Family Law and the Challenge of Modernity:  
Debate about Levirate Marriage among  
Moroccan Sages  

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Abstract

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Debate about Levirate Marriage among Moroccan Sages*

Elimelech Westreich**

To my teacher and friend, R. Mordechai Akiva, whose studies covering the space between Maghreb and India opened our eyes to the actual legal work of rabbinical courts and to the living law of the Torah.

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1 Introduction

The present study examines how in the second half of the 20th century Moroccan sages, in Morocco and in Israel, coped with the challenges posed by modernity to the continued practice of levirate marriage, as it had been common for many generations in their communities. I analyze the positions of the sages in Morocco, including the various factions present they belonged to and the relationships between them; I discuss the influence of legislation enacted in the State of Israel in the area of levirate marriage on the state of affairs in Morocco, and compare the arrangements in the two countries; I explain the changing attitudes of several of the Moroccan sages toward the Israeli legislation following their immigration to Israel and their encounter with R. Ovadia Yossef, who struggled to bring back the old glory of levirate marriage.

From the vantage point of modern legal values, the levirate commandment is unusual in that it establishes a matrimonial connection between the widow whose husband died without leaving offspring and the husband’s brother, without the widow’s consent, denying her the freedom to marry at will after her husband’s death. According to Jewish law, if a man dies without leaving a living offspring, a matrimonial (levirate) relationship is established between his widow and the living brother of the deceased. The levirate connection is realized by matrimony and, according to Torah law, does not require any additional judicial action. The levirate connection is similar to the matrimonial one, albeit weaker. Many decisors view it as an incestuous relation, although others do not regard it as such. Similarly to the married woman, the widow can be released from the levirate connection through a legal act that requires the agreement of the man: the act is called chalitza, whereas the act that ends the matrimonial relation is called a get. Marriage of the widow to a stranger without first obtaining chalitza generally results in the legal system dissolving the marriage using the means at its disposal. Nevertheless, according to the dominant halachic view, because the levirate marriage is a weaker relationship, a child born of a stranger and the widow who had not obtained chalitza is not declared illegitimate (mamzer). Moreover, according to a common Halacha, it is possible to
make false promises to a brother-in-law and to mislead him in order to obtain *chalitza*, and the *chalitza* is nevertheless considered valid, whereas in the case of a married woman, under similar circumstances, the *get* would be considered invalid without an appropriate mental base.

The Sephardic legal tradition holds that, similarly to a married woman who refuses to lead a matrimonial life with her husband, refusal of the levirate marriage and of matrimony with the brother-in-law by the widow leads to her being declared rebellious, with all the attendant marital and financial consequences. Only if the widow has a legally acceptable ground can she prevent being declared rebellious, in which case the brother-in-law can be coerced to perform *chalitza*, pay alimony, and submit to other financial obligations toward the widow. The list of grounds and their strength have changed over time and over the Sephardic-Oriental space; even within the Moroccan tradition itself it is possible to detect changes over time.

I studied the contraction and expansion of the list of grounds throughout the history of Jewish law in Morocco, ¹ and this study points to an approach that holds levirate marriage in high regard. This approach was still in force in 1940, when members of an official rabbinical court in one of the important Moroccan communities applied the weight of all their influence on an aged widow to accept a levirate marriage despite the fact that all of her deceased husband’s brothers were married. Her refusal to marry the eldest, as ordered by law, and willingness to marry only the youngest one resulted in her being declared a rebellious woman and in the loss of significant portions of her *ketubbah*.

At the end of World War II, however, the public atmosphere changed. Demands were voiced among the Jewish community for greater personal freedom, including for women. Levirate marriage, which clearly injures the widow’s freedom, was subjected to strong criticism, and halachic sages, many of whom filled official functions as judges, were asked to act in the matter. At the time, a central organization, the Rabbinical Council, consisting of key Moroccan judges, had just been recognized by

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the French authorities and empowered to offer solutions for the religious problems of all Jews in Morocco.

Halachic sages in Morocco answered the challenge, and confronted directly and exhaustively the topic of levirate marriage, as well as many other issues brought before them. Their chief means was legislation, a legitimate legal tool in Jewish law, although in recent generations it has been used less and less frequently, especially in Ashkenazi circles, which tend to be reluctant to enact new ordinances. This was not the way of the Jewish legal tradition in Morocco, at least not in the second half of the second millennium. Since the arrival in Morocco of the Spanish exiles, a body of ordinances known as the Kerem Chemer has been enacted which included several ordinances regarding the levirate issue. This body of work played a central role in Jewish law within the community, and according to the rabbi and scholar Y.M. Toledano, who served as rabbi of Tangier, Cairo, and Tel-Aviv:

Later [the Kerem Chemer collection] became the cornerstone of Moroccan Jews in general, and the "Shulchan Aruch" on which everyone relied... And most verdicts and religious trials involving Moroccan Jews were decided according to it, without paying attention to whether there were dissenters among famous halachic decisors [poskim].

The importance of local legislation was apparently on the minds of Moroccan sages in their attempt to cope with a range of topics and challenges, including that of levirate marriage. Rabbi Dr. Moshe Amar, who analyzed the gamut of new Moroccan legislation in the 20th century from a broad perspective, suggested that Moroccan tradition of many generations affected this legal activity and left its imprint on it.

Prof. Menachem Elon, former Deputy Chief Justice of the Supreme Court of Israel,

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3 M. Amar (ed.), Jewish Law in the Moroccan Communities, Jerusalem, 1988. This work is of great importance for the current study because it contains all the publications of the six Rabbinical Councils. For a comprehensive introduction on legislation in Morocco since the arrival of the Spanish exiles and until the legislations in the 20th century, see M. Amar, “Introduction: The Fess Ordinances and the Ordinances of the Rabbinical Council in Morocco,” ibid, pp. 9-55. See also M. Amar, “Moroccan sages of the last generation coping with current issues,” in M. Bar-Yoda (ed.), Halacha and Openness: Moroccan Sages and Poskim for Our Generation, Tel-Aviv, 1985, pp. 50-52 and passim.
also commented on the Moroccan legislation since the Spanish expulsion and praised it as an example of effective contemporary legal activity, contrasting it with the idleness of the Chief Rabbinate in Israel in the critical area of inheritance law, which are discriminatory against women.

This aspect of legislative activism accompanies the main thrust of the study: the manner in which the topic of levirate marriage was shaped by Moroccan sages in the second half of the 20th century. As legislation was a central vehicle for effecting a change, the extent of activism is an inseparable part of the discussion about the content of the topic of levirate marriage. The process is a complex and dialectical one, in which two factions of the community of sages confront each other. The dominant one, led by the Chief Rabbi, R. Shaul Danan, attempted to institute far-reaching changes in three legal areas: grounds, sanctions imposed on the brother-in-law, and the financial rights of the widow. Against R. Danan was poised the conservative faction led by important heads of rabbinical courts in Morocco, who vigorously opposed substantive changes to the common legal tradition. The two factions conducted a substantive and fruitful dialog, trying to persuade each other and to reach a compromise that was satisfactory to all. The argument was conducted without any of the participants dismissing their opponents or leveling arguments that have a personal rather than a substantive character.

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6 R. Shaul Danan played a central role in all Rabbinical Councils involved in new legislation in Morocco, including the legislation regarding levirate marriage. See M. Amar, Introduction, supra note 3, p. 42.

7 About the conservative faction of halachic sages in the Middle East and the one seeking changes, see Z. Zohar, Tradition and Change: Halakhic Responses of Egyptian and Syrian Rabbis to the Challenges of Modernization - 1880-1920, Jerusalem, 1993. Throughout the work (the summary is in the final chapter, pp. 283-298), Zohar identifies the Syrian sages as adopting a conservative stance, and contrasts them with Egyptian sages who adapt to the modern reality and support change.
In due course, the debaters in Morocco learned about the position of Israel’s Chief Rabbi Uziel, who was leading the Chief Rabbinate in Israel in enacting a revolutionary ordinance regarding levirate marriage. Known as the Jerusalem Ban, this ordinance prohibited levirate marriage entirely for Sephardic and Oriental Jews, and in practice made the status of Sephardic widows identical with that of Ashkenazi ones. This ordinance strengthened the position of the dominant faction in Morocco and expanded the legislation there, although at no point did this faction adopt the arrangements enacted in Israel. But even the Israeli legislation was not sufficient to persuade the opponents of the Moroccan legislation, because in their opinion the circumstances in Israel and Morocco were different.

This did not mark the end of the inter-relations between the Moroccan and Israeli centers. In the 1970s and 1980s, prominent figures among Moroccan sages, who had participated in the debate in Morocco, immigrated to Israel. Here they met for the first time a key player, R. Ovadia Yossef, who was not a public figure when the Jerusalem Ban was enacted. Under his influence and that of various arguments he raised, the Moroccan sages withdrew their support of the Jerusalem Ban and accepted the position of R. Yossef, according to which the Ban lacks legal validity. Protecting the Moroccan tradition, R. Shalom Mashash, who served as Chief Rabbi of Jerusalem and leader of the Heads of Rabbinical Courts in the city, called for the enactment of an ordinance in the spirit of the Moroccan one, which is free of the flaws of the Jerusalem Ban.

The study compares the two pieces of legislation and the different attitudes of the Moroccan sages in their country of origin and in Israel. This comparison produces a comprehensive understanding of the legal arrangements surrounding levirate marriage in these two active centers, enabling us to follow the degree of legislative activism of halachic sages in the two centers, and to shed light on its general characteristics.

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9 E. Westreich, “Protection of the marital status of Jewish women in Israel: Encounter between the legal institutions of various ethnic groups,” (Hebrew) Pelilim (1999), pp. 326-337.
Levirate Marriage in the Moroccan Tradition

2.1 Landmarks in the judicial history surrounding the levirate issue in Morocco

The Moroccan tradition starts after the Geonim with R. Yzchak Alfasi’s (Riff) ruling and verdict in the controversy between two traditions of the Geonim. The issue was whether levirate commandment or chalitza have precedence. It continues with legislation that places a firm obligation on men to divorce their wives in order to prevent igun as a result of the levirate connection. Further legislation rejects the validity of the monogamy clause in the ketubbah because of the levirate commandment, resulting in injury to the wife of the brother-in-law and indirectly to the widow. Finally, it ends with a narrow interpretation of the legislation, given in a ruling by R. Yaakov Even Zur (Yavetz), one of the prominent Moroccan sages, which expanded to some degree the protection of the widow.

The first stage is characterized by the ruling of Riff in the second half of the 11th century in preference of the levirate commandment over chalitza, according to one of the common traditions in Babylonian yeshivas. This ruling placed the widow in an inferior legal position whenever she refused the levirate marriage without having an argument that could effectively force a married man to divorce his wife. Such refusal could result in her being declared rebellious, with severe matrimonial and financial consequences. This legal foundation appears to have existed for hundreds of years, and we are not aware of any changes to it.

The second stage occurred some two years after the Spanish expulsion. It was the result of the initiative of the exiles’ sages and leaders, who arrived in the city of Fessi in Morocco. These passed legislation to promote their objective, which was to prevent the igun of widows in a levirate connection. To this end, they enacted an ordinance that coerced every man on his death bed to divorce his wife in order to

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10 This portion is based on my article, supra note 1.
11 About the relation between levirate marriage and chalitza in the Mishnah and the Talmud, see M.A. Friedman, “Now they said the chalitza commandment takes precedence over the levirate commandment,” (Hebrew) Teuda 13 (1997) pp. 35-66.
prevent the creation of a levirate connection after his death. This was a new enactment, the like of which cannot be found in Spain before the expulsion, and not among members of the Spanish community who arrived in other places. The custom of adding the content of this ordinance to the ketubbah appears later in the Ottoman Empire and in Italy. The means of the Fess legislators to achieve the divorce before the death of the husband, coercion to issue the get, is an extreme solution in Jewish law. It is reasonable to assume that the exiles operated under the influence of the doctrine of Harosh, who since the 14th century had inculcated among members of the Castilian community a legal doctrine that reduced the importance of levirate marriage. At the same time, in my opinion, in Southern Spain and North Africa there were still factions that acted according to Maimonides's rule regarding the law of the rebellious woman, which served as the platform for the sanction specified in the enactment, forcing the husband to divorce his wife, without the need of basing it on a special Talmudic ground.

The third stage was again a strong legislative one, directed against the interest of the woman. The main point of the ordinance decreed that the monogamy clause, which was common among the exiles, is annulled in case of a levirate connection. The ordinance was consistent with Maimonides's position a few hundred years earlier, although this was not known to the legislators. But their ordinance contradicted the opinion of R. Y. Karo, delivered in a responsum, in which he rejected levirate marriage in favor of the monogamy clause. It appears that the decline of the status of Harosh among the exiles in Fess made possible this type of legislation, which injures both the brother-in-law's wife and the widow. It is not unlikely that the rise in the status of Kabbalah contributed to the strengthening of the levirate commandment, given the importance that Kabbalah attributes to it.

The fourth and last stage is characterized by a legal activity of the commentary and analysis of rulings type. From the legal point of view, three topics are of central importance: the grounds at the disposal of the widow for rejecting the levirate marriage and preferring chalitza; the means of coercion against brothers-in-law who refuse to perform chalitza; and the financial consequences for the widow in case she refuses the levirate marriage.
Clearly, if the widow has a ground by which it is possible to force a husband to divorce his wife, that ground should be strong enough to force chalitza as well. Questions arose only about grounds that were not recognized in the case of married women, or that had been recognized in the past but with time eroded. The impression is that arguments that eroded for married women survived better for widows both as independent and as auxiliary arguments. Prominent among these are: (1) rebellious "loathsome to me;" (2) bigamy; (3) absence of economic means.12 The argument of the rebellious woman eroded during the Middle Ages in the Sephardic tradition, and with the arrival of the refugees of 1391, it also repressed local traditions in the Maghreb. The bigamy argument was based on the monogamy clause in the Ketubbah held by the brother-in-law's wife, and provided only indirect protection to the widow. This argument was the subject of controversy between two factions: one based on Maimonides's responsum rejected the clause by virtue of the commandment; the other, based on R. Karo's responsum, rejected the levirate commandment by virtue of the clause. Eventually, an ordinance decided the controversy in favor of Maimonides, rejecting R. Karo's approach. Lack of financial means was recognized in responsa by Harosh, but the vagueness of the concept allowed extensive leeway for the ruling sages.

The area of the arguments was consolidated in the 18th century by Yavetz, who compiled the body of ordinances of Moroccan Jews and whose rulings were appended to the ordinances as a commentary. In one of his rulings, he narrowed the ordinance that rejected the monogamy clause only to the relationship between the brother-in-law and his wife, and rejected its applicability to the relations between the brother-in-law and the widow. Yavetz addressed at length the topic with reference to the case of a widow in a levirate relationship with a married brother-in-law and father of children, who had extensive financial problems and was also loathsome to the widow.13 Yavetz addressed each argument separately: loathsome, married, and poor. His position in principle was that neither was sufficient to form an argument

12 About various arguments during the period of the Geniza in cases of a levirate connection, see M.A. Friedman, Polygamy in Israel: New Documents from the Cairo Geniza, (Hebrew) Jerusalem, 1986, pp. 129-151.
13 Mishpat Vetzedaka Beyaakov Responsa, B24.
for coercing the man to perform *chalitza*, but at least two of the three are necessary. Among these, he preferred not to use the argument of the rebellious woman so as not to impose on the widow the attendant financial penalties. The high status of Yavetz in Morocco established levirate marriage as a real institution, as well as a custom, with respect to the arguments in favor of coercing *chalitza* in this country for many generations. It appears that there has been no meaningful change in the area of levirate marriage and the arguments for *chalitza* until the middle of the 20th century.

### 2.2 Levirate marriage on the eve of the enactment of the Morocco Ordinances

A clear manifestation of the fact that levirate marriage was a living, common, and powerful reality in Moroccan society and law is found in the ruling of the Meknes rabbinical court of 22.08.40, found in the manuscript of this court’s log.\(^{14}\) The court was founded by the French authorities in 1918, some six years after Morocco became a French protectorate. Similar courts were founded in other cities, and above all of them was the High Court of Appeals in Rabat.\(^{15}\) The head of the court in Meknes was R. Yehoshua Birdugo, who eventually served as the head of the High Court of Appeals and was the head of the First Rabbinical Council in 1947.\(^{16}\) Together with him served R. Raphael Baruch Toledano, eventually his replacement as head of the Meknes court. As we shall see, R. Toledano opposed vigorously any changes to the levirate laws and forced the Rabbinical Council to renounce far-reaching changes it had introduced in this law. In the same court served also R. Yosef Mashash,

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14 The log of the Meknes Rabbinical Court, 1924-1941, Joshua's Court, B327 (M. Amar edition, unpublished). See also *Shaalu Le’Baruch* Responsa, Even Ha’ezer 68, which is a collection of rulings by R. Baruch Avraham Toledano. It contains a ruling about an 80-year old brother-in-law, who the window claimed cannot perform matrimonial duties. The rabbi ruled that he is entitled to the levirate marriage, but used his influence to make him perform *chalitza* because it is not appropriate for an old man to be married to a young woman. I am grateful to R. Shimon Golan for directing my attention to this case.


eventually the Chief Rabbi of Haifa, who was open to general culture and the
challenges modernity posed to tradition, to which he had been exposed earlier, when
he served as rabbi of Talmasan, in Algeria. R. Mashash supported the ruling, and
eventually published it in his book of responsa.

These are the particulars of the case. David died without having children, leaving
behind his widow, Jamila, who had been married to him for 47 years. He also left
three married brothers, Yamin, the eldest, Itzhak, and Yaakov. Yamin asked the court
to perform the levirate marriage with Jamila. The court describes the development of
the case as follows:

We called the widow and she said she does not desire to perform the levirate
marriage with Yamin. We went to great length to change her mind so that she
would consummate the levirate marriage with him, but she refused adamantly.
And when we placed a great deal of moral pressure on her to observe the
commandment, she said that she would do so with Yaakov, the youngest of the
said brothers. And when we asked her why she chose Yaakov given that all are
married and have sons and daughters, she answered that this is her will and there
is no reason for it. And Yamin's representative... said that the law must be
observed without compromise.

None of the parties involved in this matter (the brother, the widow, and the court)
had any doubt as to the importance of the levirate commandment and the need to
observe it. The controversy was about which of the brothers will carry it out, the

17 For short biographical notes about R. Mashash, see Z. Zohar, "All who practice Torah for its
own sake benefit from many things: Rabbi Yosef Mashash about the right of women to devote
themselves to the study of Torah," Paamaim 82 (2000), pp. 151-152. Zohar notes his openness to
general culture. See also Bashan, supra note 15, p. 323-328. Zohar appears to indicate that R.
Mashash follows an open and different halachic path than is customary among the ultra-
Orthodox. See Z. Zohar, "The Halacha as a non-fundamentalist religious language: Rabbi Yosef
Mashash and the case of the Talmasan butchers," A. Sagi and Z. Zohar (eds.), Jewish Culture in
the Eye of the Storm: Anniversary Book for the 70th Year of Yosef Achituv, Tel-Aviv 2002,
pp.569-591, which notes the differences in his halachic rulings about desecrators of the Sabbath
by comparison to what was common among ultra-Orthodox Ashkenazi rabbis.

18 Maim Haim Responsa of R. Yosef Mashash, B, Even Ha'Ezer 13. I am grateful to R. Shimon
Golan who pointed out this source to me. R. Yosef Mashash supported wholeheartedly the
traditional social values and the dominant halachic approach regarding the levirate marriage. See
Zohar, All who practice, ibid., p. 155, indicating that R. Mashash adopted a conservative
approach regarding women's function and status, and regarding the structure of the family.
oldest, as required by the commandment, or the youngest, whom the widow preferred. Based on the presentation of the case up to this point, it is clear that the court attributed great importance to the elder brother observing the commandment, and invested a great deal of effort into persuading the widow and pressuring her by preaching and moralizing. All this was to no avail, as the widow insisted on her preference of the youngest brother for emotional reasons, without providing a proper argument for her refusal to marry the oldest brother.

The court presented the legal situation, and decreed that the levirate commandment took precedence over chalitza based on what R. Karo said in Shulchan Aruch: "The levirate commandment takes precedence over chalitza, and if she does not want to marry any of the brothers [or the oldest, in case she wants to observe the levirate commandment, according to Rama's gloss] without a satisfying argument, she is rebellious. And some say that chalitza takes precedence." According to the prevalent rule in the Sephardic and Oriental traditions, whenever R. Karo brings two dissenting opinions, the first one general and the second in the name of others, the first, general opinion is to be followed. The result is that not only complete refusal of the levirate marriage by the widow brings upon her the status of a rebellious woman, but also her refusal to do so with the oldest brother specifically. Note that as reflected in the verdict, neither the widow nor the court viewed the fact that all the brothers were married a ground for ruling that chalitza takes precedence in this case. This position is rooted in the Moroccan legal tradition, which rejected the monogamy clause in favor of the levirate commandment with respect to the brother-in-law's wife, and certainly with respect to the widow.

Apparently, the widow could have defended herself with the argument that she was old and could not conceive. After all, she had been married to her husband for 47 years. The court addressed the issue of its own initiative and tried to estimate the age of the widow based on the assumption that before the French rule girls used to marry between the age of seven and ten. The widow was therefore around 54-57 years old.

In this matter, the court found a relevant source in the Talmud whereby woman who

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19 Shulchan Aruch, Even Ha'Ezer 165 A.
marries before she is 20 years old can conceive until she is 60, and therefore the widow still had the potential to bear child.\textsuperscript{20} In addition, based on Maimonides and R. Karo's work \textit{Beit Yosef}, the court stated that even sterile and old women deserve levirate marriage because this is the law and because "several sterile and old women were ordered to do so and have the potential to establish a name for themselves."

The court did find an answer by Rashdam whereby a woman of 46 is considered incapable of conceiving, and therefore her husband is entitled to marry another woman before ten years of marriage have passed.\textsuperscript{21} But in the opinion of the court, the argument of Rashdam is not the result of his conviction that a 46-year-old woman cannot bear child (and in this case the woman is at least 54 years old). The court believed Rashdam's position to be that most women do not conceive at 46, although a minority may do so. Rashdam chose to ignore this minority in the interest of the commandment, and because most women do not conceive at 46 the man is allowed to take another wife to observe the commandment to be fruitful and multiply.\textsuperscript{22} By contrast, in the present case, the interest of the commandment demands that we assume that the woman is still able to conceive although only a few women conceive at age 57, and therefore this widow was declared fit to bear child and qualified for levirate marriage. This ruling clearly sheds light on the extreme importance that the court attributed to the levirate commandment, to the point where even an old woman, with practically no real chance of conceiving, was perceived as being obligated to consummate the levirate marriage.

In this case, the widow rejected the levirate marriage with the elder brother without a proper ground, and the court declared her rebellious. As a result, she lost most of the

\textsuperscript{20} Among judges in rabbinical courts in Israel, we found divergent views on the halachic applicability of this saying in our days. See in this respect E. Westreich, "Medicine and natural science in the rulings of rabbinical courts," \textit{(Hebrew) Mishpatim} 26 (1996), pp. 457-458, 480-481.

\textsuperscript{21} Rashdam Reponsa, Yore Dea 91. This answer is discussed in E. Westreich, "Men's claims for reasons of infertility," \textit{(Hebrew) Mishpatim} 25 (1995), p. 265. A similar position was adopted by R. Herzog in a ruling of the Great Rabbinical Court; see E. Westreich, \textit{supra} note 20, pp. 457-458.

\textsuperscript{22} For an analysis of Rashbad's approach to allow the husband to marry in order to fulfill the commandment to be fruitful and multiply, see E. Westreich, "The commandment to be fruitful and multiply in Jewish law in the Ottoman Empire in the 16th century," \textit{(Hebrew) Teuda} 13 (1997), pp. 233-235.
monetary components of her *ketubbah*, that is, the main part and the supplements. Even from the dowry that she brought into the marriage she could retrieve only the assets that remained outright, and forfeited all the assets that eroded or were lost. Furthermore, a woman who is declared rebellious loses all rights to shelter and alimony from her husband's estate – the court did not even take the trouble to mention this because it was so obvious. So Jamila was left to live out the remainder of her life without the succor of a son or daughter, and without substantial portions of property and cash that her *ketubbah* had promised her. It is not clear whether or not the court ordered the brothers to perform *chalitza*, and probably Jamila had no particular interest in the matter, among other reasons because of her advanced age, which precluded any real chance of her forming a new family relationship. The intense pressure exerted on Jamila to consummate the levirate marriage, and the heavy economic penalties imposed on her for her refusal to accept the elder brother demonstrate conclusively the extent to which the institution of the levirate marriage was alive and customary in this society, and how high its legal status was in the eyes of the rabbinical judges.

3  Protest and Preparation for Legislation (First Rabbinical Council, 1949)

3.1  Institutional organization and opportunities for coping with challenges

After World War II, France shared the sovereignty of Morocco with the Sultan. The French authorities decided to allow the Jewish community to establish a central institution, the Rabbinical Council, which was expected to meet occasionally to address topical issues by enacting ordinances (among other means at its disposal). The institution existed for only a short period and succeeded in convening six times, but the meetings were fruitful and their results captured the attention of scholars.

It is noteworthy that the Rabbinical Council consisted of judges who served in regional rabbinical courts and in courts of appeals. This fact was of great

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23 For a list of members at the various councils, see *Jewish Law in the Moroccan Communities*, *supra* note 3, p. 215 (1st Council); p. 232 (2nd Council); p. 254 (3rd Council); p. 285 (4th Council); p. 361 (5th Council); p. 407 (6th Council).
consequence in the adoption of the legislation and its implementation in practice in court rulings, however revolutionary the legislation may have been. As a result, there were no cases in Morocco when judges systematically ignored the legislation of the Rabbinical Council, scuttling serious attempts to address topical issues, as was usually the case in rabbinical courts in Israel. The matter of implementation of legislation in rabbinical courts was raised in a lecture by R. Mashash at a convention of rabbinical judges in Israel in 1983.24 At the time he already served as Chief Rabbi of Jerusalem and chief of the heads of rabbinical courts in the city, but had previously been an active participant in the Rabbinical Councils in Morocco, and even served there as Chief Rabbi.

At the convention in Israel, R. Mashash sought to share with the judges the successful experience that had accumulated in Morocco in using legislation as a tool for coping with topical problems, and noted the need for inculcating such use as a condition for its success. Based on the successful experience in Morocco, he also presented the solution devised there for coping with levirate marriage, which we shall discuss latter.

3.2 Voices of protest

At no time, not before enactment of the ordinances and not after it, did Moroccan sages express any doubt about the principle: the levirate commandment is very important and deserves continued support if the widow and the brother-in-law wish to observe it. The main preoccupation of the participants at the Rabbinical Council was with legal aspects of the levirate commandment that arise when there is a conflict between the brother-in-law who wishes to perform the levirate commandment and the widow who refuses.

The levirate issue came up already at the First Rabbinical Council, and recommendations were made in areas "that appeared to need correction in the matter of levirate marriage and chalitza."25 But discussion of the recommendations was

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24 Shemesh Vemagen Responsa, A, Even Ha'Ezer 16, in the Introduction. R. Mashash revisits this topic at the end of the speech, C.
25 Jewish Law in the Moroccan Communities, supra note 3, p. 236.
postponed to the Second Rabbinical Council, probably because of the sensitivity of the topic, having to do with issues involving pure prohibition and permission (*isur ve'heiter*), and perhaps even incest, and because it was a deeply rooted legal social institution in the Moro-ccan Jewish community. It is also possible that leaders of the community knew that there were profound disagreements on the subject, and therefore decided to act patiently. Note that the custom of introducing a topic for consideration at one council so that it comes up for debate at a later one is not mentioned in the charter of the councils. This is yet another indication of the complexity of the topic of levirate marriage and of its sensitivity in the opinion of the participants.

Leaders of the First Rabbinical Council did not explain what was the reason at this time for enacting an ordinance regarding the levirate issue. Conflicts between the brother-in-law and the widow were not new, and most of the halachic debates about levirate marriage and *chalitza* were conducted in the wake of such conflicts. But it appears that at this time, in the middle of the 20th century, basic elements of Jewish society in Morocco were changing. As a result of the French conquest and the penetration of French culture into the Jewish environment, the spirit of modernity began manifesting itself in the Jewish community in Morocco. One of the manifestations of the new spirit was an improvement in the status of women and their vigorous opposition to matrimonial ties established without their consent. These trends enjoyed broad public support (or at least, among dominant circles within the community), which did not allow the matter to be removed from the public agenda and pressured the rabbinical system to provide an adequate solution.

Indeed, a clear manifestation of the pressure of modernism can be found three years later in the statements of R. Shaul Even Danan, who replaced Yehoshua Birdugo as President of the Court of Appeals and headed the Fourth Rabbinical Council: "And

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27 Bashan, *supra* note 15, p. 317: "At the 6th Congress of Jewish Councils in Morocco, which convened in 1952, the following solutions and demands were approved: an expectation from the annual meeting of the rabbis to decide regarding women's rights of inheritance, and an improvement in the status of women." The author does not refer to the source, and the levirate issue is not mentioned. But from the statement of R. Shaul Even Danan (below) it is clear that there was such a demand on the part of some public assembly.
therefore, to force a woman to marry against her will, and in our days when women presume reminding us that they are not slaves, and the people of the entire country respond wholeheartedly to their call.”28 R. Danan was referring to the recommendation to expand the ordinance of 1949 (discussed below), but there is no doubt that these factors were already present in the background of the decision of the First Rabbinical Council to hold a practical meeting about changing the levirate laws.

4 Empowering of Legislation to Reject Levirate Marriages

4.1 Introduction

The social and legal reality that is reflected in the case of Jamila and Yamin explains why one of the important topics discussed at the Rabbinical Council was the levirate issue, which appears to have come up at four out of the six councils, always amid sharp controversy. Debates and decisions focused on the three central legal topics surrounding levirate marriage: the grounds for chalitza available to the widow, means of coercion against the brother-in-law, and economic consequences for the widow.

4.2 Debate about coerced chalitza (Second Rabbinical Council, 1948)

The matter of levirate marriage was addressed directly at the Second Rabbinical Council, in 1948. Two positions were presented before the sages assembled at the council. One was that of R. Shlomo Hacohen, Head of the Rabbinical Court in the city of Oujda. The other was that of the head of the Council, R. Shaul Even Danan. R. Shlomo Hacohen wished to retain the current situation as formulated in the legal teachings of Yavetz, whereby chalitza is not coerced for any one of the grounds: married, poor, or loathsome brother-in-law, or when there is large age difference between the brother-in-law and the widow. First, R. Hacohen presumed that the halacha followed those who maintain that the levirate commandment takes precedence, based on the ruling of R. Yosef Karo in Shulchan Aruch. Based on his commentary to Shulchan Aruch and on additional sources, he inferred that even if the

28 Jewish Law in the Moroccan Communities, supra note 3, p. 303.
widow is sterile or old, the levirate commandment takes precedence over chalitza. This applies also to married brothers-in-law, who are not to be coerced to perform chalitza in his opinion, based on the answer of R. Eliezer Ben Yoel Halevy (Ravia), given in Ashkenaz in the 12th century.29 Even with respect to a brother-in-law who cannot maintain the widow, R. Hacohen sought to narrow as much as possible the definition of absence of means, and not extend it to any and all who are having financial difficulties. R. Hacohen based his argument on a variety of sources, including the ruling of Yavetz published in the first volume of his responsa, in section 357.

Regarding a brother-in-law who cannot feed the widow, R. Hacohen drew attention to a ruling by Eliahu Chazan in Egypt at the end of the 19th century, known in the halachic literature in the Orient.30 In this ruling, R. Chazan appears to allow coercing a brother-in-law who is not capable of feeding the widow to perform chalitza. But close examination of the case and of the obstacles that the widow had to overcome until she obtained a favorable ruling point to an opposite direction from the one sought by the head of the Council, R. Danan. This is a completely and unquestionably destitute brother-in-law, not a businessman who had fallen on hard times, as was the case in the ruling by Yavetz. Despite these clear and unequivocal circumstances, R. Chazan avoided ruling against the brother-in-law for four years. Only after numerous entreaties and pleas on the part of the widow, and faced with the threat of the brother-in-law to leave town and turn the window into aguna, did R. Chazan finally agree to rule that the brother-in-law perform chalitza. When the Egyptian authorities arrested the brother-in-law in order to carry out the order, R. Chazan flinched, and even at this stage he demanded his release so that the chalitza may not be coerced. Based on his other writings, R. Hacohen's reliance on this ruling appears to indicate that his position was not to enact the ordinances that allow coercing chalitza for a variety of grounds, but only if the brother-in-law cannot

29 For a comprehensive discussion of this answer, see E. Westreich, Changes in the Status of Women in Jewish Law: A Journey Among Traditions, " (Hebrew) Jerusalem 2002, pp. 127-129. This opinion clearly represents the ancient Ashkenazi tradition, which subsequently underwent many changes until eventually the levirate commandment was rejected entirely in favor of chalitza. Ibid., pp. 190-193.
30 Ta'alumot Lev Responsa A, Even haEzer 8.
maintain the widow according to the strict rules that apply when coercing a man to divorce his wife. It is possible that R. Hacohen relied on the ruling of *Shulchan Aruch* whereby a man who cannot maintain his wife is forced to divorce her, and certainly this should apply also to a brother-in-law and a widow.

The sages assembled at the Second Rabbinical Council did not accept R. Hacohen's vigorous reservations. The head of the Council, R. Danan, adopted an approach designed to limit the injury to the widow who refuses the levirate marriage, and he led the Council in this direction. In his opinion, the position reflected in the ordinances described below is in fact the same as the original law (before enactment of the ordinances), and contrary to R. Hacohen, he believed that, according to Yavetz, it is possible to coerce *chalitza* for each of the abovementioned grounds.

According to the charter of the councils, which were intended to be efficient and effective, only one hour was allocated for this debate, after which the matter was brought to a decision by majority vote. The ordinances were formulated as follows:

(1) If the widow refuses the levirate marriage because of poverty, and it appears to the court that the brother-in-law is not capable of providing for her needs, or because he is married, or because he is loathsome to her, as in the case of the rebellious woman for reason of loathsomeness, in any of these three cases *chalitza* takes precedence and it is coerced, as we shall see further. (2) If he does not want to perform *chalitza*, he is obligated to provide for her food, clothing, shelter, health, and the fruits of her occupation (for twelve months, after which he is coerced). (3) She will receive her *ketubbah* from her husband's assets, or the portion to which she is entitled according to the terms of her *ketubbah* with her husband. (4) (And if he does not have and refuses to feed her, etc., he is immediately coerced.)

The ordinance consists of two texts: the main ordinance and additions in parentheses. According to the note at the end of the ordinance, "the parenthetical materials are additions by the rabbis in the 'Council' and were all accepted by agreement."

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31 *Jewish Law in the Moroccan Communities, supra* note 3, p. 237.
We examine first the main ordinance, without the parenthetical additions, then the changes that were added in parentheses. The basic ordinance goes quite far and represents a sharp departure from Moroccan legal tradition. The widow was given three alternative arguments, each very common, and each one of which is sufficient for her to justify her preference of *chalitza* over levirate marriage. The legislators thereby abandoned the traditional Moroccan approach, and even the Sephardic approach represented by R. Karo, and came close to the Ashkenazi tradition. Initially, these arguments carried only economic penalties, but these were heavy and apparently very effective. First, the brother-in-law was charged with meeting all the needs of the widow, including food, clothing, shelter, and health care. At the same time, they allowed her to keep all the fruits of her occupation, contrary to the situation of married women maintained by their husbands or widows maintained by an estate, who must hand over the fruits of their occupation in return for the alimony they receive.

The new legislation would not have been complete, had members of the Council not addressed the issue of financial and property relations between the widow and the brother-in-law or his family. This is because a widow who refuses to perform the levirate marriage without legal justification forfeits a central component of her rights according to her *ketubbah*, as indeed the Meknes court ruled in Jamila's case. But Council participants addressed this issue as well, and in Section 3 of the ordinance it is stated that the widow enjoys her full *ketubbah* or the part she is entitled to according to the various regulations, and receives her dues from her husband's assets as if she had been a regular widow, without a levirate connection. This is a most consequential order in view of the fact that in principle the Moroccan tradition maintained that the levirate commandment takes precedence, and therefore a widow who refused to observe it could not be awarded the property mentioned in the *ketubbah*.

Had the Meknes court ruled in Jamila's case according to the new legislation, it would have reached a vastly different ruling. Because Yamin was married, Jamila would have been entitled to refuse him, and because the other brothers were also married she would have been entitled not to consummate the levirate marriage at all.
The court would then have ruled that chalitza takes precedence, and grant her all the components of her ketubbah. If Yamin and his brothers refused to perform the chalitza, they would have been subject to severe economic penalties and forced to provide for all her needs while she would be able to retain any and all income from her occupations.

The ordinance that grants the widow all her property, according to the ketubbah, has far-reaching practical consequences, because the matter of the widow's property was one of the main motives of the brother-in-law for demanding levirate marriage and not chalitza. By enacting this ordinance, the Moroccan sages eradicated one of the main obstacles to the widow's matrimonial freedom. It is noteworthy that to this day, decoupling the matrimonial and economic dimensions of marriage remains the main concern in the struggle to improve the situation of women whose divorce is being held up in rabbinical courts. For example, the Property Relations between Spouses Law, 1974, was amended recently, enabling the court to balance the assets between the spouses before the divorce and without a direct relation with the granting of the get.32

At this stage of the Council, several orders were added in parentheses. These additions reach even further, as they point to direct coercing of the brother-in-law to perform chalitza after he fed and maintained the widow for twelve months.33 With respect to all the arguments mentioned, the brother-in-law receives a leeway of 12 months, after which is coerced directly to perform chalitza. The farthest-reaching was the last order, whereby if the brother-in-law does not maintain the widow because he does not have the means or does not wish to feed her, he is immediately coerced to perform chalitza, without even waiting 12 months. Clearly, there is a vast difference between this ordinance and the halachic ruling of R. Eliahu Chazan in Egypt at the end of the 19th century. The statement of R. Danan, that "there is almost no need to debate this ordinance at all, only a good addition is required in order to

33 This addition is written in parentheses. A note about it appears close to the text of the ordinance.
unify the opinions of the courts.”\textsuperscript{34} does not appear consistent with the revolutionary nature of the ordinances, and may have been intended for rhetorical purposes only, to blunt the impact of the innovation before its opponents.

This order is far-reaching for the additional reason that it applies also if the widow demands \textit{chalitza} using the "loathsome" ground, the quintessential claim of the rebellious woman. In the common halachic sources of the Moroccan tradition, from Rif and Yavetz to R. Birdugo's court in Meknes, the rule was that a widow who rebels using the loathsome argument forfeits the main portion of her \textit{ketubbah} and the supplements. The widow could obtain only her dowry (by virtue of the ordinance enacted by the Geonim), and according to R. Birdugo, it is possible that she is granted only the portion of the dowry that remained intact. Following the current ordinance, even the widow who rebels using the loathsome argument can obtain her \textit{ketubbah}, with all its monetary components, in addition to \textit{chalitza} being forced on the brother-in-law. Because the loathsome argument is a broad one, not limited to narrow and specific situations, it is likely to enable a high percentage of widows to claim that the brother-in-law is loathsome to them and to be released from the levirate bondage entirely, without incurring financial losses. Nevertheless, we must bear in mind that not every widow refusing the levirate marriage without a reason is entitled to the status of "loathsome" rebellion, and it is reasonable to assume that the widow was required to prove in one way or another the claim of loathsomeness. At the Fourth Rabbinical Council, the domain of reasons for \textit{chalitza} was expanded to include also widows who refused the levirate marriage without providing a reasonable argument.

4.3 Stronger penalties and full recognition of refusal of the levirate marriage (Fourth Rabbinical Council, 1952)

Before the Rabbinical Council expanded the sphere of grounds for \textit{chalitza}, it was called on to defend the decisions accepted during the Second Council, which apparently did not end the controversy. This is what transpires from the statements of

\textsuperscript{34} \textit{Jewish Law in the Moroccan Communities, supra} note 3, p. 237.
R. Yehoshua Maaman, who served as a judge in Espi and participated in the Council. He noted that "again several rabbis, members of the Council, challenged the above coercion regulation." In the meantime, Moroccan sages learned about the ordinance enacted by the Chief Rabbis of Israel, which prohibited levirate marriage altogether, except in special cases. The content of the ordinance became known to the public at large, putting pressure on the rabbis "to prevent levirate marriage outright." Subsequently, before the Fourth Rabbinical Council, R. Danan turned to R. Uziel asking for clarifications regarding the ordinance. R. Uziel sent him "the copy of the ordinance in which the necessity for correction is clarified for reasons described, adding that the intention of most brothers-in-law is not the observance of the commandment."

R. Danan did not adduce R. Uziel's arguments, but his statements appear to imply that the first argument R. Uziel raised in favor of the ordinance is similar to the motives of Moroccan sages, namely, the opposition of the general public, and of women in particular, to forcing the widow into the levirate marriage. This opposition is rooted in the spirit of modernism. We shall see below that in the text of the Chief Rabbinate's published ordinance the argument is one of the unity of the people of Israel, and not the one offered by the Moroccan sages. We are also in the possession of a letter R. Uziel wrote in answer to R. Yehoshua Maaman already at the beginning of 1952, stating his arguments. According to R. Uziel, the main motivation of the brother-in-law in our days for demanding the levirate marriage is to extort money from the widow, not a desire to observe the commandment. Another argument is that marriage between Ashkenazi and Sephardic Jews, common in Israel, is liable to cause great tension in levirate situations, because Ashkenazi Jews reject the levirate connection entirely and regard it as prohibited. R. Maaman read this letter before the

35 Emek Yehoshua Responsa, C34.
36 Jewish Law in the Moroccan Communities, supra note 3, pp. 302-303.
37 The reference is apparently to the Sixth Council of the community, which assembled in 1952. See Bashan, supra note 28.
Fourth Rabbinical Council, and according to what he wrote in his book of responsa, participants at the Council "liked it."

Indeed, following the ordinance of the Chief Rabbinate in Israel, R. Danan decided to expand the scope of arguments, and suggested recognizing every instance of opposition to levirate marriage on the part of the widow as a ground for chalitza, not only the loathsome argument. He began his speech in favor of the ordinance as follows:

This ordinance we enact with the authority of the Almighty and with the authorization of the courts in both heaven and on earth, and we impose and prohibit all Jews in Morocco from performing the levirate marriage without the consent of the widow. In other words, the main part of the ordinance is to prohibit levirate marriage if the widow refuses, but not more than that. Note that this preamble is not present in other ordinances of the Moroccan Rabbinical Council, and it appears that the need to mobilize heaven and earth hints at opposition among participants. Indeed, under the title "This is the formulation of the decision that was reached," supplementary material that does not appear in other ordinances, it was added in parentheses "after long negotiations." This is what appears in the final formulation of the enactment, after the changes that were made:

(1) Without the widow's approval there is no levirate marriage under any circumstances, but chalitza. (2) If the brother-in-law refuses to perform chalitza, he is not coerced but is obligated to all the financial charges mentioned in Sections 2, 3, 4 of the Second Council in the year 1949, p. 7. (3) If the widow does not claim one of the three grounds mentioned at the Second Council and the brother-in-law wishes to perform chalitza, it is his choice to pay out the ketubbah or share the estate of the husband.

Thus, the Council took an additional step forward toward rejecting levirate marriage, and enabled the widow to oppose it even if none of the mentioned grounds

39 Supra note 36.  
40 Supra note 39.
(loathsome, married, and poor) apply. But the legal relief available to her to support her claim was entirely in the economic-financial realm, which is the right to alimony from the brother-in-law and the right to retain the income from her occupation, similarly to the widow who was able to claim one of the three grounds. At the same time, the widow who refuses the levirate marriage is not granted the right to coerce the brother-in-law to perform *chalitza* after 12 months, as was decreed in the 1949 ordinance with respect to one of the three grounds. Whereas if one of the three grounds apply, the widow can claim the division of the estate, in case she refuses the levirate marriage without a ground, the right to choose remains with the brother-in-law. No explanation was given for this ordinance, but at the Fifth Rabbinical Council, in 1954, two reasons were mentioned. First, not to give the widow an incentive to refuse the levirate marriage for financial reasons only, and second, to give the brother-in-law an incentive to perform *chalitza* by granting him a larger portion of his brother's estate.

With enactment of these amendments, the Moroccan legal tradition reached the peak of activism with respect to the topic of levirate marriage by granting maximum support to the widow who refuses the levirate marriage for any reason, although in the case of pure refusal, as opposed to cases in which one of the three grounds applied, *chalitza* was not coerced, but only economic penalties imposed. From this point on, the Moroccan tradition began moving in the opposite direction, that of erosion of this support.  

5 Retreat and Stabilization (Fifth Rabbinical Council, 1954)

5.1 Success of the conservative counter-attack

The approach that went such a distance to reject levirate marriage was not shared by all the Moroccan sages. We saw that already at the Second Council, in 1949, R. Hacohen adopted a reserved approach that differed from that of the head of the Council. Similarly, the amendment to the ordinance, in 1952, was accepted according to the testimony of the legislators, only "after long negotiations," indicating that not

all were in agreement. Indeed, at the Fifth Council, in 1954, R. Haim David Siriro, head of the rabbinical court in Fess (Fez), reopened the discussion about coercing *chalitza* and asked to reconsider the matter, noting that "at the previous Council (1952) we agreed on coercing *chalitza*. It is true that we relied on high authority. But nevertheless, the heart hesitates in face of criticism by the opponents."\(^{42}\)

In his response, the head of the Council, R. Danan, who served in this position since the Second Council onward,\(^ {43}\) presented the content of the original ordinance of 1949, emphasizing that "everything was accepted by agreement," and noted that "afterwards there were numerous challenges to the matter of coercion, as noted by R. Siriro."\(^ {44}\) Detailed testimony about the sharp controversy and conflict surrounding this issue is found also in an answer written by R. Shlomo Mashash, who participated at the Fourth Council (1952) as a judge from the city of Dar Labida.\(^ {45}\) He reported sharp and consistent opposition on the part of R. Raphael Baruch Toledano, head of the rabbinical court in Meknes, at the Second and Fourth Councils:

> He protested loudly against this ordinance and wrote a long verdict proving that there should be no coercion using the married ground and not the loathsome one, and that it is prohibited to enact an ordinance that is against religion except when he cannot maintain both women. And the sages of the Council thanked him, and accordingly reversed their opinions and decreed not to coerce except by means of alimony. See the last ordinance of 1954.\(^ {46}\)

The position of R. Toledano is presented in greater detail by R. Yehoshua Maaman:

> And again several rabbis, members of the Council, raised a challenge, and R. Raphael Baruch Toledano drafter a long letter, supported with arguments of our teachers who were strict in the matter of coercing *chalitza*. He distributed it in the city of Rabat and to a portion of the above mentioned Council, and said that the ordinance enacted in Israel is not to be relied upon, and that the reasons


\(^{44}\) *Ibid*, p. 371.


\(^{46}\) *Tvuot Shemesh* Responsa, Even Ha'Ezer 150. R. Mashash wrote this answer in 1974, when he served as a judge in Casablanca.
adduced to praise the ordinance do not apply at all in our country, Morocco. He summed up his statement with the following words: "Therefore, gentlemen! Rabbis of the Council, note my words and I am certain that you will reject these ordinances, the first and the last, and remove from us this great responsibility..."47

Indeed, R. Danan gave in under pressure, and at the Fifth Council he recommended the following amendments: "Remove the parenthetical statement in Section (2)," that is, erase the addition in parentheses in the 1949 ordinance that ordered coercing chalitza for all three grounds. This recommendation was accepted with the agreement of all the rabbis who participated at the Fifth Council. The legislative revolution in Morocco retreated and erased the order to coerce the brother-in-law to perform chalitza for being married, loathsome, or poor.

Another recommendation asked to change Section 4 of the 1949 ordinance, "if he does not have the means or does not wish to feed her, he is immediately coerced to perform chalitza" to "if he is destitute he is immediately coerced to perform chalitza." Nothing was said about the meaning of this change or about its motivation in the preamble to the ordinance or in the explanatory notes. This change also appears to have been intended to reduce the extent of coercion imposed by the original ordinance, in which the brother-in-law was coerced to perform chalitza immediately if he subjectively refused to feed the widow despite having the means to do so, similarly to someone who objectively did not have the means to maintain the widow. The new formulation eliminated the subjective decliner of alimony and defined more narrowly the brother-in-law who is objectively destitute. It was now decreed that only "a destitute man" shall be coerced to perform chalitza immediately, meaning that not everyone having economic difficulties is considered as such. Apparently, this formulation was intended to revert to the existing definition used for married women, whom men are also coerced to divorce if they are destitute and cannot feed them according to the ruling of Shulchan Aruch.

47 Supra note 36.
In his criticism of the original ordinance, R. Haim David Siriro preferred enticing the brother-in-law to perform *chalitza* by granting him a larger portion of his deceased brother's estate, and reducing the property rights of the woman. R. Toledano also recommended this course of action, enticing the brother-in-law by increasing his portion of the inheritance rather than using the coercive means in the original ordinance. He recommended relying on Rama's opinion about the custom in Poland "to divide the assets between the widow and the brother-in-law who performs *chalitza*, and the brother-in-law receives property and agrees to perform *chalitza* without coercion, and everything is settled peacefully." 48

In the second part of his statement, R. Danan addressed the recommendation about "the division between the brother-in-law performing the *chalitza* and the other brothers," responding apparently to R. Siriro. R. Danan recommended adding the following clause: "The brother performing the *chalitza* receives a double portion from the estate of the deceased, whether from the half, if he is dividing with the widow, or from the remainder of the estate, if he pays out her *ketubbah*." 49 The two methods of dividing the estate are mentioned in both the 1952 and the 1954 ordinances. The widow either receives the *ketubbah* or half the estate of her deceased husband. But in the 1952 ordinance, the widow who claims one of the three grounds for chalitza can choose the option she prefers, whereas in the 1954 ordinance, which refers to the widow who refuses the levirate marriage without a reason, the choice is left to the brother performing the *chalitza*.

In his explanatory comments to the division of the estate between the brother performing the *chalitza* and the other brothers, R. Danan referred to the ordinance passed at the Fourth Council (1952) only. He pointed to the fact that from the wording of the ordinance it appears that the brother performing the *chalitza* receives

48 *Ibid*.

49 In the Moroccan legal tradition there were two common customs regarding the rights of the widow to her husband's estate. According to the tradition of the Spanish exiles and their descendants, the widow inherited half the estate and received nothing from her *ketubbah*. According to the tradition of the original local residents and of their descendants, the widow cashed in her *ketubbah* according to Talmud law and inherited nothing. Thus, it is decreed here that the brother performing the *chalitza* receives a double portion from half the estate in case the exiles' custom applies, or a double portion from the estate that remains after the widow receives her *ketubbah*, according to the local custom.
all the remaining portion of the estate, and that precise formulation can clarify whether this is what was intended. Apparently the recommendation and the ordinance applied to every case of chalitza, in the spirit of R. Siriro’s proposal, but in the case mentioned in the 1952 ordinance the wording was vague, and therefore R. Danan noted that the new clause should be formulated in a way that clarifies the obscure parts.

This model of using financial enticement instead of direct coercion to perform chalitza developed in the late Ashkenazi tradition and was well known in Oriental case law. The Ashkenazi tradition had relatively early accepted the approach whereby chalitza takes precedence over the levirate commandment, and there were strong factions in the Middle Ages, such as the one represented by Harosh, that mandated chalitza, certainly when the brother-in-law was married. But in his gloss to Shulchan Aruch, which reflects the prevalent Ashkenazi tradition, Rama ruled that the brother-in-law should not be coerced to perform chalitza despite the fact that chalitza takes precedence, and should be either misled or enticed to do so. Another common custom in Polish and Ashkenazi communities was to draft a chalitza bill before the marriage, the essence of which is an obligation on the part of members of the groom's family to grant chalitza to the bride at no charge if a levirate situation should arise. The prevalent custom, however, was to reach a compromise between the widow and the brother-in-law and to grant him property from the estate at the expense of the other brothers and of the widow.

The order to compensate the brother-in-law with property if he agrees to perform chalitza should be considered together with the order to make him maintain the widow until he does so. The obligation to pay alimony is also, to a great extent, adopted from the Ashkenazi tradition, which ruled that chalitza takes precedence, and has no justification in a tradition that maintains that levirate marriage takes precedence. Thus, using the method of the carrot and the stick, Moroccan sages

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hoped to resolve the levirate issue that caused dissatisfaction in the community. On the surface, this change appears to have restored calm. In the protocol of debates and decisions of the Sixth Council, in 1956,\textsuperscript{52} which was the last one held, there was no mention of levirate marriage at all. Moroccan tradition stabilized around the approach that imposes the obligation to perform chalitza in all cases of refusal of the levirate marriage by the widow, obligates the brother-in-law to pay comprehensive alimony without enjoying the fruits of the widow's occupation, and grants the widow the right to obtain a portion of her husband's property. If she could avail herself of one of the three grounds for chalitza, bigamy, loathsomeness, or poverty, the widow was awarded at least half the estate of her deceased husband, at times more, depending on the content of the ketubbah.

But even this change in legislation, which imposed only alimony instead of direct coercion, was apparently not satisfactory to a portion of Moroccan sages, and they challenged it. This is what transpires from an responsum by R. Mashash, written on the eve of the Sixth Council, in 1955, in which he defends the ordinance.\textsuperscript{53} The responsum is actually a memorandum he was asked to submit to the Rabbinical Council in 1955 "in the matter of coercing chalitza according to the ordinance of the Rabbinical Council to obligate the brother-in-law to pay alimony to the widow as long as he does not perform chalitza if it is appropriate to do so." R. Mashash ends by expressing his hope that "this will satisfy the challengers."

In his answer, R. Mashash defended the third ordinance that was reached at the Fifth Council in 1954, and ruled unequivocally that the Rabbinical Council has the authority to impose the payment of alimony to make the brother-in-law perform chalitza. He rejected the criticism against the ordinance, which claimed in principle that it deviated from existing halacha because:

\begin{quote}
Although it is not according to the plain halacha, whereby we used to rule that the levirate commandment takes precedence, as all ordinances, this one also
\end{quote}

\textsuperscript{52} \textit{Jewish Law in the Moroccan Communities}, supra note 3, pp. 405-448.
\textsuperscript{53} \textit{Tvuot Shemesh} Responsa, Even Ha'Ezer 47.
deviates from the halacha based on the current situation, as long as it is to some degree based on early Poskim or the Ahronim.54

Every ordinance has three components: (a) deviation from the ways of the halacha; (b) according to the current situation; (c) some support by previous decisors (Rishonim or Ahronim). Clearly, according to its essence, every ordinance changes the existing law, which does not in any way invalidate its legality or its validity. This applies also to the concrete ordinance to obligate the brother-in-law to maintain the widow until he performs chalitza. The question is, based on the degree to which the ordinance deviates from existing law, whether it can still be regarded as legitimate, for example, in the levirate case at hand? Is direct and immediate coercion allowed, or only indirect coercion by the imposition of alimony? R. Mashash provided no additional details about this matter, although the style of his writing can provide some clues, as we shall see later.

R. Mashash has no difficulty finding support among previous decisors. He directs the readers to the ordinance of "our rabbis the rabbis of Israel," which is the ordinance, known as the Jerusalem Ban, enacted by the Chief Rabbinate of Israel, and which was considered on several occasions by Moroccan sages. R. Mashash finds additional support not only in authoritative halachic texts but also in the prevalent custom, "almost everywhere in the world," to avoid levirate marriage and to prefer chalitza. A similar claim was raised in the explanatory comments to the Jerusalem Ban, where the legislators emphasized that "most Jewish communities and the Ashkenazi communities in Israel accepted as the halacha that chalitza takes precedence over levirate marriage..." This claim drew extensive criticism on the part of R. Ovadia Yossef, which led him to the conclusion that the Jerusalem Ban was enacted without authority.55

Nevertheless, one of the central justifications for the ordinance in Israel, "for the sake of peace and unity in the State of Israel, so that the Torah may not be two Torahs," did not apply at all to Morocco, which was unified in its custom that the

54 Ibid. The intention at the end of the quotation seems to be “based on the Rishonim or Ahronim.”
55 Westreich, supra note 9, pp. 328-331.
levirate commandment took precedence. Here R. Mashash addressed the second component, "according to the current situation," in order to justify the ordinance. This did apply to Morocco, as "in the spirit of the time, the entire population challenges forcing women into marrying those whom they do not want, because they are not like slaves who must marry those whom they hate." Change according to the spirit of the time reflects the adoption of modern approaches to women's freedom of marriage, and is the source of the public opposition to forcing women into matrimony against their will, which is a characteristic of levirate marriage.

5.2 Revival of the rule of the rebellious woman in response to conservative pressure

Granting explicit legitimacy to modern trends that reject a matrimonial relation forced by a commandment of the Torah is a far-reaching measure by halachic approaches known to us, especially those originating in the Ashkenazi fear of enactment. This may be the reason why R. Mashash diverted the argument to a known and established halachic area, the rule of the rebellious woman who claims that her husband is loathsome to her. R. Mashash used the expression "they are not like slaves, who must marry those whom they hate," which is close to the expression used by Maimonides to justify his position that the husband must be coerced to divorce a rebellious woman who has a loathsome argument.56 R. Danan used a similar argument in his presentation to the Rabbinical Council when in the name of the women who opposed levirate marriage he claimed that "they were not slaves."57

The position of Maimonides was utterly rejected by later jurisprudence, as R. Mashash noted at the beginning of the debate, so that in itself it provides only weak support. Thus, R. Mashash set out to examine the arguments that had led decisors to object to this halacha, and tried to distinguish their statements within the context of a widow in a levirate connection. He began with the famous argument raised by Harosh that the ordinance of the rebellious woman was needed at a given point in time, whereas now "the opposite appears to be true, and Jewish women are arrogant,"

56 Maimonides, Mishne Torah, Hilachot Ishut 15.
57 Jewish Law in the Moroccan Communities, supra note 3, p. 303.
so that recognizing the law of the rebellious woman would result in women abandoning their husbands *en masse*.\(^{58}\) If so, the ordinance requiring the coercion of the brother-in-law causes no injury to this public interest, "as we leave all married Jewish women to their husbands, and only she who comes to marry him in addition can refuse, and the commandment shall be observed by *chalitza*." In other words, married women will not be able to obtain release by means of the rebellious argument, and thus the issue that Harosh feared is moot. Only in the case of a levirate connection, when the woman has not yet married the brother-in-law and asks not to enter a matrimonial relationship, does the ordinance apply and the brother-in-law is coerced to sever the tie.

R. Mashash maintained that the second argument raised by Harosh can also be distinguished. The argument is that even if we accept the woman's claim that her husband is loathsome to her, this does not justify coercing the husband to divorce his wife because she is the wife he took as a young man and he loves her. Thus, the right solution in his opinion is for the woman to remain within the marital relationship and renounce sexual relations. Harosh mentions several times the fact that the wife was taken in the man's youth. R. Mashash focused on this fact and distinguished between her and the widow, "who is a new wife who had never been married to him." And R. Mashash has yet another strong and real argument against this claim by Harosh, coming from a different direction. In our days, he maintains, "we know clearly that if he does not divorce her and will not maintain sexual relations with her, she will follow the path of prostitution and produce illegitimate Jewish children (*mamzerim*)." Thus, it is important to allow women to be released from the bondage of matrimony and not cause them "to be tied down to living widowhood," as Harosh suggests.

Although rejection of Maimonides's rule of the rebellious woman for many generations makes it impossible to go back to it and adopt it, this applies only to women who are actually married. For those "who have not yet entered into a marriage agreement, the need of the present time requires only the correction of an

\(^{58}\) Harosh Responsa, Rule 43:8.
unintentional connection." Moreover, in our times, when there is a danger of prostitution on the part of widows who are refused chalitza, their situation appears to be similar to that of women in the times of the Geonim, for whom the rule of the rebellious woman was enacted out of fear that they will follow the wrong path.

Regarding the authority to enact ordinances that deviate from Talmud law, R. Mashash mentioned that the Geonim ordered coercing the husband to divorce his rebellious wife "contrary to the clear Talmudic halacha... to provide redress for Jewish women." R. Mashash declared unequivocally: "And we will also follow in their footsteps, and the authority of the rabbinical courts is in force to enact for the present generation something as necessary as this, and not allow Jewish women to follow an evil path and prostitute themselves..." This authority exists in principle. R. Mashash does not propose a revolutionary measure in married life but only with regard to widows in a levirate connection. And he found support for his position in a responsum of R. Shimon ben Zemach Duran (Rashbatz), one of the Spanish exiles of 1391, who opposed Maimonides's rule of the rebellious woman when he arrived in North Africa.59 Rashbatz claimed that even after Maimonides's rule had been rejected, if the woman had claimed that her husband is loathsome to her already before the marriage, and it was her mother who had forced her to marry, the husband should be coerced to divorce her. The reason for it is that in this case it is clear that she does not make the claim only because she fancies someone else. Although Rashbatz qualified his statement by saying that in practice he would not easily coerce, R. Mashash maintained that the widow is different and this is the correct action in practice.

As is common in rabbinical rulings, R. Mashash listed a variety of decisors to reinforce his position. First, he relied on the opinion of the author of Halachot Gdolot, whereby in cases in which the widow refuses the levirate marriage with a solid basis for her claim, the brother-in-law is coerced to perform chalitza. Second, Rama in his commentary Darchei Moshe relies on Ribesh and rules that whenever

there is a fear of prohibition (isur) they coerce chalitza immediately, and this is how the halacha is put in practice. Above all, R. Mashash was acutely aware of the present need. Eventually, after laying the foundation of his argument that at the present time it is possible to coerce chalitza if a widow refuses the levirate marriage even after rejection of Maimonides's rule of the rebellious woman, R. Mashash took a tactical step back and maintained that "as long as the ordinance was to coerce by means of the money paid in alimony, which is what makes him perform chalitza," there is no flaw or fault in the ordinance.

But R. Mashash was not satisfied with this argument in principle regarding the extensive legislative authority given to sages in appropriate situations, and sought to demonstrate that the ordinance is rooted in the levirate rules proper, even for those who maintain that the levirate commandment takes precedence. According to R. Mashash, it is justified to coerce chalitza in every instance in which the widow claims that the brother-in-law is loathsome to her or refuses the levirate marriage because the brother-in-law is married "so much so as that our ordinance was to coerce by means of the money paid in alimony only, which is what makes him perform chalitza of his own accord." The ordinance to coerce the payment of alimony is only a portion of what the law permits under these circumstances, and even direct coercion is appropriate, but Moroccan sages preferred to use only indirect pressure.

5.3 Internalization of the legislation in Moroccan case law

The legal arrangements that the Moroccan ordinances shaped, whereby alimony is imposed on the brother-in-law in case the widow refuses the levirate marriage, was applied in a later ruling of R. Mashash, given in 1974, when he was head of the rabbinical court in Casablanca. In this case, about a month after a young couple was married in Morocco, the husband was killed in a traffic accident. The brother-in-law, who lived in France, was married with children and lacking the means to maintain two wives. The widow vigorously refused the levirate marriage and claimed that the brother-in-law was loathsome to her. The brother-in-law demanded the

60 Supra note 47.
levirate marriage and refused to perform chalitza. His reasons were of a mystical nature, and he claimed that he feared "he would die if he performed chalitza, as it already happened in their family twice." In this case all three of the special grounds obtained: married, in difficult economic conditions, and loathsome. R. Mashash discussed at length the degree of recognition granted to the three grounds and the means of coercion that can be applied to the benefit of the widow. First, he focused on the fact that the brother-in-law was married, and ruled that in view of the disagreements between decisors this was not enough to form a reason for coercing chalitza. At the same time, one ought not regard this as a true controversy among decisors, because:

what we found when we examined some of these decisors who maintain that if the brother-in-law is married he is coerced to perform chalitza, as noted above, is that they accept the Ban of Rabbenu Gershom.\(^6\)

It follows that according to the Moroccan tradition, as in other Sephardic and Oriental traditions that did not accept the Ban of Rabbenu Gershom, there is no coercion because the brother-in-law is married. There is no question that historically R. Mashash is correct, as the source of the coercion in Ashkenazi traditions, is first and foremost Harosh's responsa, which entered Spain and from there seeped into Moroccan and other Oriental jurisprudence. R. Mashash regarded in this light Maharik's answer,\(^6\) one of the central and best-known ones on the topic of coercing a married brother-in-law to perform chalitza, and noted correctly that Maharik ruled that it is possible to coerce chalitza because he belonged to the Ashkenazi tradition and because of the sources on which he relied.\(^6\)

R. Mashash now had to address the ruling of R. Yosef Karo in his responsum about the brother-in-law from the Maghreb and the Ashkenazi widow. R. Karo regarded the fact that the brother-in-law was married a reason for coercing chalitza.\(^6\) Here too,

\(^6\) \textit{Ibid.}

\(^6\) Maharik Responsa, Shoresh 102.

\(^6\) For a comprehensive discussion of Maharik's position and of its relation to the Ashkenazi tradition, see Westreich, \textit{supra} note 30, pp. 215-216.

\(^6\) For a comprehensive analysis of this responsum and of the rabbinical debate of the matter, see Westreich, \textit{ibid.}, pp. 288-300.
according to R. Mashash, one can detect the Ashkenazi connection, as the court that R. Karo addressed consisted of Ashkenazi judges, and the source he quoted was "from the work of Harosh, and he follows the method of decisors who accepted the Ban of Rabbenu Gershom." Moreover, R. Mashash believed that in the commentary Beit Yosef R. Karo adopted a different approach than in this responsum, and according to Beit Yosef, it is not the fact that the brother-in-law is married that decides the matter, rather it is that chaliltza takes precedence, but it is not a reason for coercion. In the contradiction between Beit Yosef and the responsum, one must favor Beit Yosef, "for only these we accepted even if some decisors disagree with them, and not what he says in the responsum."

R. Mashash considered only the brother-in-law's inability to feed his wife to be a legitimate ground for coercing chalitza, and this is what forms the center of gravity in cases in which the three grounds apply. Even here, R. Mashash respected the Moroccan ordinance that allowed financial deprivation to serve as a ground for immediate and direct coercion. But in his opinion, the addition of the fact that the brother-in-law is married is "for those who say that in the absence of food we do not coerce by force but by words and the banishment of Rabbenu Tam" (that is, indirect coercion).65 Therefore, in the case at hand it is possible to coerce the brother-in-law directly to perform chalitza immediately, without hesitation, and there is no reason to first use the banishment of Rabbenu Tam, "and this is the ordinance of the Rabbinical Council of 1954, that if he is destitute they coerce him to perform chalitza."

6 Legislation in Levirate Matters: Between Morocco and Israel

6.1 Introduction

Above we pointed out a direct connection between Moroccan sages who enacted the ordinance in their country and Chief Rabbi Uziel, who together with his colleague, R. Herzog, enacted in 1950 a series of ordinances in family law known as the

65 Supra note 54.
Jerusalem Ban. One of the prominent ordinances dealt with the levirate issue and applied to all the ethnic communities living in Israel:

In most Jewish communities, as well as in the Ashkenazi community in Israel, they accepted that the *chalitza* commandment takes precedence over the levirate commandment, and even when both the brother-in-law and the widow wish to consummate the levirate marriage they do not allow them to do so. And when the brother-in-law is married, the custom everywhere was not to allow them to perform the levirate marriage. And given that in our days it is clear that most brothers-in-law are not motivated by the commandment, and for the sake of peace and unity in the State of Israel, so that the Torah may not be two Torahs, we impose on residents in the Land of Israel and on those who will emigrate and settle henceforth a complete prohibition on the levirate commandment. They are obligated to perform *chalitza* and obligated to maintain the widow according to what the court shall rule until they release the widow by *chalitza*. This prohibition can be waived only for special reason and by the decision of the Greater Council, with the signatures of the Chief Rabbis of Israel.66

In this section we compare the legislations in the two countries and discuss the mutual relations that existed between them regarding the changes to the levirate laws.

6.2 The effect of the Jerusalem Ban on the Moroccan ordinances

The first initiative in Morocco to change the levirate laws dates back to 1947, and the first comprehensive ordinance was enacted in 1948. We have seen that the ordinance embraced changes in the three principal legal areas of the levirate issue: expansion of the scope of grounds, the imposition of penalties on the brother-in-law, and improvement of the economic situation of the widow who refuses the levirate marriage. The Jerusalem Ban was enacted 10 months later, in February of 1950, and

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addressed only the grounds and penalties. A. Bashan was wrong, therefore, when he wrote that:

The levirate topic was debated at three assemblies, and they reached the following conclusions after consultation with R. Uziel in Israel: (a) If the woman refuses the levirate marriage because of poverty, or because he is loathsome or married, he must perform chalitza; (b) If he refuses to perform chalitza, he must provide for her food, clothing, and shelter for a year; (c) The widow receives her ketubbah from her husband's property. These elements were present already in the first ordinance of 1949, and even went further with the supplement in parentheses that ordered coercing chalitza after 12 months. R. Uziel did not assist with the formulation of the components of this ordinance, which remained unchanged even after the Fifth Council. In practice, the appeal to R. Uziel took place only after the opposition of prominent rabbis, among them the heads of rabbinical courts R. Shlomo Hacohen from Oujda, R. Raphael Baruch Toledano from Meknes, and R. Haim David Siriro from Fess. Thus, the core of the Moroccan ordinance is the product of internal Moroccan initiative, until the Fourth Council in which the encounter with the Jerusalem Ban exercised its effect.

This conclusion relating to the order of events is important not only for determining the active nature of legislation in the Moroccan tradition, but it also clarifies the legitimacy of the Israeli legislation headed by R. Uziel. This legislation was subjected to bitter and sharp criticism on the part of R. Ovadia Yossef, which, as we shall see, affected even the positions of the Moorish sages who later emigrated to Israel. R. Yossef rejected the legitimacy of the legislation primarily by claiming that such an act of legislation by Sephardic sages represents a breach of authority, as the precedence of levirate marriage over chalitza is rooted without question in the Sephardic-Oriental tradition. In R. Yossef's opinion, R. Uziel's act merely subjects the Sephardic tradition to the Ashkenazi one, which prefers chalitza over levirate marriage. After seeing that the Moroccan tradition, which regarded levirate marriage

very highly, rejected it of its own initiative in many cases, it is clear that R. Uziel was not alone in this matter in the Sephardic-Oriental arena.

Still, we must examine how close the two ordinances were, to be able to say that the Jerusalem Ban found its match in the legislation of the Moroccan Rabbinical Council. Moreover, we must examine whether R. Uziel had an effect on the later stages of the Moroccan legislation. To this end, we compare the various elements of the two legislations.

6.3 The motives behind the ordinances

In the explanations and background information provided for the Moroccan ordinances during the various stages of legislation, a prominent central factor is mentioned: the sharp opposition of women, and together with them of broad elements of the Jewish public, to imposing matrimonial ties on widows against their will. This opposition was rooted in the spirit of modernism. There is no doubt that these trends were in contradiction with the essence of levirate marriage, in which the widow is perceived as a wife granted to the brother-in-law by heaven. At no stage does it appear that halachic sages in Morocco identified with the spirit of modernism. Nevertheless, they responded to it and enacted ordinances intended to prevent as far as possible situations in which the widow pays a heavy price for refusing the levirate marriage, as did Jamila in Meknes.

By contrast, the explanations that accompanied the ordinance that was part of the Jerusalem Ban were different. These reached us in two textual versions, neither of them official. One version appeared in an appendix in the book by the scholar Ben-Zion Shershevsky, and it is part of the ordinance that was enacted. The second version appears in the work of R. Yehoshua Maaman, who quotes a private letter by R. Uziel to him in response to R. Maaman's question, and it contains only the essential points of the Jerusalem Ban but not its complete wording.

In Shershevsky's version there are two arguments: (a) most brothers-in-law are not intent upon observing the commandment; and (b) for the sake of peace and unity in the State of Israel, so that the Torah may not be two Torahs. Both arguments are
problematic and subject to criticism. The first argument is not relevant to the Sepharic tradition, which prefers levirate marriage over chalitza, as, according to Taldumic sages who maintain that the levirate commandment takes precedence, the brother-in-law is entitled to come onto the widow in the name of beauty, or matrimony, or anything else and he does not have to intend to observe the commandment. The second argument has no sources in halachic tradition or in the social norms common in the last generations, and it expresses the personal outlook of R. Uziel, who regarded the nationalist factor as a genuine halachic consideration. These are the essentials of R. Yossef’s criticism of the motivations for the ordinance.

Naturally, neither of these arguments is mentioned in the explanatory text of the Moroccan ordinances, nor are they relevant to the legal tradition of the country. Moroccan sages were not disturbed in the least by the motives of the brothers-in-law, and it was only the opposition of the women that prodded them to enact the ordinance. Similarly, the issue of national unity was not relevant to the levirate issue, as Moroccan tradition was unified and everyone agreed that the levirate commandment takes precedence. Note, however, that councils of sages did make efforts to bring about a unified law in areas in which several traditions coexisted. One such issue is inheritance, and the other has to do with the testing of the lungs of slaughtered beasts – a question of kashrut. The limits to which Moroccan sages went in the use of unity as a motive for enacting ordinances require in-depth study of topics that are outside the scope of the present work.

Nevertheless, examination of the arguments that R. Uziel listed in his letter to R. Yehoshua Maaman can blunt some of the criticism leveled against R. Uziel and the ordinance of the Chief Rabbinate:

The basic reasons for enacting the chalitza ordinance were: (a) In latter days there are many who insist on the levirate commandment knowing that the widow does not want it, and they take advantage of this commandment for their own benefit, to neutralize the widow until she satisfies them with a pile of money, which forces the widow to seek succor from fraudulent marriage or a life of lawlessness, God forbid. (b) At this time, when immigrants arrive to
Israel in large numbers from all corners of the world, and there are increasing numbers of marriages between the two Jewish tribes, the Ashkenazim and the Sephardim, who diverge in their customs in this matter, the Ashkenazim, according to their custom, are moving away from levirate marriage to the degree that it appears prohibited to them, and this, according to what our Rabbi Rama says, may he rest in peace, so that even if both want to consummate the levirate marriage they are not allowed to do so, therefore in cases of marriage between the two tribes a controversy arises between them that results in the woman becoming aguna.\textsuperscript{68}

To highlight the difference between the justification provided in the letter and the official justification, we distinguish between two situations: (a) the brother-in-law is interested in the levirate marriage and wants his brother's widow to become his wife, but his motive is not observance of the commandment but the side benefits that the wife granted him by heaven bestows upon him; (b) the brother-in-law is not interested in levirate marriage at all and has no desire to marry his brother's widow, his only intention being to take advantage of the law and extort money from her. In the Sephardic tradition that prefers levirate marriage over chalitza, the first situation is considered to be appropriate, and does not provide the widow with any ground for demanding chalitza. The second situation is treated differently, and according to R. Uziel, it justifies, even in the Sephardic tradition, coercing the brother-in-law to perform chalitza.\textsuperscript{69}

The second justification is not identical either with the one that appears in the ordinance. In the ordinance, the argument for national unity appears at an abstract level, and it is intended to prevent the concurrent observance of two traditions with

\textsuperscript{68} \textit{Supra} note 36.

\textsuperscript{69} I believe that a similar distinction was made regarding the commandment to be fruitful and multiply, where the judges of the Great Rabbinical Court were divided on whether to accept it as a legal argument for the benefit of a non-observant husband. R. Ovadia Hadaya, who accepted the man's claim in these circumstances, argued that it is sufficient for the person to wish to be fruitful and multiply for its own sake, even if he has no intention of observing the commandment to be fruitful and multiply. R. Herzog, who adopted an opposite view and rejected the man's claim, addressed the situation in which the man did not intend to be fruitful and multiply and was merely trying to take advantage of the commandment to get rid of his wife. See Westreich, \textit{supra} note 16, pp. 257-258.
respect to the same issue, a situation that is liable to disrupt national harmony. In his letter, R. Uziel addressed a specific conflict that arises in a special situation in which a Sephardic man is married to an Ashkenazi woman. In such a case, the Sephardic side regards levirate marriage as a proper outcome, consistent with a commandment, whereas the Ashkenazi side sees it as a prohibited act that ought not be undertaken even if both sides agree to do it, and certainly not if the widow opposes it. To avoid friction in inter-ethnic situations (and not in order to promote some abstract national unity), the Rabbinate enacted the ordinance that imposes the Ashkenazi norms on the Sephardic community. Clearly, this form of justification rejects the criticism of R. Ovadia Yossef and others, who argued against R. Uziel that there are many ethnic differences in observance between communities in Israel and nothing is ever done to narrow or blur them.

In addition to these two arguments, which appear with variations in the ordinance itself, R. Uziel raised several others. First, he mentioned that there are Sephardic decisors who adopted the Ashkenazi norm that chalitza takes precedence, always or in certain situations, for example when there is too large of an age difference between the widow and the brother-in-law. Another argument is obscure: "In our days there are breakdowns and failures that one ought not talk about." It is not clear what R. Uziel referred to here. Was it perhaps the fear of the deceased having had a child by a woman with whom he lived without being married?

It is possible that R. Uziel hinted to another justification that is mentioned several times in the writings of his colleague, R. Herzog, having to do with the fear of the pressure and strength of the Israeli left at the time. Shortly after the establishment of the State of Israel and following the War of Independence, the Israeli left was at the peak of its might. A strongly contested struggle was being waged in Israeli society around the manner in which marriage was to be formalized by law. The arrangement that was in effect during the British Mandate was to perform marriage and divorce according to Torah law. Would this arrangement continue, or will there be sweeping change and transition to a model of civilian marriage? The statutory

\[^{70}\text{Westreich, \textit{supra} note 1, p. 449.}\]
points of conflict were the Women's Equal Rights Law, enacted in 1951, and the Rabbinical Courts' Jurisdiction (Marriage and Divorce) Act of 1953. The Knesset Minutes, which reflect the many debates on this subject, show that it was the levirate issue, rather than some other matter such as divorce, that outraged those who opposed marriage and divorce according to Jewish law.\(^{71}\)

The levirate issue was problematic in Israel because of the structure of inheritance laws and the division of jurisdiction between the civilian and religious instances. Both the civilian and the rabbinical courts can declare who the heirs are and divide the estate. In matters of inheritance both instances are required to apply the religious law of the parties, but the rights to the estate and the right of the widow to inherit her husband must be determined based on the British Mandatory Inheritance Act. As a result, widows in a levirate connection preferred to claim their right to the estate in civilian court, and only then demand *chalitza* in rabbinical court. But some brothers-in-law argued that before they were summoned to court regarding the widow's demand for *chalitza*, the widow should return her part of the estate and agree to be tried again according to Torah law. For a Sephardic widow, this meant that in the absence of a solid ground for coercing *chalitza*, her refusal of the levirate marriage would result in being declared rebellious and lose her rights to her husband's estate. Indeed, in some cases R. Herzog intervened to assist widows whose brothers-in-law tried to dispossess them of the inheritance they obtained in civilian court by virtue of the Mandatory Act. He justified his action by the fact that "everyone who knows the situation as it stands, would agree, I believe, that if this is how the situation had been in the days of our forefathers (Razal) they would have enacted ordinances"\(^{72}\) to allow the widow the portion that civilian law grants her.

The substantive argument that among some Sephardic decisors *chalitza* took precedence over levirate marriage was not relevant in Morocco, where since time immemorial they ruled that the levirate commandment took precedence. Nor was the argument about the difficulties with inheritance relevant in Morocco, where the

\(^{71}\) Knesset Minutes, Vol. 9, p. 2092 (MK Ada Maimon, Meeting 267, 26.6.1951.); *ibid*, pp. 2116-2117 (MK Shoshana Parsitz, Meeting 269, 2.7.1951); *ibid* p. 2122 (MK Fayga Ilanit); *ibid* p. 2129 (MK Hana Lamdan).

exclusive authority to rule in these matters was in the hands of the Jewish courts, which ruled according to religious law. There was no involvement of a competing system in Morocco, operating according to other considerations, and above all, there was no dominant ideologically motivated public that rejected outright the authority of the Halacha and saw itself free to manage its Jewish life based on a different outlook. In Morocco, the public regarded itself subject to tradition and its values, even if various individuals did not fully observe it. Through its community council, the public was asking only that the rabbis respond to its demands and improve the status of Jewish women in several areas, including that of levirate marriage. Moroccan sages were not facing an ideological opponent that viewed religion and its arrangements as something that deserved to be abolished or at least not to be forced upon those who did not acquiesce to it.

The differences in the types of problems that sages in Morocco and in Israel were facing resulted in different legislative work, which was apparent already when it came to the grounds for coercing chalitza.

6.4 Expansion of the scope of grounds

Moroccan sages adopted an item-by-item approach to the legislation, and identified three grounds that would henceforth serve the widow: married, poor, and loathsome brother-in-law. According to R. Danan, who was the dominant figure in the Council, recognition of the three grounds does not amount to a revolution and could have been reached also by judicial interpretation. As shown above, there have been sages, including Rabbis Shlomo Hacohen, Baruch Raphael Toledano, and Haim Siriro, who claimed that these orders were revolutionary with respect to existing law and fought tooth and nail against the ordinance. Following contact with R. Uziel, and after receiving the information about the Jerusalem Ban, the Council expanded the list of grounds and added every instance of refusal of the levirate marriage by the widow as justifying coerced chalitza. Formally, there was no dramatic change in the law in Morocco, but in practice the concept of levirate marriage lost all content and remained in force only when both sides agreed to it.

73 See S.N. Eisenstadt, Introduction to Zohar, Tradition and Change, supra note 7, pp. 3-4.
The technique used by legislators in Israel was vastly different. Levirate marriage was prohibited outright in Israel, and the judges did not address the issue of grounds in detail because they prohibited levirate marriage even if both parties desired it, adopting the Ashkenazi norm both formally and practically. This is what R. Uziel wrote explicitly to R. Maaman: "... we found it necessary to enact this ordinance and follow Rama's opinion which is accepted among all Ashkenazi communities in Israel and in the Diaspora."74 R. Ovadia Yossef's wrath appears to have been unleashed, among others, by the subjection of Sephardic and Oriental Jews to the Ashkenazi norm, as I showed elsewhere. The ordinance does qualify, however, the absolute nature of the prohibition, and establishes that it can be set aside in special cases, with the agreement of the expanded Council of the Chief Rabbinate and the signatures of both Chief Rabbis. No such order exists in the Ashkenazi tradition. Had there been one, it may have been possible to argue that the law applied to Sephardic Jews is still different from that which applies to Ashkenazim, but it would not have been sufficient to blunt the dire impression the ordinance made on those who wished to restore the old glory of the Sephardic and Oriental traditions. It is difficult to know how R. Yossef would have reacted if the Moroccan ordinances had been enacted in Israel. And we do not know why R. Uziel, who was the initiator of the ordinance regarding levirate marriage, did not adopt the Moroccan formulation which allowed levirate marriage in principle if the widow agreed to it. Was he afraid that Oriental judges would take advantage of this opening and revive levirate marriage by pressuring the widow also in cases in which she refused the levirate marriage, and even when she had good reasons for doing so? I return to these two questions when we meet the Moroccan sages again in Israel.

6.5 Sanctions imposed on the brother-in-law

The answer to the question whether the obligation is to perform the levirate marriage or chalitza is important in itself, especially in a closed society that generally observed the injunctions of its rabbis and judges, such as the Jewish community in Morocco. We saw this in the case of Jamila, who changed her mind following

74 Supra note 36.
pressure by judges of the rabbinical court and agreed to the levirate marriage in principle, although she chose the youngest among the brothers. Nevertheless, of real and practical importance is first and foremost the penalty imposed on one of the parties in case it refuses to observe the order of the court. This is a genuine gap between Moroccan and Israeli rabbis. In the Jerusalem Ban, the decisive fact is that the *chalitza* commandment takes precedence and levirate marriage is prohibited. The only penalty imposed on the brother-in-law is payment of alimony over the period of his refusal to perform *chalitza*, and no direct coercion or pressure is mentioned. The origin of this penalty is in a 1943 ordinance of the Chief Rabbinate, which imposed alimony on brothers-in-law who were ordered by the court to perform *chalitza* and who did not do so, causing the widow to become *aguna*. Now the penalty was extended to every brother-in-law, as the ordinance prohibited levirate marriage and ordered *chalitza* in all cases.

By contrast, in Morocco, the sages of the Rabbinical Council imposed stronger and broader penalties. Already in the initial stages of debates at the Second Council they imposed a sweeping obligation to maintain the widow, which included several components. The same Council later decreed that after 12 months the brother-in-law is directly coerced to perform *chalitza*. At the same time they ordered that if the brother-in-law is not capable of maintaining the widow or does not want to maintain her, he is immediately coerced. After the encounter with the Jerusalem Ban, the scope of grounds was expanded to include every instance of refusal on the part of the widow, but for grounds other than the three recognized ones, the brother-in-law was ordered only to pay alimony and was not coerced after 12 months. The Fifth Council, however, removed the penalty of direct coercion after 12 months because of sharp opposition to this order, and limited the applicability of the ground based on inability to maintain the widow to the truly destitute. In the end, the penalty applied by the Moroccan ordinance also amounted to the imposition of alimony, similar to the Jerusalem Ban, and only poor brothers-in-law were coerced to perform *chalitza*, an element that was missing in the Jerusalem Ban.

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75 Shershevsky, *supra* note 67, Appendix A, Section 2, p. 448.
The first Moroccan ordinance decreed that in addition to the imposition of alimony on the brother-in-law, the widow was allowed to retain the income from her occupation.\textsuperscript{76} This order came in response to the basic rule in Jewish law that the man's obligation to feed his wife and the orphan's obligation to feed the widow imposes an obligation on the woman to surrender the income from her occupation to those providing for her maintenance. Leaving the income from the widow's occupation in her hands increases the economic pressure on the brother-in-law, as the obligation to pay alimony is not even partially offset by the widow's income. In traditional times a woman's income from her occupation was lower than the alimony she needed, and therefore the imposition of alimony already represented an element of coercion. But with the constant rise in income from the widow's occupation as a result of advances in the economic status of women, if the Talmudic rule of offsetting the alimony with the income from their occupation remained in force, women would receive nothing from their husbands. This difficulty exists today in many cases of women who are refused a divorce by their husbands, as it is impossible to apply the penalty of alimony to the refusing husband because of the woman's income. The late Prof. Ariel Rosen-Zvi made desperate attempts to solve this distressing problem, but was not able to achieve a real breakthrough.\textsuperscript{77} Moroccan sages were able to provide a solution that was effective in its time and place, and one that also has great potential for future improvement of the status of women.

6.6 Property consequences for the widow

The imposition of alimony and direct coercion were the stick used against the brother-in-law; the granting of property rights to the widow in her husband's estate represented the denial of the carrot that was liable to motivate the brother-in-law to demand the levirate marriage. According to Talmud law, the widow is entitled to receive her ketubbah from her husband's estate, and she takes precedence over the other heirs because she is considered to be a debtor of the estate. This law was common among Moroccan Jews known as the "locals." Among the Spanish exiles

\textsuperscript{76} Supra, text next to note 32.
\textsuperscript{77} A. Rosen-Zvi, Family Law in Israel: Between the Sacred and the Secular, Tel-Aviv 1990, pp. 415-425.
who arrived in Morocco, the custom (enshrined in an ordinance) was to collect for the widow half of her husband's estate. Her refusal of the levirate marriage denied her substantial components of her ketubbah, including its main portion, the supplement, and the portion of the dowry that was not intact, as the ruling in Jamila's case shows.

Already in the first ordinance of 1949, it has been decreed that the widow receives all components of the ketubbah or her portion of the estate, denying the brother-in-law the motivation not to perform chalitza. Following the Fourth Council, there was a certain erosion in the rights of the widow who refused the levirate marriage without a ground, when it was decreed that in such a case it was the choice of the brother-in-law whether she receives her ketubbah or a portion of her husband's estate. This measure was enacted as an incentive for the brother-in-law to perform chalitza, and at the same time as a negative incentive for the widow, so that she does not seek chalitza for economic reasons. Another correction, intended also as an incentive for the brother-in-law to perform chalitza, was granting a double portion from the deceased brother's estate to the brother performing the chalitza. There is no question that the penalties imposed on the brother-in-law and the granting of economic rights to the widow enabled Moroccan sages to assemble a comprehensive and efficient arrangement without significant breaches. All this was possible in Morocco because state law granted rabbinical courts exclusive rights to rule in matters of inheritance, and the law applied in court was Jewish law.

By contrast, the Jerusalem Ban did not seek at all to settle the property rights of the widow, an issue of great importance for the solution to the igun problems of widows who refuse the levirate marriage. The determining factor in this matter was not the weakness of the rabbis but the constitutional reality prevalent in Israel at the time, which was radically different from that in Morocco. As noted above, the civilian court had the authority to rule in matters of inheritance, and if the widow wished to have her case heard in the civilian court she could not be prevented from doing so. Although the civilian court ruled according to the religious law applicable to inheritance, it also granted the widow a portion of the inheritance by virtue of civilian law, and more important, it did not address the property laws regulating the
relations between the brother-in-law and the widow. When the brother-in-law and the widow arrived at the rabbinical court to solve the *challitza* problem, the court could intervene only indirectly in the rulings of the civilian court if the widow agreed to renounce the portion she was awarded by the civilian court. If she refused, the rabbinical court found itself trapped between state law, which granted validity to the division of the inheritance by the civilian court, and Torah law, which in many cases denied the widow portions of her right to the inheritance. This division troubled greatly the Chief Rabbis and was one of the factors that prevented reaching a comprehensive solution to the problem.

7 Criticism of the Jerusalem Ban by Moroccan Sages in Israel

7.1 Rejection of the Jerusalem Ban by Moroccan sages

Several decades later, following the emigration of Moroccan rabbis to Israel, a new encounter took place between the Moroccan tradition and the Jerusalem Ban regarding the levirate matter. The most prominent among the rabbis was Shalom Mashash, who arrived in Israel in 1978 and was named Chief Rabbi of Jerusalem and chief of the heads of rabbinical courts in the city. When he served as a member in the Rabbinical Council in Morocco, he was obviously aware of the influence the Jerusalem Ban and the opinion of R. Uziel had on R. Danan and on the changes that were added to the Moroccan ordinances as a result of this influence. R. Mashash himself regarded the Jerusalem Ban as sufficiently authoritative to justify the Moroccan ordinance, which changed existing law, and he defended it vigorously against the opposing rabbis. He also raised a similar claim to the one that appears in the Jerusalem Ban, that in most places the custom was not to carry out the levirate marriage. R. Yehoshua Maaman also emigrated to Israel and served as a judge in Beersheba. He also knew well the position of R. Uziel from a personal letter, and having read it in public to the assembly of rabbis, he appears to have supported it wholeheartedly. But above all, these sages identified with the approach of those sages who assumed that a serious problem was besetting the continued existence of levirate marriage in a modern environment because it imposed a matrimonial tie on
the widow. When they arrived in Jerusalem, they encountered directly, for the first time, a radically opposite approach championed by R. Ovadia Yossef.

R. Yossef delivered his position in principle in a court ruling already in 1953, shortly after the enactment of the Jerusalem Ban, but it appeared in print only in 1974, after R. Yossef was elected Chief Rabbi of Israel and Rishon Lezion. R. Yossef opposed the Jerusalem Ban forcefully for rejecting levirate marriage outright, and he continued to support the Sephardic and Oriental tradition according to which levirate marriage takes precedence. This position resulted in several legal outcomes, such as the declaration of a widow as rebellious and the release of a brother-in-law from alimony payments. According to R. Yossef, the arguments adduced by R. Uziel in support of the ordinance are not sufficient to serve as a foundation for it, because the national consideration of the unity of Israel does not justify the abolition of deeply-rooted ethnic traditions such as levirate marriage. Furthermore, it is not true that most Jews reject levirate marriage and prefer chalitza. As for the insincerity of brothers-in-law at the present time, in his opinion this claim is not relevant because based on the position that levirate marriage takes precedence it makes no difference what the real motives of the brother-in-law are. It follows, in R. Yossef’s opinion, that the Jerusalem Ban of the Chief Rabbinate breaches the authority of the legislators and it is not valid. But beyond specific arguments against the Jerusalem Ban and against R. Uziel who initiated the ordinance, in all of the abundant writings of R. Yossef there is not a single mention or even a hint to the fact that the levirate problem facing the sages is a real human and social one in contemporary reality. R. Yossef saw only an attempt to impose the Ashkenazi tradition on Sephardic and Oriental Jews under the guise of national unity, which R. Uziel regarded very highly.

This conclusion was not confined to the theoretical plane. R. Yossef put it in practice already while serving as Chief Rabbi of Tel-Aviv, and even more vigorously when he served as Chief Rabbi of Israel.79 In several rulings he issued, which have been discussed extensively, he ordered explicitly that the levirate commandment be observed when both sides agree to do so, and in one case he used his influence to

78 Westreich, supra note 9.
pressure a widow to agree to the levirate marriage. Because of R. Yossef's position, and maybe because of his pressure, even the chief heads of Ashkenazi rabbinical courts retreated from the ordinance and ruled to allow Oriental Jews to perform the levirate marriage. As I conjectured elsewhere, even R. Haim David Halevy, who was Chief Rabbi of Tel-Aviv-Jaffa, avoided following in the footsteps of R. Uziel because of pressure from the R. Yossef when he served as Chief Rabbi of Israel.\footnote{E. Westreich, "Rulings of R. Haim David Halevy in family matters: Between R. Uziel and R. Ovadia Yossef," (Hebrew) in A. Sagi and Z. Zohar (eds.), A Living Judaism: Essays on the Thought of Rabbi Haim David Halevy, Jerusalem 2007, pp. 129-174.}

R. Mashash had a genuine opportunity to stake out his position in Israel on this topic while he was serving as Chief Rabbi of Jerusalem and chief of the heads of rabbinical courts in the city.\footnote{R. Shalom Mashash emigrated to Israel in 1978.} At that time, the following case was brought before him: "Before me were a brother-in-law and a widow, both young, the brother-in-law not married, both wishing to observe the levirate commandment and asking to arrange for them chupa and kiddushin." This case lies outside the meeting point of the two ordinances: whereas according to the Moroccan ordinance there would have been no obstacle to carrying out the levirate marriage, indeed the legislators would welcome such an act, according to the Jerusalem Ban levirate marriage was prohibited in this case as well, and a special decision of the Chief Rabbis of Israel was needed to allow it for special reasons.

R. Mashash followed here the position that would have been taken in Morocco, according to the local ordinance, and argued without hesitation that the parties should be allowed to marry. Among Sephardic Jews in Israel and worldwide the custom and legal tradition has always been to prefer levirate marriage over chalitza, and to rule accordingly in practice. It is true, however, that in the modern era "there are many women who do not wish to perform the levirate marriage, especially if the brother-in-law is married and has sons, or is old, or cannot maintain two women." And there is constant fear that the widow will stray from the true path if she remains entangled in the levirate connection, especially if she is young. Therefore, in cases such as these, when the widow has a justified ground, the brother-in-law is coerced to perform chalitza, primarily by financial means such as paying alimony to the
widow, both by virtue of the law and of the Moroccan ordinance. But in the present case, when the parties are well suited to one another as husband and wife and agree to marry, there is no justification to bar their way to the levirate marriage. Nay, not observing this great commandment "is an insult to the living and the dead, as Boaz said, that the name of the dead be not cut off from among his brethren." An additional argument was that occasionally it is to the benefit of the widow "so that she is not left aguna, and women who received chalitza are avoided by many out of superstition." At times this is also in the interest of the brother-in-law, who although may be free, it is not at all clear that he will succeed in marrying. The conclusion that R. Mashash drew regarding the Jerusalem Ban of the Chief Rabbinate of Israel was that "Simply it is not deserving to call this a correction because it corrects nothing and only spoils."

This sweeping statement is extreme, and it is difficult to see how it fits reality. For the most part, the Jerusalem Ban relieved the distress of widows who refused the levirate marriage with a known reason or without providing a convincing argument, and protected them from brothers-in-law whose only desire was to grab the estate of the deceased brother and at times to extort money from the widow. In all these matters there was no argument between R. Mashash and the legislators who enacted the Jerusalem Ban, and it is possible that R. Mashash would have been willing to go farther in his determination to bring the brother-in-law to heel. But R. Mashash had a formal argument for rejecting the ordinance of the Jerusalem Ban, namely that in the past an ordinance would become valid after "they declared it in the synagogues and seven dignitaries of the city agreed with it and then it was valid." In the case of the Jerusalem Ban regarding levirate marriage, however, the situation is entirely different because "R. Uziel alone followed the Ashkenazim for reasons of unity, and in the end the reason was not realized." This appears to be merely an auxiliary argument, and rightly so, because the factual data on which it relies, that is, that R.

82 The publications of the rabbinical councils that were collected in Jewish Law in the Moroccan Communities do not mention that the agreement of the public at large was obtained for the ordinances enacted regarding levirate marriage. According to Amar, from the Third Council onward, members of the community councils in Morocco also participated in the rabbinical assemblies, and these voiced their opinions about the suggested ordinances (Amar, Introduction, http://law.bepress.com/taulwps/art121
Uziel decided on his own, without the support of other Sephardic rabbis, is groundless.\textsuperscript{83} It is possible that the ire of R. Mashash was aroused by the fact that the argument used in the Jerusalem Ban was the desire to bring upon national unity, or worse, by the fact that R. Uziel made the Sephardic tradition subservient to the Ashkenazi one. With regard to the national unity argument, R. Mashash complained about the fact that in practice there is no unity between the ethnic communities, and every community preserves its traditions in a variety of areas having to do with life style and yore dea. This is in fact the criticism leveled by R. Ovadia Yossef, as I elaborated elsewhere. In any case, it is clear that this argument is taken from R. Yossef's ruling and shows plainly the substantial influence he had on R. Mashash.

7.2 R. Mashash's call for the revival of Moroccan tradition

The fact that R. Mashash adopted the criticism toward the Jerusalem Ban and stated that the content of the ordinance in the matter of levirate marriage is invalid does not indicate that he also adopted in toto R. Yossef's position on the levirate matter. In the above-mentioned ruling, he clarified his position about the widow who refuses the levirate marriage and distinguished between his approach, which originated from within Moroccan tradition, and that of R. Yossef. "It is true that it appears from what R. Yossef says that this is the ruling even without the woman's consent to the levirate marriage..." in other words, the rule is that the levirate commandment takes precedence even if the widow refuses the levirate marriage. According to this rule, a widow who refuses the levirate marriage sustains severe financial and property loss and remains aguna, without any ability to put pressure on her brother-in-law to perform chalitza. And even if the widow is not declared rebellious, the brother-in-law cannot be ordered to pay alimony, contrary to the Jerusalem Ban and the ordinance of the Chief Rabbinate of 1944.

This is not the position of R. Mashash, who believed that if the brother-in-law "is married or old or ill," we do not declare the widow rebellious and her property is not

\textsuperscript{83} See the statement of Ovadia Hadaya, Westreich, \textit{supra} note 1 pp. 466-471.
injured. Even a widow who refuses the levirate marriage without a specific ground is not considered rebellious, but only by virtue of an ordinance similar to the Moroccan one. And it is possible to pressure the brother-in-law to perform chalitza on behalf of all widows by obligating him to pay alimony to the widow, also based on an ordinance similar to the Moroccan one. Thus, regarding the critical issues that weighed on the rabbinical system in Israel, R. Mashash identified in principle with the positions of Rabbis Uziel and Herzog, who enacted the Jerusalem Ban, and maybe was even prepared to go further in theory, and certainly in practice.

R. Mashash expressed this opinion at a conference of rabbinical judges on matters of family law, which took place in 1983, some two years after the above-mentioned ruling. First, let us examine the main points of R. Mashash's outlook on the need for enacting ordinances in the field of family law:

I wish great success in all matters, and hope that the rabbis will succeed in drafting good ordinances for the benefit of the people, and most important is to make them permanent rules and to treat them in all the courts the same as rules decreed in Shulchan Aruch, and decisions not ruled according to them, upon appeal, shall be reviewed and ruled according to the ordinance which is for the benefit of the people. For we must know that we live in a time when freedom and thought have opened and broadened, and there are laws that cannot be enforced given the spirit of our times...

The spirit of the Moroccan tradition is present in every sentence, especially in the courage to look straight at reality and state that there are topics that cannot be defended in their existing form because of the "spirit of our times." Toward the end of his speech he addressed the issue of levirate marriage as follows:

More about the levirate commandment. It is proper to abolish that ordinance that was enacted in the days of R. Uziel, which rejected entirely the levirate commandment for Sephardic Jews, even if both are unmarried and agree to consummate the levirate marriage, for it is not according to halacha to abolish a Torah commandment, and Sephardic Jews who believe that the levirate

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84 Shamash Umagen Responsa A, Even Ha'Ezer 16.
commandment takes precedence should be allowed to observe it when it is fitting and no damage is caused to either party.\textsuperscript{85}

R. Mashash referred to the ruling cited above, which was given contrary to the ordinance, and noted that the ruling received R. Yossef's approval and that the parties are happily married, with children. But this proposal does not explain how to protect the widow who refuses the levirate marriage from being declared rebellious or how to pressure the brother-in-law to perform \textit{chalitza}. In the central part of his recommendations, R. Mashash did grapple with the issue of women who were denied divorce by their husbands, and sought the remedy in reviving the law of the rebellious woman, which allowed coercing the husband to divorce his wife. In his opinion, his recommendations in the matter of the rebellious woman

... will help also in the case of \textit{chalitza} when the widow does not want the brother-in-law, or he is married and has sons, or is old, and such. For in any case, according to the law, many agree that he should be coerced to perform \textit{chalitza}, and certainly with the changing of the nature of the generation we should rule with those who maintain that he should be coerced...\textsuperscript{86}

This legislative technique is similar to what we have encountered already. First, R. Mashash presented the position he sought to achieve, and noted that even following the plain halachic law there are decisors who already rule according to the proposed position. Clearly, it is fully justified to enact ordinances in circumstances of profound change among the Jewish population, which is no longer willing to abide by existing halachot. But this is not all. R. Mashash then retreated tactically by noting that this position in principle "will indirectly find a way to ease the situation and to bring him to perform \textit{chalitza} by imposing on him alimony to the widow for as long as he does not carry out the \textit{chalitza}. In Morocco we enacted an ordinance to impose alimony on the brother-in-law who refused to perform \textit{chalitza}.

His proposal was now reduced to the first ordinance enacted by the Chief Rabbis during the British Mandate, which was reaffirmed in the Jerusalem Ban, and

\textsuperscript{85} \textit{Ibid}, C.  
\textsuperscript{86} \textit{Ibid.}
according to which a brother-in-law who refuses to perform *chalitza* is obligated to pay alimony to the widow. But the problem is that in the abovementioned responsum, R. Yossef sharply condemned this component of the ordinance as well, and ruled that obligating the brother-in-law to pay alimony results in invalidating the *chalitza* that follows such obligation as an artificial *chalitza*. In the political and structural reality of the Chief Rabbinate and the rabbinical courts in Israel, the space between the statements and good intentions of R. Mashash and reality is as wide as that between Casablanca and Jerusalem.

Contrary to R. Mashash, who called for a revival of the Morocco ordinance, R. Yehoshua Maaman appears to have faithfully toed the line represented by R. Yossef. In a responsum he wrote in 1987, he subscribed to the main points of R. Yossef's claims and conclusions regarding the invalidity of the ordinance of the Chief Rabbinate, and went beyond that. Revisiting the Moroccan ordinances, he said:

> Thus, in light of all that has been said above from beginning to end [criticisms by Rabbis Shlomo Hacohen, Raphael Baruch Toledano, and Ovadia Yossef], it seems to me that also in the cases mentioned in the books of the Rabbinical Councils in Morocco, whether because of poverty or because the brother-in-law is married or loathsome to her, everything shall be only according to the clear halacha stated by our teachers and great scholars.\(^\text{87}\)

This is a complete retreat from the Moroccan ordinances that produced a change in the existing law, and a demand for treating the three grounds mentioned in the ordinances according to the law that existed in the mandatory halachic sources before the ordinances were enacted. R. Maaman's only advice to the judge grappling with a levirate case was to "try to influence the widow gently whenever possible." Holding such an opinion, there was nothing left for R. Maaman to do but end his speech with a prayer and a hope that "may it be His will that no Jewish women be in need of *chalitza* or levirate marriage."

Clearly, this was not the way of Moroccan sages in their native land when they chose to enact a clear and practical legislation to cope within the reality of modernity with

\(^{87}\) Supra note 36.
the demand of the widow to obtain *chalitza* and not to have to submit to the levirate marriage. At no point did these sages shirk their responsibility toward the population that heeds their opinion, and did not pass their load on to heavenly grace in the hope that it would prevent levirate situations.

8 Conclusion

Through the institution of the Rabbinical Council, which was recognized by the French authorities, the judges and sages of Morocco confronted the reality of mid-20th century and grappled with public demands to improve the legal status of women, consistent with the spirit of equality and modernism. One of the central issues was levirate marriage. According to the legal and social tradition in Morocco, after her husband died without leaving children, the widow was tied in a matrimonial relation with her deceased husband's brother without having agreed to it, and her refusal of the levirate connection resulted in heavy penalties against her, both matrimonially and economically. Moroccan sages continued to identify with the old values that held the levirate commandment in high esteem, but believed that they had an obligation to address openly the challenge brought by modernity. In this, they differed from their colleagues in Israel, who also grappled at the same time with the levirate issue, but the motives they presented were an absence of the desire to observe the commandment and a consideration of national unity.

The Rabbinical Council in Morocco assembled six times, and the levirate issue was debated extensively at most of the Councils. The dominant figure at the assemblies was R. Shaul Even Danan, head of the Great Rabbinical Court of Appeals. Other important judges and sages participating at the Councils were R. Shalom Mashash and R. Refael Baruch Toledano. R. Danan led an active move intended to bring about far-reaching changes in the levirate law to minimize injury to the widow's personal freedom. The central tool for change that R. Danan used was legislation. The Moroccan tradition was characterized by intensive use of legislation since the arrival of the Spanish exiles. The present study showed clearly that unlike the Ashkenazi tradition of recent generations, which renounced the use of legislation because of a
fear of enactment, in Morocco in the middle of the 20th century the use of legislation was still widespread.

The activism of R. Danan and his faction in the field of legislation was manifest in all three central legal aspects of the levirate issue: grounds for chalitza, penalties imposed on the brother-in-law, and the economic consequences for the widow. Among the community of judges, however, there was a conservative faction that contained three heads of rabbinical courts in important communities: Rabbis Toledano in Meknes, Siriro in Fess, and Hacohen in Oujda. These opposed vigorously the line led by R. Danan as well as the elements of his legislation in all three areas, especially the second one, which had to do with imposing penalties on the brother-in-law.

There was ongoing dialog between the two factions, at times blunt, throughout the legislative process. The process moved dialectically and stabilized only toward the Sixths (and last) Council. At first, there was an increase in the provision of legal means for the benefit of the widow despite the opposition of the conservative faction, which proposed its own solutions for solving the problem. In the middle of the process, the activist faction was reinforced by the encounter with the Jerusalem Ban of the Chief Rabbis of Israel and by the explicit encouragement by R. Uziel of R. Danan's initiatives. But at no stage did Moroccan sages accept the Israeli solution specified in the Jerusalem Ban, which abolishes levirate marriage entirely and prefers chalitza in all cases. Nor did they adopt the conduct of some of their colleagues in Israel following the enactment of the Jerusalem Ban, who challenged it outside the institutional legislative framework, which was the Chief Rabbinate of Israel. Especially, they did not follow the path of the harsh critic of the ordinance, R. Ovadia Yossef, who began attacking it in a court ruling in which he challenged the very legitimacy of the ordinance and the motives of R. Uziel, until he was able to abolish it in practice when he reached the position of Chief Rabbi.

The confrontation between the two Moroccan factions arose already in the first stage of the legislation, at the Second Council of 1949. R. Danan sought to establish three grounds that justify a demand by the widow to obtain chalitza: a married, poor, or
loathsome brother-in-law. In opposition to him, R. Hacohen claimed that these grounds do not justify coercing the brother-in-law to perform *chalitza*, except if he is thoroughly destitute, in which case he can be coerced the same way a married man is coerced under similar circumstances. The position of the activist faction was accepted, and was expanded in the second legislation that took place at the Fourth Council, in 1952. Under the impression left by the Jerusalem Ban and the encouragement of R. Uziel, Moroccan sages added to the list of grounds every case of refusal of the levirate marriage on the part of the widow. At this stage again the conservative rabbis criticized the legislation, with R. Toledano of Meknes leading the fight.

It appears that the confrontation between the factions focused on the opposition of the conservatives in the area of penalties. R. Danan’s extensive activism in this area reached its peak already in the first legislation, in a two-stage process.

In the first stage, the penalties focused on indirect pressure by obligating the brother-in-law to pay alimony and meet all of the widow’s existential needs while at the same time allowing her to keep the income from her occupation. The income of the woman’s occupation was to become a factor of growing importance, as women increasingly joined the labor market and achieved professional careers. The Jerusalem Ban also contains an obligation to pay alimony, but there is no mention of allowing the widow to retain the income from her occupation.

In the second stage, direct coercion to perform chalitza was added for each of the three grounds if the brother-in-law continues to refuse performing *chalitza* for 12 months. Farthest-reaching was the order to coerce the brother-in-law to perform *chalitza* immediately if he is objectively lacking economic means or if he refuses to maintain the widow. These penalties went much farther than the Jerusalem Ban, which did not address at all the aspect of direct coercion to perform *chalitza*. Speakers for the conservative faction criticized extensively the direct coercion of *chalitza*, emphasizing the severity of coercion carried out not according to law in a matter that touches upon issues of incest. Their counter-proposal, offered by R. Siriro of Fess, was to follow the custom common in the Ashkenazi tradition of preferring
enticement of the brother-in-law over coercion, offering him a double portion of the deceased brother's estate if he agrees to perform *chalitza*.

Eventually, the dominant faction retreated, and in the third stage, at the Fifth Council in 1954, the coercion to perform *chalitza* was abolished and only the obligation to pay alimony was retained. At this stage the rabbis adopted the enticement proposal to grant the brother performing the *chalitza* a double portion of his brother's estate.

The Council initiated legislation also with regard to the economic situation of the widow and decreed that in the case of the three valid grounds, the widow does not lose any of her financial rights in her *ketubbah*. But a distinction was made between the three explicit grounds (bigamy, poverty, loathsomeness) and pure refusal, and in the latter case the legislators granted the brother-in-law the choice of giving the widow her *ketubbah* or half the estate. We have no documents in our possession about the reaction of the conservative faction to changes in this area, and we have no knowledge whether they agreed not to apply the law of the rebellious woman to the widow when one of the new grounds obtained, and not to apply it even in the case of her groundless refusal of the levirate marriage. In Israel, the financial rights of widows who are refused *chalitza* have not been settled by the Chief Rabbinate because matters of inheritance were under the parallel legal jurisdiction of the civilian courts. This situation gravely burdened the rabbinical judicial system in Israel and prevented it from providing a fitting solution to the conflicts between the widow and the brother-in-law. Eventually, any possible solution was scuttled completely by the position of R. Ovadia Yossef.

Unlike R. Yossef, the activist faction that was dominant in the Rabbinical Councils attempted to persuade the conservatives to accept the levirate legislation. It was left to R. Shalom Mashash, serving at the time as a judge in Casablanca, to justify and consolidate the means of coercion decreed in the ordinance. In a comprehensive article he later published in his book of responsa, R. Mashash based justification for the ordinance both on general principles derived primarily from the law of the rebellious woman, and on the Jerusalem Ban. At a conference of rabbinical judges in Israel that took place decades later, R. Mashash indicated that the Moroccan
ordinances were internalized by the community of judges, who ruled according to them. The flourishing of legislation in Jewish law did not continue for long because most of the Jews left Morocco, including the central figures mentioned in this study, and immigrated to Israel. R. Danan arrived in Jerusalem but did not discharge public rabbinical functions. R. Maaman became a judge in Beersheba, and R. Mashash became the Chief Rabbi of Jerusalem and chief of the heads of rabbinical courts in the city. The two latter sages joined R. Yossef's position, which rejected the binding validity of the Jerusalem Ban with regard to levirate marriage. R. Maaman identified with R. Yossef's arguments and distanced himself entirely from the position he had adopted in the 1950s, while he was corresponding with R. Uziel. The position of R. Mashash was more complex. In clear opposition to R. Yossef's opinion and arguments, he maintained that it is fit to enact an ordinance that would adopt the rules decreed in the Moroccan ordinances, but in practice agreed with rejecting the validity of the Jerusalem Ban in the levirate matter, although by virtue of different arguments than those raised by R. Yossef. In this way, Rabbis Maaman and Mashash restored the old glory of levirate marriage to the position of the legal tradition in Morocco at the time of the Jamila affair in Meknes, before the era of new legislation began.