women and refusing to grant them a get. In this matter, the Ashkenazi tradition was most cautious and rejected forcefully any attempt to use a clause in the kidushin as a legal tool for its annulment should that become necessary. The Sephardic and oriental traditions were more open to such a clause, which was in use in the 20th century as well.59

Rabbi Uziel confronted this issue in the 1920s–1930s, and at the beginning adopted the Ashkenazi position that rejected the use of the clause in the kidushin.60 But later he changed his position and supported

58 I searched the databases of the Res. Project and found that only Rabbi Uziel used it as an Halachic argument. See Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 322.
59 A.C. Freiman, Seder Kidushin VeNisuin, (Jerusalem, 5725–1964, rep.)
60 Res. Mishpetei Uziel, Part 2 – Even Ha’Ezer (Tel Aviv, 5698–1938) ch. 44. This responsa was addressed to the Rabbinical Court in Istanbul.
the use of the \textit{kidushin} clause, according to the Sephardic and oriental traditions.\footnote{Ibid., ch. 45–46, sec. 45–46} This makes it clear that the innuendos about his supposed subordination to Rabbi Herzog or other Ashkenazi rabbis are groundless,\footnote{Res. Yabia Omer, Part 6, (Jerusalem, 5746–1986, rep.) Orach Chaim, ch. 43, par. 3. Rabbi Ovadia Joseph addressed harsh words Rabbi Uziel and Rabbi Toledano, the Chief Rabbi of Tel Aviv.} and that his actions were the result of his outlook and his grasp of what was possible within the constraints of time and place.\footnote{See also his position in the matter of adopting the Sephardic pronunciation by all communities, in opposition to the position of Rabbi Kook, the Ashkenazi Chief Rabbi. Westreich, \textit{supra} n. 3, at 321. Moreover, see below his position in the matter of blood tests as a method for determining paternity, which was in opposition to that of Rabbi Herzog, who as a result was forced to renounce it.}

Rabbi Uziel’s independence in the matter of levirate marriage and the absence of any subordination to Rabbi Herzog can be seen in the case of the Kurdish widow. We showed above that Rabbi Herzog acceded to the widow’s demand, which was based among others on the Jerusalem Ban, to coerce the brother-in-law to perform \textit{chalitza} despite the fact that she obtained her part of the inheritance through civilian law and in contradiction to Torah law. It transpires from Rabbi Herzog’s words that Rabbi Uziel disagreed with him and claimed that they ought not to renounce the observance of the Torah inheritance laws and that the widow should return her portion of the inheritance. Apparently, Rabbi Uziel wanted to continue following the rule established in the case of the potash worker’s widow whose demand for alimony was rejected until she returned the inheritance she had received by virtue of the civil law. In this case, Rabbi Herzog was not supported in his position by a well-rooted and continuous Ashkenazi tradition but by his personal opinion, in which political considerations involving the struggles between the dominant secular authority and the rabbinical judicial system were mixed together. The consideration of providing succor to the poor widow, which is one of Rabbi Herzog’s strong arguments, and the national-political consideration that appears in his words, did not sway Rabbi Uziel from his adherence to what appeared to him to be the Halachic position.

It follows from the above that Rabbi Uziel did in fact effect a far-reaching
change in the Sephardic judicial tradition, which he pushed to its possible limits, but I believe that he did not break down the frameworks and did not operate as a person with a private world view. At the same time, there is no doubt that with respect to the oriental tradition, this legislation represented a complete revolution, and a complete change in the life style of members of ancient ethnic groups in Israel. The judicial tradition of the various oriental communities clearly preferred the levirate marriage and did not acknowledge or recognize the different pretexts mentioned above as justifying a preference for *chalitza*. Levirate marriages were common from the social point of view as well, as was clearly considered preferable to *chalitza*. For example, among the general membership of these ethnic groups it was a common belief that brothers-in-law who performed *chalitza* rather than the levirate marriage would die within a year. Consequently, there were people who chose to carry out the levirate marriage and then divorce the widow rather than perform *chalitza*, and a case of this nature was publicized in the writings of R. Shalom (Salem) Itzchak HaLevi one of the Yemenite Rabbi in Tel Aviv. But we have seen already that Rabbi Uziel did not hesitate to impose the Sephardic legal norms on the oriental communities at least as far as matters of family law were concerned.

It is difficult to determine with certainty Rabbi Uziel’s outlook based on individual topics in family law, however important these may be. But it is possible to suggest a general outline that fits well with his positions in matters of levirate marriages and other issues in family law. Rabbi Uziel regarded national unity as a value of great importance that justified changes in the Halacha prevalent in various communities. In this, he responded positively to one of the most fundamental expressions of the modern western spirit of his times. At the same time, he viewed the improvement of the status of women an important value even in matters that followed from fashions originating in the western world, including levirate marriages, polygamy, and forced divorce. His conclusions follow from internal sources no less than from external pressures, as the Sephardic tradition has for many generations regarded the improvement

64 Rabbi Shalom (Salem) Itzchak HaLevi, Res., Divrei Chachamim, (Jerusalem, 5732–1972) Section Even HaEzer, 12.
of the women’s condition a consideration of Halachic value and employed various legal means to take action in this regard.

And still, it must be strongly emphasized that Rabbi Uziel never crosses the lines of the Halacha and does not reach Halachic positions found among the non-orthodox, whatever the pressures of western modernism. Indeed, he is willing to adopt new Halachic positions only if they are actually present in a strong and significant stream in the world of the Halacha and of Judaism. Thus, in the case of levirate marriages and of close family matters he was prepared to impose entirely new norms on the oriental ethnic groups, and to push to extremes existing norms with regard to Sephardic groups, but only because these are already present and rooted for many generations in the large and strong Ashkenazi community. The same is true with regard to adding the kidushin clause as a means for solving the problem of abandoned wives, which he was prepared to impose on the Ashkenazim because it was present for many generations among the Sephardic and oriental communities.

It is possible to prove this argument by examining Rabbi Uziel’s opinion in the matter of the use of blood tests to determine paternity. Rabbi Herzog took a strong position in favor of accepting the scientific result that allows disproving paternity based on blood tests close to its discovery in the 1940s. In his opinion, the statements of chazal in scientific matters are not incontrovertible and not compelling, and should be rejected in the face of new discoveries that have passed the test of modern scientific validation based on accepted principles. This, of course, is the case with regard to sources of a Midrash nature, that are not purely normative. Rabbi Herzog was eager to insert this test into the Halacha and was even willing to declare a child a mamzer based on it. Rabbi Uziel strongly disagreed with Rabbi Herzog’s opinion and never retreated. His position was that even scientific statements by chazal were rooted in revelation and their validity was that of prophecies, even if they are mentioned in Talmudic segments of a Midrash nature and not normative. In his opinion, there is such a source in the Talmud, in the Nida tractate, which states

66 Westreich, ibid., at 461–463.
that the mother contributes the blood to the infant, and therefore it is not possible to determine paternity based on blood tests. He wrote and published this opinion for the first time in 1946, but he persisted in this approach five years later and opposed Rabbi Herzog's position vigorously.\footnote{Rabbi Herzog, Rules and Writings, (Jerusalem, Mosad Harav Kook, 1996) Section 7, chapter 20.}

The case was one of a girl demanding support from her father, with no implications of \textit{mamzerut}. Rabbi Herzog strongly advocated performing a blood test and determining paternity as far as possible on this basis. But many judges opposed this position, and as Rabbi Herzog noted, so did Rabbi Uziel. In the end, Rabbi Herzog was forced to retreat from his attempt to impose his view on the Great Rabbinical Court of Appeals. Rabbi Uziel did not renounce his position in the face of modern science, which is one of the salient expressions of modernism and of westernization, and did not capitulate to Rabbi Herzog. It was only in matters affecting the women's marital status that he went so far as to accept the modern trends and he did so because of the basic tendency that was already present in the Sephardic tradition, and the complete adoption of these trends in the Ashkenazi tradition for hundreds of years. My conclusion is that the Jerusalem Ban initiated and brought to fruition by Rabbi Uziel as far as levirate marriages are concerned was a process carried out within the confined of the Sephardic tradition and under no circumstances is it the result of subordination or capitulation to the Ashkenazi tradition. Although in this case the Sephardic tradition is pushed to the limit of its flexibility, and it may have been wise to adopt a somewhat more moderate approach, there is no justification in the criticism that the ordinance caused a complete breaking of the vessels. It is possible to examine this claim in the measure of the continuity and of the influence that the Jerusalem Ban exercised among Sephardic sages and traditions.

C. Rabbi Ovadia Hadaya: Controlled, Moderate Acceptance of the Jerusalem Ban

Rabbi Ovadia Hadaya, one of the most important Sephardic rabbis, served for many years on the Great Rabbinical Court of Appeals. He arrived in
Jerusalem as a child at the end of the 19th century together with his father who was one of the important sages of Aleppo. He acquired his Torah learning in Jerusalem and began his judicial activity as a judge in the Rabbinical Court in Petach Tikva. He joined the Great Rabbinical Court of Appeals in the time of Rabbis Herzog and Uziel, and quickly made his mark as one of the influential judges, to be consulted on every important and complex matter. He wrote dozens of decisions during his tenure with the Court, some of which were published in a series of volumes containing his responsa, “Yaskil Avdi” and in other publications. Examining his attitude toward the ordinance of the Chief Rabbinate is important especially in light of the sharp criticism leveled by oriental sages, primarily by Rabbi Yossef, against the ordinance and against Rabbi Uziel who brokered it.

Rabbi Hadaya addressed the Jerusalem Ban in relation to the matter of levirate marriages in a decision handed down in the fiftieth in the case of the Yemenite couple. The facts were as follows: the husband of a Yemenite woman died, leaving several brothers in a levirate relationship with his widow. The eldest, upon whom rests the levirate commandment, was aged, whereas the widow was young. Moreover, he was married and a father to sons. His desire was to consummate the levirate union with his brother’s widow, arguing that “it was accepted among them that chalitza was dangerous.” The Court tried to persuade him that his fears were grounded only in superstition, and asked him to perform chalitza according to the custom in Israel, set by the ordinance of the Chief Rabbinate in 1950. He refused, as did his other brothers, arguing that they feared for their lives. The regional court rejected the argument that chalitza was hazardous, and ordered the brother-in-law to perform chalitza and pay alimony, but declined the widow’s request to coerce him. Both sides appealed the decision, and the case reached Rabbi Hadaya at the Great Rabbinical Court of Appeals.

Rabbi Hadaya began with a brief discussion of the question whether the levirate commandment had precedence over chalitza. His conclusion was clear that the levirate commandment had precedence. But in his

68 Res. Yaskil Avdi, (Tel Aviv, 5719–1959) Part 6, Chap. 121.
69 Res. Yaskil Avdi, ibid., par.3.
opinion, the special circumstances of the case, together with the ordinance of the Chief Rabbinate justified ordering the brother-in-law to perform *chalitza*, but not coercing him to do so. He found a direct precedent to his opinion in the responsum of Rabbi Moshe Benvenisti, one of the important sages in Istanbul in the 17th century.\(^7^0\) In the case before Rabbi Benvenisti, the man was married, with children, and had taken an oath before his wife not to marry a second woman. The widow refused to perform the levirate union so as not to enter into a polygamous situation, and Rabbi Benvenisti accepted her position for all the stated reasons. It is true that in the case before Rabbi Hadaya there was no monogamy oath, since it was not a Yemenite custom to promise not to marry another woman, but in his opinion the relevant ordinance in the Jerusalem Ban was equivalent to a monogamy oath. Accordingly, Rabbi Hadaya found the decision of the Rabbinical Court justified, rejected the brother-in-law’s demand, and ordered him to perform *chalitza*.

The comparison between the Jerusalem Ban and the monogamy oath led Rabbi Hadaya to suppose that the means of remitting them were also identical. The guiding principle was that it was necessary to have a “sufficient and honest reason, about which it could be said that this was not what the legislators had intended,” in order to remove the prohibition imposed by the ordinance. It follows that the various sources found in the Sephardic judicial tradition dealing with the release from the monogamy oath are relevant, *mutatis mutandis*, to the discussion of removing the prohibition of the Jerusalem Ban concerning levirate marriages. It also follows that according to Rabbi Hadaya the ordinance was intended to expand an existing Sephardic rule that was limited to married brothers-in-law who had taken a monogamy oath, and impose it on all Sephardic and oriental Jews. It is entirely clear that Rabbi Hadaya saw no attempt of Ashkenazi domination in principle and no legal pattern established by this ordinance.

Rabbi Hadaya called the brother-in-law’s fear of dying were he to perform the *chalitza* rather than the levirate commandment, it as an “imaginary” claim; he had no doubt that the legislators had not intended

to of release brothers-in-law from the obligations of the ordinance as a result of it. Were the brother-in-law to claim that for members of the Yemenite community this is a real claim and that therefore the ordinance does not apply to them? Rabbi Hadaya decreed that the ordinance was enacted “with the agreement of all the rabbis and all the representatives of the ethnic groups, including the Yemenite Rabbis”\(^1\) so that no one could take such a claim seriously. Rabbi Hadaya’s final conclusion was that the brother-in-law must be ordered to perform chalitza because of the ordinance, and if he refused, to pay alimony or to impose on him harchaka d’Rabbeinu Tam (a shunning of the man by the community), an indirect but effective penalty.

Another levirate case was debated by Rabbi Hadaya toward the end of the 1950s regarding a widow from Rehovot and her brother-in-law from the Ha’Tikva neighborhood.\(^2\) The widow obtained her portion of the inheritance according to the civil law and demanded that her brother-in-law perform chalitza or pays her alimony. The brother-in-law agreed to perform chalitza but demanded his portion of his brother’s inheritance according to Torah law, and had other financial claims. The Regional Rabbinical Court in Tel Aviv accepted the widow’s request, ordered the brother-in-law to perform chalitza and imposed on him alimony until he actually did so. This decision was appealed, and Rabbi Hadaya wrote a long and comprehensive decision, discussing in detail many points, including the Jerusalem Ban. He did not question the validity of this ordinance, and wrote: “… like here in the Land of Israel there is an ordinance not to perform the levirate marriage and he happened to fall into a levirate situation”.\(^3\) Rabbi Hadaya went farther and established that if the ordinance to perform chalitza had an attachment requiring the payment of alimony in case the brother-in-law refused the chalitza, the ordinance regarding the alimony would also be valid. The topic that

\(^1\) Rabbi Hadaya, supra n. 69.

\(^2\) Res. Yaskil Avdi, part 6, ch. 122. It appears that here too the case was that of a Yemenite couple. The couple lived in Rehovot and the Hatikva neighborhood, where many Yemenites lived. From paragraph 9 it also transpires that the couple belonged to an ethnic group that allowed the levirate marriage even if the brother-in-law is married and has children.

\(^3\) Res. Yaskil Avdi, ibid., at par. 9.
concerned him was whether it was possible to reject by virtue of the ordinance a brother-in-law’s claim to obtain his portion of his brother’s inheritance according to Torah law, at least in cases in which the couple belonged to an ethnic group that favored levirate marriages even if the brother-in-law was married and had children. The rabbi’s answer was that in principle, if the brother-in-law was willing to perform *chalitza* but demanded his portion of the inheritance according to Torah law, the court should not impose alimony on him until the widow agreed to litigate according to Torah law. However, with respect to inheritance of land, the rule that applies was *dina de’malchuta dina* (the law of the land is the law) and therefore the civil law was valid even in the eyes of the religious law. And given that in this case most of the conflict centered regarding a plot of land owned by the deceased, the Court regarded the disposition of the inheritance according to civil law as valid. Accordingly, the brother-in-law was ordered to perform *chalitza*, and alimony was imposed on him if he refused to do so.

Rabbi Hadaya struggled here with the same issues that confronted Chief Rabbis Herzog and Uziel in the period of the British Mandate (the potash worker case) and in the early days of the state (the Kurdish widow case). But his was a middle-road solution: he didn’t entirely ignore the circumvention of Torah law in matters of inheritance, as did Rabbi Herzog, nor did he insist on full compliance with Torah law regarding the inheritance, as demanded Rabbi Uziel. In his view, as far as the land was concerned, the rule of *dina de’malchuta dina* applied, and therefore the court could still order the brother-in-law to pay alimony despite the fact that the widow obtained a portion of the inheritance. This position becomes problematic when a portion of the estate consists of property that is not land. This in addition to applying the Sephardic pattern on the special norms derived from the ordinance, as he wrote in the case of the Yemenite couple. Rabbi Hadaya, therefore, did not go so far as to apply the Ashkenazi norm in its full measure on members of the Sephardic and oriental communities. However the ordinance is interpreted, there is no doubt about Rabbi Hadaya’s unequivocal support of the Jerusalem Ban in levirate matters. His statement in the case of the Yemenite couple that the rabbis and representatives of all the ethnic groups had agreed to the enactment of the ordinance is of great importance because of his status
as one of the most important judges of the Great Rabbinical Court and because of his ethnic origin. His support of the Jerusalem Ban also casts an unfavorable light on the serious charges leveled by Rabbi Ovadia Yossef against Rabbi Uziel, which represent Rabbi Uziel as subordinated to the Ashkenazim, and creates great difficulty for Rabbi Arusy, who supports enthusiastically Rabbi Yossef’s criticism of Rabbi Uziel. According to Rabbi Arusy, Rabbi Hadaya “did not perceive and did not appreciate the fact that the intention of the ordinance was to sideline the Sephardic Halacha” and to install the Ashkenazi tradition in its stead, an absolutely illegal motive.  

This assessment is intended to nullify Rabbi Hadaya’s support of Rabbi Uziel and of the Jerusalem Ban. If we consider Rabbi Hadaya’s position, Rabbi Yossef is confronted with two Sephardic rabbis, and by dint of the Halachic principle of "aharei rabim lehatot" (follow the majority), Rabbi Yossef’s opinion should be rejected as the opinion of a single person. Rabbi Arusy adduced no evidence to support his serious claim against Rabbi Hadaya, and as shown below, he supported other severe charges leveled by Rabbi Yossef against Rabbi Uziel. Because no comprehensive studies have yet been published about Rabbi Hadaya and his opinions, it is difficult to disprove decisively a claim of this nature. But an examination of his rabbinical decisions and the central role he occupied in the Great Rabbinical Court are not consistent with such excessive naiveté. Based on what he wrote in his decisions in the Great Rabbinical Court, the ordinance was enacted with the agreement of representatives of the ethnic groups, so that it was not only two rabbis who supported the ordinance.

D. Rabbi Haim David Halevi: Rearguard Action Against Rabbi Yossef

Rabbi Haim David Halevi, a student of Rabbi Uziel and Rabbi Ovadia Yossef’s heir to the positions of Chief Sephardic Rabbi and Chief of the Rabbinical Courts of Tel Aviv, adopted a more intricate position. During the many years in which Rabbi Halevi served in these capacities he never took an explicit stand in levirate matters despite his many writings on questions of Halacha and law. He was not involved in any form in the Sharabbi case, which came up during his tenure, unlike his Ashkenazi

74 Arusy, supra n. 2, at 290.
colleague in Tel Aviv, Rabbi Frenkel, who openly and explicitly adopted Rabbi Yossef’s position. In my article that dealing with Rabbi Halevi’s deafening silence in matters of family law I assumed that Rabbi Halevi was torn between his sympathy for Rabbi Uziel whom he regarded as his teacher and guide, and Rabbi Yossef who ruled unopposed in the rabbinical and judicial world throughout his tenure in Tel Aviv. As a result, Rabbi Halevi refrained entirely from ruling in matters of family law in order to avoid an open confrontation with Rabbi Yossef on the one hand and not to offend the dignity of his teacher, Rabbi Uziel, on the other. This makes it quite clear that he had no doubt about the validity of the ordinance as regards levirate marriages and did not doubt Rabbi Uziel’s sincere motives, although it is possible that Rabbi Halevi believed that the ordinance went too far by rejecting levirate marriages entirely.

IV. The Eastern Reaction: Rabbi Ovadia Yossef and Supporters

A. Rabbi Ovadia Yossef: Restoring the Ancient Prestige of the Sephardic and Oriental Traditions

Rabbi Ovadia Yossef, a native of Baghdad, educated in the yeshivas of the old city of Jerusalem, who eventually became a central rabbinical figure of the Sephardic and oriental communities and the leader of a large political movement in Israel. He took a different view of the changes effected by the Jerusalem Ban, especially as it regards levirate marriages, and chose to turn backward. At the zenith of the age in which the Sephardic and oriental traditions closed ranks with the Ashkenazi tradition regarding the protection of women’s marital status, the seeds were sown which in time yielded a return of the Sephardic and oriental traditions to their erstwhile states.

This section is divided into two. One analyzes in detail Rabbi Yossef’s decisions. This section has already been published and is included in

75 Westreich, “Rabbi Haim David Halevi: Between Rabbi Ovadia Yossef and Rabbi Uziel”, supra n. 4.
this article for the sake of completeness. The other reveals the basis of his world view, which helps elucidate his views on the levirate questions and his complaints against Rabbis Uziel and Herzog. This second part is largely new. It contains various findings that emerged in the course of my research and provides answers to several important and puzzling questions: What is the exact nature of Rabbi Yossef's position? With what point in history is he striving to connect and what agenda is he trying to adopt from that period of glory? What is the role model he follows? What exactly does the rabbi find threatening these days? Who broke the continuity with the past? I believe that within the framework of the current study I can answer some of these questions as far as family law is concerned.

In short order Rabbi Yossef launched a frontal attack on the Chief Rabbinate in general and on Rabbi Uziel in particular, focusing on appealing the validity of the Jerusalem Ban, which revoked the precedence of levirate marriages over chalitza regarding Sephardic and oriental Jews as well. Rabbi Yossef challenged this regulation in a decision of the Regional Rabbinical Court of Petach-Tikva, in 1951. Analysis of what he wrote indicates that he attacked the regulation prohibiting levirate marriages on formal, judicial policy, and moral grounds.

In the formal area, Rabbi Yossef focused on the authors' argument that the abolishment of levirate marriages was consistent with rules and regulations established by the Halacha regarding the levirate commandment – in this case the rule that the levirate marriage should not be allowed if the man acted for extraneous reasons such as a desire for the widow because of her beauty or wealth and not because of his intention to perform the levirate commandment. Rabbi Yossef opened the discussion with a comprehensive review of the Halacha as to whether the levirate commandment had precedence over chalitza, and using his broad erudition, took into account a most extensive range of Halacha sources that touched upon the subject. He rightfully rejected the argument internal to the Halacha according to which levirate marriages must be abolished because there was no intention at the present time to carry out the commandment. Basing his argument on classical Sephardic Halacha sources, such as Rabbi Yitzchak Al-fasi (Rif) and Rabbi Moses ben Maimon (Rambam), he showed that according to those who ruled that the levirate commandment had precedence over chalitza the intention of the brother-
in-law was not an issue at all. Even if the brother-in-law was motivated by the widow's beauty or wealth, the Halacha that orders levirate marriage before chalitza is still valid. Yossef went further and argued that an overwhelming majority of sages, including many Ashkenazi ones, ruled that levirate marriage had precedence over chalitza, and above all of them, Rabbi Yosef Karo, whose rulings and ordinances represent the last word for the Sephardic and oriental Jews. This argument relies on a somewhat mechanical method, and indiscriminately names sages and authors without acknowledging historical trends and traditions or the changes that took place over the generations.77

The second area is that of judicial policy. The argument of the authors of the Jerusalem Ban was that national considerations, like the unity of the people and the need to prevent the split of the Halacha into two legal systems, made the abolishment of the levirate marriages necessary. Rabbi Yossef attacked these arguments vehemently and wrote:

What the members and presidents of the Chief Rabbinate of Israel wrote in the above mentioned document is: "For the sake of peace and unity in the State of Israel, so that the law will not be two laws, the levirate commandment is entirely prohibited and chalitza is obligatory." With all due respect, they greatly exaggerated in this, and their opinion is not at all correct, for in their everyday actions in any number of areas regarding the slaughter of animals and non-kosher food, in other permissions and prohibitions, and in rules of the Sabbath, of purification of family, every community acts according to the customs of their rabbis, the Sephardic community following the authors of Shulchan Aruch and the Ashkenazim the Rama. Similarly, they use different forms when praying and reading the Torah, in the writing of scrolls of Torah, tefillin, and mezuzahs, and so on, and never fear that as a result the law will become two laws, as it is known

77 Note that what counts for him as one author, like the Tosafot, is in fact a collective work or a large school of many sages, That was productive in Ashkenaz and in France for about two hundred years and whose influence penetrated forcefully the Spanish culture.
that each one has the custom of his forefathers to rely on, and both this and that are the words of the living God.\footnote{Res. Yabia Omer, supra n. 53.}

The basic assumption of Rabbi Yossef is that for the purposes of discussing the unity of the Halacha and the abolishment of the Sephardic tradition one cannot differentiate between the levirate commandment and Halachic matters of ritual (as opposed to judicial) nature such as prayer or the slaughter of animals. The levirate commandment is not different from other ways in which every community has persevered its tradition in non-judicial matters without injury to the unity of the people and without fear that the law will become two laws, so there is no justification to abolishing the levirate commandment. By placing all Halachic topics in the same category, without distinction between judicial and non-judicial matters, Rabbi Yossef garnered meaningful support in the words written by Rabbi Kook regarding non-kosher food.\footnote{Rabbi A. I. HaCohen Kuk, Igroth Haraaya (Jerusalem, 5722) Chapter 611.} Rabbi Kook’s document is important to Rabbi Yossef because this is the Chief Rabbi and founder of the Chief Rabbinate who is speaking, someone who cannot be accused of hostility to or estrangement from the values of the Zionist movement or of disregard for its objectives. And it is possible that the document also contains a concealed criticism of the tendency of imposing Ashkenazi norms on the Sephardic community in the name of unity, although Ashkenazi Jews who arrived with the first waves of immigration in fact followed a policy of separation.

Substantively, the following objections can be raised to Rabbi Yossef’s approach of not distinguishing between judicial and ritual matters:

First, Halacha sources that legitimized the multiplication of traditions based on the argument of following the custom of one’s forefathers (lo titosha torat imecha) focused on ritual, not judicial matters. This distinction should not be overlooked, and it is necessary to address the opposing view that binds judicial and ritual matters together.

Second, substantively, if we recognize every ethnic group’s tradition in the judicial field, especially in family law, many difficulties are liable to arise, first and foremost in cases in which the parties belong to different

\footnote{Res. Yabia Omer, supra n. 53.} \footnote{Rabbi A. I. HaCohen Kuk, Igroth Haraaya (Jerusalem, 5722) Chapter 611.}
ethnic groups. As a result of the many differences between the traditions of the different ethnic groups, and their variety, the legal system would be required to invest enormous energies into the development of a branch that would settle intra-Halachic contradictions to an extent that is not known in Jewish history. To the best of my knowledge, the rabbinical legal system does not appear capable of creating a consistent method at the conceptual level and an efficient mechanism at the practical level to settle contradictions between different judicial traditions and to address the phenomena likely to arise in the State of Israel.80

Third, at the institutional level, the main criticism is pointed at Rabbi Uziel, whose support, in his capacity of Chief Sephardic Rabbi, for the Jerusalem Ban means that the initiative to abolish levirate marriages is a Sephardic one and internal to the community, not one forced upon it externally by the institutions of another community. This fact encumbered Rabbi Yossef’s task since he was not able to claim that Ashkenazi forces imposed foreign norms on the Sephardi and oriental Jews, despite his claims regarding norms that originate in the rulings of rabbinical judges.81 It appears, though matters are not explicit, that Rabbi Yossef chose to diminish the status of Rabbi Uziel as his means of undermining the justification that the Jerusalem Ban enjoyed by the support for it of the Sephardic rabbi. The use of Rabbi Kook’s words was already a challenge of sorts of Rabbi Uziel in that he did not follow Rabbi’s Kook’s example in the matter of levirate marriages and did not defend the Halachic tradition of the Sephardic and oriental Jews. But Rabbi Yossef has explicit indications that Rabbi Uziel was prepared to sacrifice the Sephardic tradition on the altar of national unity even in matters of non-kosher food:

In a meeting of the Council of the Chief Rabbinate of Israel they discussed matters of animal slaughter and the inspections of slaughter houses in Israel, and the Rishon

80 See also Eliash, Ethnic Pluralism, supra n. 1, at 368.
81 See Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 342 for his descriptions of arguments he held with judges regarding marriage licenses and the interpretation of the Ban of Rabbenu Gershom.
Lezion the sage rabbi Ben Zion Uziel of blessed memory, from his love of the unity of the nation and his desire to remove the partitions between the ethnic groups, recommended to renounce the Sephardic slaughter and to merge the slaughtering in Jerusalem, and agreed that the Sephardic community should accept the Ashkenazi customs. But Rabbi Zvi Pesach Frank of blessed memory [who was at the time the Chief Ashkenazi rabbi of Jerusalem] opposed it vehemently and said: Even if the rabbis agree to the abolition of their way of slaughter, I will organize Sephardic slaughter in Jerusalem, as in our opinion every community must continue the tradition of its forefathers and follow in their generations-old customs.82

Additional criticism is implied by the fact that it was the Ashkenazi Chief Rabbi of Jerusalem, Zvi Pesach Frank, who strongly defended the Sephardic tradition in matters of non-kosher food. But the assumption of greatest consequence behind this section is that Rabbi Uziel’s position is not binding for the Sephardic and oriental ethnic groups, and the proof is that Rabbi Frank threatened to organize himself Sephardic slaughter were it to be abolished. The argument for this serious charge is that Rabbi Uziel was led to his views regarding levirate marriages and animal slaughter by his desire for the unity of the people of Israel. Rabbi Yossef does not criticize this claim, most likely because the love of the people of Israel is not mentioned in the sources as a real Halachic factor, as opposed to the principle of lo titosh torat imecha, which is explicit and frequently used.83 The extent of the criticism against Rabbi Uziel is softened by the emphasis on his personal greatness manifest in the great weight that he assigns to the unity of the people of Israel.

From here, Rabbi Yossef needed only to take another small step and claim that in the matter of the levirate marriage as well it was this irrelevant motive – the desire for the unity of the people of Israel – that

82 At the end of the responsum.
83 Above, it was pointed out that Rabbi Uziel often used the national unity theme, and that it is an exception among rabbis.
moved Rabbi Uziel, who by agreeing to abolish levirate marriages exceeded his authority, and his position does not obligate the Sephardic Jews. This is exactly what he wrote in his conclusions:

Apparently in the matter of the prohibition of levirate marriages for Sephardic Jews, the sage Rabbi Ben Zion Uziel perseveres in his opinion, as a result of his desire for the unity of the nation, and how great that love must have been to cause him to stray from the right path. And God forbid that we should abolish the rulings of our teachers, the masters of the land, the great Sephardic rabbis, for the illusion of the unity of the nation. In matters of interest for many, who can forgive and forgo? The great God will pardon.

Rabbi Yossef believed that there was nothing left to do but beg forgiveness for Rabbi Uziel, whose great personal qualities made him stray from the right path and caused the illegal abolition of an important rule in the area of family law. Presenting Rabbi Uziel as a sinner deserving of mercy is a sharp indictment in an intellectual environment in which controversy is the order of the day, as best demonstrated in the responsa and writings of Rabbi Yossef himself, who presents a multiplicity of approaches and positions for every detail. This statement is particularly extreme in view of the fact that the Moroccan rabbis and community were strongly influenced by Rabbi Uziel’s lead and the Jerusalem Ban.84

In light of his criticism of the Jerusalem Ban regarding levirate marriages, and in light of the fact that Sephardic authorities, and above all Rabbi Karo ruled that the levirate commandment had precedence, Rabbi Yossef concluded:

There is no validity to the agreement of the presidents and members of the Chief Rabbinate of Israel who decreed the complete abolishment of the levirate commandment also for the Sephardic and oriental communities, and they have no authority to do so.

84 Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 325.
The general conclusion regarding the invalidity of the Chief Rabbinate regulation concerning levirate marriages was applied to the following concrete case that came before the court:

A case has been brought before us in the regional court in Petach Tikva about an immigrant from Yemen who wants to perform levirate marriage with his brother’s wife, and the woman does not want him and requests that he perform chalitza and release her (without a reasonable cause for her refusal to accept the levirate marriage).85

If indeed the Chief Rabbinate regulation of 1950 is invalid, the rule that was customary in the Sephardic and oriental traditions, which gives precedence to the levirate marriage, is reinstated and the woman’s refusal to accept the levirate marriage without proper cause will bring about a rejection of her request for chalitza. As a result, her claim for alimony until the chalitza is performed, based on the Jerusalem Ban, would also be rejected, as would her request to receive the terms granted in her Ketubah. This is how Rabbi Yossef ruled:

God forbid that we should rely on what has been decreed in the above enactment [= the Jerusalem Ban] namely that if the brother-in-law refuses to perform chalitza the court should impose on him alimony to the widow until he performs the chalitza, as it is clear that if the brother-in-law wants to perform the levirate marriage, and there is no Halachic impediment to it, God forbid he should be forced to spend money without legal justification.

Rabbi Yossef added a warning that chalitza performed following a court ruling based on the Jerusalem Ban might be invalid, which means that the levirate connection has not been severed, so that after the chalitza has been invalidated the widow would have to obtain chalitza from all

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85 Res. Yabia Omer, supra n. 53, at paragraph 1.
the brothers of her deceased husband.86 These are astonishing statements, since the rule is that an erroneous chalitza is still valid, and the court is even entitled to knowingly mislead the brother-in-law and tell him that he must perform chalitza by law. An extreme example of this is a case that occurred in Jerusalem in the 16h century, in which great sages were involved, including Rabbi David ben Zimra (Radbaz), Rabbi Moshe ben Yosef Trani (Mabit), and Rabbi Karo himself.87 The case involved a Moroccan brother-in-law and an Ashkenazi widow who refused to accept the levirate marriage, and the question was whether the decision should follow the Sephardic tradition, which prefers the levirate marriage, or the Ashkenazi tradition, which prefers chalitza. Radbaz claimed that the Sephardic tradition should be followed and the brother-in-law should not be forced to perform chalitza, but in the course of the proceedings he misled the brother-in-law and told him that the chalitza commandment had precedence and it was his obligation to perform it. Therefore, even if it is assumed that the Jerusalem Ban is invalid, and that the brother-in-law performed the chalitza only because he was told that this was the rule, this is in fact what Radbaz did knowingly, and in that case the chalitza was not considered invalid. Rabbi Yossef’s final directive was that:

“it is highly deserving for the court to encourage the performance of this important commandment, and therefore in the case under consideration the court should persuade the widow to accept the brother-in-law’s request and perform the levirate marriage in order to perpetuate the name of the deceased.”

Despite Rabbi Yossef’s statement that the Jerusalem Ban absolutely contradicts the Sephardic and oriental tradition as concerns levirate marriages, and his subsequent conclusion that the Jerusalem Ban is invalid, I believe that presenting Rabbi Uziel’s initiative as surprising and the sharp criticism of it are unjust.

86 Shulchan Aruch, Even Ha’Ezer, 170, 5.
87 For an intensive discussion of this case see Westreich, Transitions, at 288–300.
There is no question that the then young rabbi was a courageous one, who though a member of the rabbinical judicial system was not deterred from challenging its leaders, and especially the Rishon Lezion Rabbi Uziel. Rabbi Yossef established here a pluralistic model that mandates multiplicity and variety in opposition to the model of national unity, which from his point of view was nothing but the subjection of the Sephardic and oriental Jews to the Ashkenazi tradition. This early period of the State of Israel, the days of glory of the Jewish national movement the Zionism with socialist and anti religion dominance, Which gave superiority to European and Ashkenazi values including in matters of women equality, did not give a real chance to an approach that recognizes the presence of oriental traditions within the Jewish people in family matters. But the seed was planted already at that time, and the fruits were borne in the 1970s. Rabbi Yossef did not change his views and persevered in his work to preserve the Sephardic and oriental traditions and not to reject them in favor of the Ashkenazi tradition.

Despite the great importance of this verdict, it was not publicized and it was not included in the official collection of Rabbinical Verdicts, in which the important decisions of the rabbinical court system appear. It is not known whether the editors were prevented for political reasons from including in the publication a decision that attacks the legality and challenges the binding validity of a regulation of the Chief Rabbinate signed by the Chief Rabbis, who were also serving as presidents of the Great Rabbinical Court. It is surprising that Rabbi Yossef himself did not include this decision in his collection of responsa *Yabia Omer*, which contains many of his verdicts, the first volume of which was published in 1954. Only in 1976, in the sixth volume of this collection, was it published. It is difficult to believe that Rabbi Yossef did not grasp the full meaning of his decision or that he was reticent to express his opinion in public. Were there considerations of political order that determined the timing of the publication of this harsh opinion? Did he wait until elected to the office of Rishon Lezion and Chief Rabbi of Israel? It is possible that an early publication of the decision might have deterred some in the Israeli public, especially those who were anxious about the prestige of the Chief

88 Rabbi Yossef was elected Chief Rabbi of Israel in 1973 together with Rabbi Goren.
Rabbinate and its legislative acts. In any case, he did not conceal his positions and already in his office as the Chief Rabbi and chief of the rabbinical courts of Tel Aviv-Jaffa, in the beginning of the 1970s, he began implementing his principles. According to his declaration:

While I served as the Chief Rabbi and chief of the heads of rabbinical courts in Tel Aviv-Jaffa, I took action against this regulation [the Jerusalem Ban for the abolition of levirate marriages (E.W.)], and when members of the oriental communities and of Yemen who wanted to perform the levirate commandment came before me I encouraged them to do so, according to the opinion of the rabbi of Shulchan Aruch, the injunctions of which we accepted.89 (My emphasis E.W.)

Not only did he not support the regulation and refused to submit to its injunctions, but he actually encouraged levirate marriages among members of the oriental communities who were interested in it.

The next stage in the realization of his objective came with his appointment as Chief Rabbi of Israel and president of the Great Rabbinical Court of Appeals. Shortly after his appointment to the high office, the case of Sharabbi was addressed to him. In his decision, Rabbi Yossef repeated what he had said in his decision in 1951 when he served in the Petach Tikva court, and adopted his old views in their entirety and with enthusiasm. This is how he concluded:

Most important of all, I agree wholeheartedly with your highly learned opinion that it is necessary to allow the brother-in-law A. Sharabbi and the sister-in-law Juliet Sharabbi to perform the levirate commandment according to the Halacha. And I support you both in theory and in practice.90

89 Res., Yabia Omer, Part 8, Even Ha’Ezer Chapter, 26.
90 Res. Yabia Omer, Part 6, Even Haezer, Chapter 26, Paragraph 3.
His decision in this case was unequivocal and vigorous: the couple ought to be allowed to perform the levirate marriage and must even be encouraged to do so. And the regulation of the Jerusalem Ban, whose authors were the Chief Rabbis of Israel, is invalid and does not obligate. Especially important is his comment at the end of his opinion that “in this way the action is performed with my above approval,” that is, the theoretical doctrine became practical Halacha, this time not merely by a Sephardic or oriental sage struggling on behalf of the oriental community’s tradition, but adopted in practice by three of the senior Ashkenazi judges who were central figures in the rabbinical court system for decades.

Indeed, in the case of the Sharabbi couple it did not injure the marital status of the woman because according to the description of the facts she agreed to it at least after the decision was handed down. But the theoretical foundation given by Rabbi Yossef to the decision assumes the abolition of the Jerusalem Ban and opens the door also for cases in which a Sephardic or oriental brother-in-law will demand a levirate marriage and the woman will refuse to acquiesce. In this respect, he inflicts severe injury to the women’s marital status, because the preference given to the levirate marriage means that a woman who marries someone will also be related to his brother (if her husband has no offspring), and that her refusal of the second marital relation will not be accepted by the legal system and even trigger legal reprisals, such as her being declared a rebellious woman. It is possible that the three judges thought this case to be exceptional because the brother-in-law was a bachelor and the widow agreed to the marriage, and therefore there was no reason to prohibit it, but would have opposed it had the brother-in-law been married, and would have pressured the brother-in-law had the widow refused the levirate marriage. But in this case it was possible to leave the Jerusalem Ban in force and use the exception provided for in the Ban itself, which says:

This prohibition can be overruled only with special authority and by the decision of the wider council under the signature of the Chief Rabbis of Israel.91

91 Shershevsky, supra n. 30.
It is obvious that the qualifications and limitations are most serious, and it appears that the objective of the authors was indeed to root out levirate marriages. But the door was not closed entirely, and it is still possible to perform levirate marriages in Israel. It is surprising that the Ashkenazi judges did not choose this path. Rabbi Yossef was not prepared under any circumstances to use the exception clause in the Ban and allow the levirate marriage under this clause. For him, as levirate marriages are concerned, the Jerusalem Ban exceeded the authority of the authors of the regulation and is therefore invalid. As to the injury to the widow and other consequences, such as Jewish women straying from the right path – none of these is mentioned in his decision.

There is a temptation to present the basic principles that guide the judicial activity of Rabbi Yossef in light of his high standing in Israeli public life, particularly with the Sephardic and oriental ethnic groups. I would like to begin laying some foundations and making assumptions based only on the topic of levirate marriage and related topics in family law that were researched by me intensively. I make no attempt here to reach a comprehensive generalization about the Halachic reasoning of Rabbi Yossef.

1. First and foremost is the principle of leachzir atara le'yoshna, literally to return a crown to its old roots or to restore the crown of Torah Judaism to its ancient glory; in the context of Rabbi Yossef’s positions, it means restoring the authority of oriental Jewish tradition in Halachic matters to its original status [before its subordination to Ashkenazi tradition].

2. Continued preservation of the traditions of all communities of Israel, including small and unique ones, like the Yemenite tradition.

3. Nationalist considerations do not justify changes in the Halacha and the creation of a uniform, common law for all communities.

4. The establishment of the state and the need for a uniform legal system in the area of family law do not justify changes in the organization of the Halacha and the creation of uniform family law.

5. Modern criticism of levirate marriages, owing primarily to the imposition of marriage on women, is of no consequence.

6. Vigorous opposition to Ashkenazi domination and control over Halachic systems and content.

The first item, leachzir atara le’yoshna, and the last one, the opposition to Ashkenazi control, are supreme principles that guide Rabbi Yossef’s...
judicial career. The other principles, important as they may be, are narrower and more focused; I begin the discussion with these. It is clear that Rabbi Yossef wants to preserve all the existing ethnic groups’ traditions regarding levirate marriages, as other subjects, and he specifically singles out the Yemenite community as one that generally has a unique tradition that often differs from the Sephardic one. It is no coincidence that Rabbi Yossef took up the Sharaabi case involved Yemenite family members.

A clear expression of this policy to preserve all the existing ethnic groups’ traditions can be found in a case concerning the forcing of a man to grant a divorce to his wife who claimed that he was loathsome to her. The traditions of all the communities, except the Yemenite, have maintained for several hundred years that a man should not be forced to grant his wife a divorce in this case. Rabbi Yosef Karo ruled in this manner in Shulchan Aruch, and subsequently so did Rama, followed by Ashkenazi and Sephardic rabbis, and by others of various oriental and western communities. Only the Yemenites continued to follow the opinion of Rambam, who ruled that a man must be forced to grant his wife a divorce if she claims that he has become loathsome to her. In a case brought before the rabbinical court, a woman of Yemenite origin claimed that her husband was loathsome to her and required that he be forced to grant her a divorce. Rabbi Yossef expanded considerable intellectual effort on arguing his claim that a Yemenite couple must be judged on the basis of Yemenite judicial tradition. First he ruled that in Yemen they used to force a divorce for reasons of loathsomeness until close to the establishment of the State of Israel, and he engaged in polemics with Yemenite sages who denied the existence of such a tradition in practice. Subsequently he proved that this tradition must continue to exist in Israel and that the existing rabbinical courts should rule by it. Finally, Rabbi Yossef granted the woman’s request to force her husband to divorce her, and one of his main arguments was that according to Yemenite tradition husbands are forced to divorce their wives for this reason, following the opinion of Rambam.

92 Shulchan Aruch, Even HaEzer, 77, 2.
93 Mishneh Torah, Ishut, 14, 8.
Another case deals with divorcing a woman against her will. The family belonged to the Moroccan community. Members of this community continued to follow Talmudic law whereby woman could be divorced against her will. This contradicts the position of several trends in the Sephardic tradition, which have added a clause to the Ketubbah prohibiting divorcing a woman against her will, or have adopted the Ashkenazi Ban of Rabbenu Gershom that prohibits divorcing a woman against her will. Based on an examination of the woman’s Ketubbah and the fact that the couple belonged to the Moroccan ethnic group, Rabbi Yossef ruled that indeed they did not accept limitations on divorcing a woman against her will. This Moroccan tradition was valid in Israel, according to Rabbi Yossef, and consequently he annulled a ruling by the regional rabbinical court that had prohibited divorcing the woman against her will. This conclusion was inconsistent with the findings of Zohar, which determined that Rabbi Yossef intervened in the tradition of the Moroccan community and demanded that they change their customs.

I submit here a hypothesis not based on any explicit statement present in Rabbi Yossef’s decisions but that can nonetheless clarify and explain many of his positions. My claim is that Rabbi Yossef vigorously and obsessively opposes Ashkenazi domination, and wherever he suspects an Ashkenazi threat to the Sephardic or oriental traditions he becomes alert and ready to do whatever it takes to repulse the attack. In the cases discussed by Zohar, the subjects touched upon prayer and ritual, matters in which the Ashkenazi never interfere with other communities. By contrast, the case of divorcing a woman against her will is an obvious case of Ashkenazi intervention as far as the Moroccan community is concerned, because the regional rabbinical court demanded that the Ban of Rabbenu Gershom, a purely Ashkenazi judicial entity, be applied.

Did Rabbi Yossef try to preserve a unique oriental tradition in the case of the rebellious woman claiming that her husband was “loathsome to

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94 Zvi Zohar, *The Luminous Face of the East* (Tel Aviv, Kibbutz HaMeuhad Press 2001) 349–350. However, Zohar’s research reveals that Rabbi Yossef adopted anti-pluralist positions and condemned leaders of non-Ashkenazi ethnic groups who deviated, in his opinion, from the legitimate path traced by Rabbi Karo. This finding contradicts the opinion of Eliash whereby Rabbi Yossef represents a pluralistic approach that opposes the melting pot.
her" also because of the Ashkenazi opposition to this Halachic rule? It is reasonable to assume that the Ashkenazi tradition rejected this rule thoroughly and more vigorously than did the Sephardic and oriental traditions. This is particularly true of the latest generations when Ashkenazim have become more rigid in this respect, fearing judicial activity and the threat of secularism and reform, while Sephardic and oriental Jews remained as they had been for many generations: responding to reality and occasionally bending over backwards to solve difficult situations in the area of family law. Historically, the Ashkenazim have shied away early from the Halacha of the “rebellious loathsome to me,” which allowed forcing the husband to divorce his wife on the basis of the claim of loathsomeness, which affected other traditions in the Middle Ages.95 It should be noted that a book like Bat na’avat ha’mardut (Daughter of a promiscuous woman), which attempts to revive to some degree the Halacha of the rebellious woman, was written in an oriental and Sephardic environment Rabbi Rafael b. Shimon from Jerusalem and Cairo; it is difficult to imagine a book of this nature being written in an Ashkenazi setting. Nevertheless, I don’t know to what degree Ashkenazi sages in the rabbinical court opposed the use of Rambam’s Halacha of the rebellious woman in the above case of the rebellious Yemenite woman.

Principles 3-5 can be characterized as following from the challenge of modernism as it found expression in the Jewish national movement, in the establishment of the State of Israel, and in the striving for equality in the family status of women. Unlike the Moroccan sages who addressed the challenge of modernism directly in the case of levirate marriages and acknowledged explicitly the opposition of women in particular and of the public at large in general to this practice because of the spirit of the times,96 Rabbi Yossef makes no mention whatever of considerations of this sort in the decisions he wrote regarding levirate marriages over a long period of time. By contrast, he conveys no sense of threat from modernism to the traditional values he represents and which he holds sacred, including

96 Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 323–325.
ancient oriental traditions like those that prefer levirate marriages under all conditions, even if the brother-in-law is married and lacking in economic means. Analysis of Rabbi Yossef’s extensive writings on the topic of levirate marriages and on other areas of family law produces the impression that he does not confront the elements of modernism as such, which in fact make no difference to him.

The issue of hachzarat atara le’yoshna is, in my opinion, a basic factor in Rabbi Yossef’s thought in Halachic and judicial matters.97

My assumption is that in his demand to return to the roots of Torah Judaism Rabbi Yossef has in mind the waning of the Ottoman period, especially the time and leadership pattern of the Rishon Le-Zion Chacham Bashi Rabbi Ya’akov Shaul Elyashar. I came to this conclusion following the argument Rabbi Yossef carried on with the two Chief Rabbis, Herzog and Uziel, regarding the obligation in a matter that the sum is not fixed. This type of obligation is problematic in Jewish law, and sages were divided about its validity with respect to alimony. Most sages, among them Yosef Karo in Shulchan Aruch and Rama, consider this obligation valid. Rambam is foremost among those who deny it, supported by a few other sages. In a ruling issued during the British Mandate, Rabbis Herzog and Uziel sided with Shulchan Aruch and Rama, arguing that there was a custom in rabbinical courts to rule in this manner and against the Rambam.98 Rabbi Yossef determined that it was the Rambam’s position that must be followed and rejected the claim that there was a custom in rabbinical courts not to do so; as evidence, he brought decisions handed down by sages in Jerusalem courts during the Ottoman period. The implication of Rabbi Yossef’s claim is a rejection of the historical division established by the Chief Rabbis,

97 The expression hachzarat atara le’yoshna was used in my article, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 326, as the title of the section dealing with Rabbi Yossef. Subsequently, Zvi Zohar elaborated on this topic, to which he devoted an entire chapter of his book, The Luminous Face of the East, under this title: “The Vision Of Ovadia – Lehachzirat atara le’yoshna., supra n. 94, at ch. 16, 312–351. Zohar showed that Rabbi Yossef uses the expression hachzarat atara le’yoshna most intensively, significantly more often than any other Halacha sage. B. Lau, in his doctoral thesis, also followed this path.

98 Westreich, Legal Activity by the Chief Rabbis in the Period of the British Mandate supra n. 4, at 115–117.
who set the beginning of the current period to the time when the foundations of the Chief Rabbinate and its courts were laid, that is, the early days of the British Mandate in Palestine, in 1922. In his opinion, there was continuous judicial rabbinical activity in the land of Israel beginning hundreds of years back, at the time of Rabbi Yosef Karo and his friends in 16th century Safed, and certainly the Sephardic sages of the 19th century were an important part in this continuum, not merely one of its historical layers.

Having marked the spot to which Rabbi Yossef wants to return in Jerusalem as the waning days of the Ottoman Empire, it is possible to narrow further the locus of his yearning. As is the custom of rabbis in Israel, Rabbi Yossef hardly ever publishes his writings in other than purely Torah publications, and it is even more infrequent to find an article written by them that deal with anything but Halachic rulings. One such rare occasion is an article published by Rabbi Yossef in the periodical Shevet va’am under the title “Yisa Bracha.” Following a lengthy description of Rabbi Elyashar’s personality and especially of his humility, Rabbi Yossef describes the central themes of Rabbi Elyashar’s activity and sums up the main points of his doctrine. Rabbi Elyashar did not avoid addressing and confronting the problems that stem from “the inventions of the new technology that engenders Halachic problems.” The era of modernism and the challenge it poses to Halacha are attributed to technology and its innovations, and there is no mention of other problems raised by modernity, like nationalism, secularism, equality of women, the modern state, and uniform law and etc.. My investigation proves Rabbi Yossef right in this matter; the modern standard as a comprehensive and dramatic challenge is not echoed in the many Halachic writings of Rabbi Elyashar.

Rabbi Elyashar’s confrontations with these new problems were characterized, according to Rabbi Yossef, by a light approach that prefers permission over chumrot (the application of excessive strictness). This approach follows from the nature of Sephardic and oriental studies that emphasizes knowledge of all of jurisprudence, including the sages of recent
generations, in contrast with the Ashkenazi judicial tradition that relies only on the Talmud and the first sages, and as a result lacks confidence, is hesitant and fearful, and in the end prefers strictness over permission. As an example, Rabbi Yossef brings Rabbi Elyashar’s ruling in the case of the shmita permission that became an issue for the new settlements of the first immigration. Most of the Ashkenazi sages opposed vigorously the sales licenses fiction and demanded that the land not be worked during the shmita year, despite the certain knowledge that as a result the settlement would collapse and cease to exist. Rabbi Elyashar supported the sales license, as did the Chacham Bashi at the time, Rabbi Meir Faniz’il. For Rabbi Yossef, this controversy takes place entirely within the domain of the different approaches to ruling by Ashkenazi and Sephardic sages, which follow from their different methods of study and inquiry. As it is known, the polemic within the Ashkenazi community surrounding the sales license during shmita exceeded the bounds of a regular Halachic topic as, for example, the fiction sale of chametz on the eve of Passover. This was so because the new settlement was connected with the modern national movement that was not entirely rooted in the traditional values of old, although at that time it had not yet taken up position against the Halacha and did not collide with tradition. It is clear that the position of Rabbi Kook, who supported the sales license, was closely related to his Zionist outlook, which was supportive of the new settlement even if it was carried out by the new, modern national movements that deviated and even opposed the tradition. By contrast, Rabbi Shmuel Salant, who opposed vigorously the sales license, was one of the rabbis of the ultra orthodox old community in Jerusalem for whom everything new was a Torah prohibition, and all the more so pioneer settlers driven by modern values.

Rabbi Elyashar was particularly perturbed by matters of wife desertion and according to Rabbi Yossef he acted energetically and courageously to ameliorate the hardship of abandoned wives. He therefore supported an ordinance enacted by Halacha sages in Algeria to suspend the validity of kidushin performed without a previous civil ceremony. The reason for the ordinance was that according to the French rule in effect at the time, religious marriages were not recognized at all and a woman married honestly according to Halacha was not considered to be married in the eyes of the law, and was open to severe mistreatment on the part of her
husband and to injury to all her rights as a married woman. By annulling the kidushin that were not recognized in the eyes of the civilian law, the sages prevented serious injury to Jewish women. Rabbi Yossef does not conceal his enthusiastic support of this approach, and adduces further evidence for its support in rulings and decisions by other sages of the period, foremost among them the famous sage Rabbi Chaim Falagi from Izmir. Rabbi Yossef mentions that even in Jerusalem there has been an ordinance to suspend kidushin in order to prevent injury to the daughters of Israel and their abandonment if the kidushin were not performed close to the marriage ceremony (Chupa). His strong wish is: “Would it that even in our days a fence were erected and a stand made against the tyrants of our people who cause the abandonment of the daughters of Israel through deceit.” But to his great disappointment: “I saw rabbis greatly learned in the Torah who pondered for a long time extending the ordinance to all the towns of Israel, making slow progress, step by step, but then suddenly withdrew and became fearful of the ordinance.”

It is important to emphasize this point in Rabbi Yossef’s doctrine in light of the fact that his position with regard to levirate marriages is highly detrimental to women, as are his views on divorcing a woman against her will and on polygamy.100 It is entirely clear that arbitrary injury to women and the abuse of existing laws greatly vexed the rabbi and spurred him to decisive and unambiguous action in their defense. Rabbi Yossef sees the greatness of Rabbi Elyashar in the enactment of the ordinance suspending kidushin, as well as a point of honor and praise. At the same time, he criticizes rabbis who feared to enact the ordinance and were not prepared to extend the Jerusalem ordinance to all the towns in Israel. This is how Rabbi Yossef acted also in the case of the Yemenite woman who demanded that her husband be forced to divorce her because he had become loathsome to her, and he was prepared to invoke the pretext of the rebellious woman at least for the benefit of the Yemenites in order to prevent the woman from being abandoned.

Then why did he struggle with such determination against the Jerusalem Ban, which prohibits levirate marriages and protects widows from exploitation and the extortion of their money by their brothers-in-law? Furthermore, why didn’t he accept the minimalist decree that had been enacted already in 1944 and which forced a brother-in-law against whom an order to perform chalitza had been issued to pay alimony until he consents to perform the chalitza? Rabbi Ovadia Hadaya describes the misery of widows in a levirate relationship drawing on a (possibly fictitious) case: “There are women who are beholden to a brother-in-law who refuses to absolve them either by proper levirate marriage or by chalitza until they are paid money, and the widow has nothing of her own, and in the meantime she remains abandoned for years. And it is known how much chazal feared for the virtue of abandoned women.” The same questions apply to his opposition to extending the prohibition against divorcing a woman against her will to all ethnic groups, and implicitly, to his opposition to Rabbi Mizrachi’s rule and to his refusal to recognize the Jerusalem Ban, which prohibits polygamy to members of all communities.

It appears that in these cases too one can detect Rabbi Yossef’s fierce opposition to Ashkenazi domination and to what appears to him as cooperation with it, as opposed to a judicial and legislative activity that follows the patterns of the Sephardic and oriental traditions. A determined and stubborn struggle against hitches that follow from kidushin, including their retroactive suspension, is well grounded in the Sephardic and oriental traditions all through the days of Rabbi Elyashar and to the present time. By adopting this conduct without reservations, Rabbi Yossef retained a sense that even in the face of far-reaching legislation he would still be following along a well-trodden path, in the footsteps of Rabbi Elyashar, as long as it was intended to prevent injury to women and situations of abandonment. It is an entirely different matter when it comes to restricting levirate marriages and endeavoring to abolish them altogether, or to the expansion of the protection extended to women in other matters having to do with their marital status such as polygamy and forced divorce. Here he does not find among Sephardic sages, and certainly not among oriental ones, a strong and well-rooted tendency toward changing existing norms to broaden the protection of women and at times even to prevent their abandonment. It is true that in the history of Halacha there have been
sub-currents in the Sephardic tradition that chose this direction, but this was not a prevalent or common phenomenon. In particular, this trend finds no expression in the jurisprudence of Sephardic sages in Jerusalem in the closing years of the Ottoman Empire, and above all, in Rabbi Elyashar’s decisions. As my research has shown, the rulings of Rabbi Elyashar and of his contemporaries followed closely the Sephardic judicial tradition that required several grounds, first among them the brother-in-law being married as well as indigent, to justify demanding that he perform chalitza and exerting pressure or forcing him to do so. And this among Sephardic people for whom a tendency toward monogamy and the oath was common, so that polygamy following a levirate marriage went against their obligation and oath. As far as Rabbi Yossef was concerned, the levirate ordinances initiated by the Chief Rabbinate in 1944 and 1950 were a clear attempt of Ashkenazi control grabbing, with the Sephardic Chief Rabbi surrendering to and even cooperating with it. The only appropriate reaction from Rabbi Yossef’s point of view was fierce opposition and the rejection of the initiative in its entirety, whatever the cost that the daughters of Israel may have to pay for it. His struggle continued until he was named Chief Rabbi of Israel, and the most important Ashkenazi heads of rabbinical courts in Tel Aviv surrendered to him and acknowledged that the Jerusalem Ban was invalid, whereby the crown of the oriental tradition was restored to its former glory (chazra atara le’yoshna).

This energetic opposition to the imposition of the norms of one ethnic group’s tradition upon another gains indirect expression in another basic guideline that Rabbi Yossef found in the Halachic doctrine of Rabbi Elyashar. The Sephardic Halachic tradition, which is based on Shulchan Aruch, did not permit the use of an eruv (merging of courtyards) on the Sabbath in public areas where the streets were more than sixteen cubits wide (approximately eight meters) regardless of the number of pedestrians. By contrast, the Ashkenazi tradition and practice decreed that it was possible to use an eruv on these streets except when the number of pedestrians exceeded 600,000 in a day. In Jerusalem in the 19th century, and even today, such a number of pedestrians is not realistic, and therefore it was possible to use an eruv on the Sabbath according to the Ashkenazim. Until the 1840s there were hardly any Ashkenazim in Jerusalem, and the entire community, its rabbis, and institutions followed the Sephardic
tradition. When Ashkenazim began to arrive in the middle of the 19th century, they demanded the institution of an eruv that conformed to their European Halachic tradition. Rabbi Elyashar allowed the Ashkenazim to follow their custom and set up an eruv in Jerusalem despite the fact that he had weighty arguments to justify rejecting such an action. First, a Jerusalem custom is established according to local residents over many generations, and these were naturally Sephardic people who did not use the eruv on streets wider than sixteen cubits.101 Second, Rabbi Yossef Karo was a rabbi in the land of Israel and must be followed in Halachic decisions in general and with regard to the eruv as well. Third, there was serious concern that the Sephardic population would follow the Ashkenazi innovation and abandon the Halachic tradition to which it was bound. But Rabbi Elyashar rejected these arguments and permitted the Ashkenazim to create a new custom in Jerusalem consistent with their Halachic tradition.

Rabbi Elyashar appears as a Halachic leader who adopted a pluralistic approach and an open mind toward the recently arrived Ashkenazim. This pluralism in Rabbi Elyashar’s Halachic conduct is also reflected in his respect for custom. According to Rabbi Yossef, Rabbi Elyashar greatly respected various customs of other communities, even if he didn’t agree with them. It is difficult not to detect here a veiled criticism of the Ashkenazim and its rabbis who did not treat the Sephardic people in the same way but tried to impose their own traditions by the authority of rabbinical legislation backed by their political power. For Rabbi Yossef, a Sephardic sage toeing the Ashkenazi line, as did Rabbi Uziel in the case of levirate marriages, was intolerable.

B. Supporters of Rabbi Yossef

How did sages belonging to different ethnic groups react to Rabbi Yossef’s harsh stand? Rabbi Kapach was one of the outstanding oriental sages

101 An argument of this nature was raised by Rabbi S’Ch Gagin Rabbi Simcha Haim Gagin on the issue of kashrut laws in Jerusalem. In his view, the Ashkenazim should adopt the positions of the Sephardic Halachic tradition and abandon the Ashkenazi tradition because they continue to be absorbed by the Sephardic community, which represents the majority of Jews in Jerusalem. See Zohar, supra n. 94, at 317–318.
who served as a judge in the Great Rabbinical Court of Appeals and was considered the premier Yemenite Halacha sage. In his Halachic doctrine Rabbi Kapach consistently defended the preservation of the various ethnic traditions, but did not reach an explicit decision in the matter of levirate marriages, where he supported Rabbi Yossef’s position. It is reasonable to assume that he fully supported the view that the oriental communities should be allowed to continue observing their customs. Explicit support for Rabbi Yossef’s stand came from Rabbi Kapach’s spiritual follower, Rabbi Arusy, who addressed in detail Rabbi Yossef’s views on levirate marriages and his polemic against the Jerusalem Ban in his Doctoral Thesis.\(^\text{102}\) The work presents in its entirety and in great detail Rabbi Yossef’s answer to the question of levirate marriages in the Jerusalem Ban.\(^\text{103}\) The only voice heard is that of Rabbi Yossef’s ultra-critical one. No arguments are presented in the defense of Rabbi Uziel and his colleagues who enacted the ordinance. Rabbi Arusy repeats in detail Rabbi Yossef’s main arguments with complete agreement and without critical examination. For example, he repeats the criticism of the Chief Rabbis’ argument in favor of the ordinance based on the fact that in most Jewish communities chalitza had precedence. Rabbi Yossef challenges this factual argument by declaring that it is “not true”\(^\text{104}\) Rabbi Arusy accepts the criticism without reservation and without verification, and sees it as a means of “demolishing the ordinance since one of its main ingredients is based on a factual error.” According to Rabbi Arusy there is only one matter that requires verification, and this is whether the intention of Rabbi Yossef’s criticism was to prove that the legislators had no authority “for not being sufficiently competent in the relevant topics” or perhaps it was Rabbi Yossef’s intention to criticize them for a knowingly misleading act whose purpose was to serve as a “cover for some other trend, which was the imposition of the current Ashkenazi Halacha on all ethnic groups in Israel.”

This vigorous stand in favor of Rabbi Yossef, and the complete identification with him defines the work as belonging to the Halachic genre rather than the scientific one. The author does not examine the

102 Rabbi Arusy, supra n. 2.
103 Rabbi Arusy, ibid., at 282–192.
104 Rabbi Arusy, ibid., at 284
possibility that there may be some substance to the Chief Rabbis’ claim. Perhaps they assumed, for example, that majority and minority were defined for this purpose on the basis of the composition of the Jewish population, which was, even after the Holocaust, overwhelmingly Ashkenazi. This position is, obviously, in contradiction to that of Rabbi Yossef, according to whom majority and minority are defined by lists of sages and authors, where the Sephardic and Oriental exceed the Ashkenazim. The second claim, which is most serious, is also inconsistent with the critical method required by scientific works or even rabbinical studies. It is difficult to imagine a more serious charge against two outstanding Chief Rabbis of wide prestige, than to accuse them of knowingly using a false claim to pursue an illegitimate objective, the imposition of the Ashkenazi tradition. It would have been proper to examine the accuracy of such a claim from the point of view of the accused and to present alternative interpretations. It would have been possible, for example, to identify sources of the type I examined above. But it appears that Rabbi Arusy’s complete identification with Rabbi Yossef’s approach obviated for him the need for such a discussion. Clearly, the absence of any evidence in support of Rabbi Yossef’s criticism leaves unchallenged my conclusion that the main motive of rabbis Herzog and Uziel was not the imposition of the Ashkenazi tradition.

There is another criticism of the two Chief Rabbis, enactors of the ordinance, also based on this finding of Rabbi Yossef regarding the numeric advantage of works in support of the levirate marriage. According to this criticism, Rabbi Yossef’s claim supports the important legal rule of *aharei rabim lehatot*, which the Chief Rabbis ignored when enacting the ordinance. But this argument is problematic. In the 19th century, Ashkenazi Jews in Europe made up some seven million souls. Most of them lived in the small towns and cities of Eastern and Central Europe and supported their tradition wholeheartedly. In every place where they settled, served rabbis of outstanding learning, some of whom reached the highest levels of scholarship. From among these thousands of rabbis, a

105 Before the Holocaust there were about 20 million Jews in the world, 19 million of which were of Ashkenazi origin, that is, 95%. After the Holocaust there were approximately 13 million Ashkenazim as opposed to about one million non-Ashkenazim.
minuscule minority bothered to publish books of responsa dealing with matters of family law in general and specifically with levirate marriages. This was in stark opposition to the prevailing custom among Sephardic and oriental sages to publish works of this nature, despite the fact that their numbers were much smaller than those of Ashkenazi sages and their constituents fewer than a tenth of the Ashkenazim. What one learns from counting the sages who support levirate marriages as opposed to those who support chalitza is that the Sephardic and oriental sages used to publish many books and write about levirate marriage. There is no other evidence here regarding the extent of support for one of the positions on the part of Halacha sages in a given generation, and there is no indication in it regarding the extent to which this or that approach gained currency among the Jewish population worldwide. Also the extensive writing about a subject might be an indication that it was “hot” and there was controversy about it, whereas relative silence an indication that there was general agreement.

Following in the footsteps of Rabbi Yossef without hesitation or critical evaluation, Rabbi Arusy concludes that the Ashkenazi attempt for domination is so clear that “one should not rely upon Rabbi Uziel as he was ready to renounce the principles of oriental Halacha without having the authority to do so because of his love of the unity of Israel and because of his naiveté” (my emphasis).106 The author does not verify at all, before leveling this serious charge, whether some other reason, internal or external to the Halacha, served as the basis for Rabbi Uziel’s argument, and simply repeats Rabbi Yossef’s claim that Rabbi Uziel sinned in his naive (or worse, in his subservient) endeavor to promote the unity of the people of Israel. Nothing is mentioned here of Rabbi Uziel’s biography, roots, teachers and spiritual environment, schooling, intellectual world, and ideological convictions. The author pointedly ignores the views of Rabbis Uziel and Herzog concerning the status of women and the possibility of the existence of a Jewish Halacha system in the domain of family law in a sovereign Jewish state controlled by a dominant secular majority.

106 Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 289.
Rabbi Yossef’s theoretical and ideological doctrine began to acquire practical meaning when he started his tenure as the Chief Rabbi and Chief of Rabbinical Courts in Tel Aviv and found a following among Ashkenazi rabbis as well. In his words, early in his tenure, he assembled the judges of the Rabbinical Courts in the city and asked them not to apply to Sephardic and oriental couples the Ashkenazi norms that rarely allow marrying a second woman in cases in which the first wife was insane.\textsuperscript{107} It is reasonable to assume that he acted in the same way regarding levirate marriages, although I did not find it explicitly stated in his writings. Apparently, this conduct of Rabbi Yossef as Chief Rabbi of Tel Aviv and subsequently as Chief Rabbi of Israel produced a change in the rulings of key Ashkenazi rabbis, who began adopting a pluralistic approach in allowing levirate marriages for oriental and Sephardic Jews. A clear example of this is the attitude adopted by the Ashkenazi Chief Rabbi of Tel Aviv and two Heads of important Rabbinical Courts in the Sharaabi case. As shown above,\textsuperscript{108} these judges asked Rabbi Yossef, while he was serving as Chief Rabbi of Israel, to approve the levirate marriage of an oriental couple, thereby practically rejecting the Jerusalem Ban with respect to levirate marriages.

Rabbi Yossef however did not receive the support of Rabbi Haim David Halevi, seminal representative of the age-old Sephardic community in the Land of Israel. Rabbi Halevi replaced Rabbi Yossef as the Chief Sephardic Rabbi and Chief among the Heads of Rabbinical Courts in Tel Aviv, but throughout his long tenure he made no statement of support for Rabbi Yossef. In the Sharabbai levirate case, when the principal Ashkenazi judges, foremost among them the Chief Ashkenazi Rabbi Frankel, accepted Rabbi Yossef’s position, Rabbi Halevi’s failure to support Rabbi Yossef or to take any position is especially noticeable. The explanation provided above in the section about the Sephardic approach to levirate marriages accounts for his silence. Rabbi Halevi regarded himself as a follower of Rabbi Uziel, and therefore could not accept the severe criticism of Rabbi Yossef even if he may have believed that Rabbi Uziel went too far in rejecting levirate marriages entirely. At the same time, Rabbi Yossef

\textsuperscript{107} Westreich, \textit{ibid.}, at 342.
\textsuperscript{108} See above, Section 3.2, Retreat of the Tel-Aviv Rabbinical Court Judges.
received qualified support from Rabbi Mashash, who was the Chief Rabbi of Morocco and subsequently, in the 1970s, The Chief Sephardic Rabbi of Jerusalem. In 1981 he was required to provide an opinion about the Jerusalem Ban regarding the levirate marriage of a widow and her bachelor brother-in-law. Rabbi Mashash challenged the validity of the Jerusalem Ban with respect to levirate marriages and decreed that in principle no authority could enact a regulation that entirely abolished a Torah commandment. Rabbi Mashash wrote explicitly that in this matter he was following Rabbi Yossef, adopting his arguments, including his sharp and offending criticism of Rabbi Uziel.

Despite his severe criticism of the Jerusalem Ban, Rabbi Mashash did not completely reject the content of the ordinance. He agreed that there was justification in enacting a regulation that recognized the widow’s right to refuse the levirate marriage if she had a good reason such as the brother-in-law being married, or old, or ill. He based this approach on the ordinances enacted in Morocco shortly after the Jerusalem Ban and on his connection with these ordinances. A comprehensive inspection of the Moroccan ordinances, enacted by a community with a unique tradition in Jewish law, the nexus of these ordinances with the Jerusalem Ban, and the change that took place in the position of the Chief Rabbi of Morocco after his arrival in Israel require a separate investigation to be undertaken in the wake of the present study.

109 Res. Shemesh Umagen, Even Haezer, ch. 8.
110 Westreich, “Protection of the Marital Status of Jewish Women in Israel: An Encounter between the Legal Traditions of Various Communities”, supra n. 3, at 323–326. I sought to find support for Rabbi Uziel’s position in the Moroccan ordinances, but I do not now believe that Rabbi Uziel needed this support.