

# Halakhah, Law, and Worldview: Chief Rabbis Goren and Yosef and the Permission to Marry a Second Wife in Israeli Law

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## Introduction

In Israel, marriage and divorce laws are religious, and within the borders of the State of Israel Jews can marry only according to Jewish law.<sup>1</sup> Jewish law is also present in the Israeli Penal Code, in the article prohibiting polygamy. In principle, the law forbids men and women to marry two spouses, and imposes a penalty of five years of imprisonment for such marriages.<sup>2</sup> Nevertheless, a married Jewish man can obtain permission to marry a second wife (henceforth, “permit” or “permission”). Below is the wording of section 179 of the above law (henceforth, “section 179”):<sup>3</sup>

If the Law applicable to a new marriage is Jewish religious law, then a person shall not be convicted of an offense under section 176 if the new marriage was contracted after permission to marry was given by the final judgment of a Rabbinical Tribunal,

\* I wish to thank the Israel State Archives (henceforth, “ISA”), the Knesset Archives (henceforth “KA”), and especially R. Goren’s family for allowing me to peruse his personal archive and for giving me access to a file containing his rulings in matters of family law. The emphases in quotations are mine.

1 *Rabbinical Court Jurisdiction (Marriage and Divorce) Law 5713–1953*, sec. 2.

2 *Penal Law 5737–1977*, sec. 176.

3 *Ibid.*, sec. 179, as amended in 1980.

**and if the judgment was confirmed by the President of the  
Rabbinical Grand Tribunal.**

The article has three requirements: that a Jewish man be at issue<sup>4</sup> (because Jewish marriage laws apply only to Jews, and only a man can be married according to these laws to two spouses at the same time); that the man receive a final verdict from the official rabbinical court; and that the verdict be approved by the head of the rabbinical court system in Israel, the President of the Rabbinical Grand Tribunal, who by statute is one of the two Chief Rabbis.<sup>5</sup> The article does not specify the circumstances under which the man can obtain the permission, leaving it to the discretion of the rabbinical court and of the President of the Rabbinical Grand Tribunal.<sup>6</sup>

There is no doubt that behind this unique arrangement there is a halakhic position that holds that a Jewish man cannot marry a second wife except in unique circumstances and at the discretion of the rabbis. To a large extent, this arrangement is reminiscent of the Ashkenazi ordinance referred to as the Ban of Rabbenu Gershom (henceforth, the "Ban"), according to which a man cannot marry a second wife unless he receives permission from a

- 4 The Islamic court, for example, does not have the authority to grant a similar permission. This appears to be the most notable instance of discrimination in Israeli criminal law, which by nature is intended to apply equally to all citizens, regardless of religion and nationality. In this area, however, the law explicitly distinguishes between Jews and non-Jews. Since the State of Israel abolished, with the Women's Equal Rights Law, 1951, the permission that existed in British Mandatory law for Muslim men to marry more than one woman, the Shari'a courts have repeatedly requested to also have the option to grant permissions similar to those available to the rabbinical courts. This discrimination claim was also raised by Justice Haim Cohn of the Supreme Court, see Cr. A 596/73 v Israel. Mahamid 28 (1) P.D. 773 (1973), 777. See also Robert H. Eisenman, *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British Mandate and the Jewish State* (Leiden: Brill, 1978), 179–86.
- 5 *Dayanim Law 5715–1955*, sec. 8(a); *Chief Rabbinate of Israel Law 5740–1980*, sec. 17(a).
- 6 In several cases petitions were filed with the High Court of Justice against permissions granted under this section, but by and large they were rejected. In the 1960s, the Supreme Court tried to limit the granting of permissions to certain grounds only, in order to reduce the discretion of the rabbinical judges, but several years later the Court changed its position, and since then it does not tend to interfere in the decisions of rabbinical judges in this matter. See Benzion Schereschewsky and Michael Corinaldi, *Family Law in Israel* (Tel-Aviv: Lishkat Orchei ha-Din, 2015), 179 n. 99 (Hebrew).

hundred rabbis.<sup>7</sup> The relationship between the regulation of polygamy in Israeli and Jewish law is quite clear. Already the bigamy clauses concerning Jews, which were enacted in 1947 in the Palestine Criminal Code Ordinance (henceforth, “CCO”), and which to a large extent shaped the arrangement that exists today in Israeli law, were written by the Chief Rabbis at the time, Herzog and Ouziel, and the Mandatory legislature accepted the proposed arrangement almost without change.<sup>8</sup> Archival inquiry into the actions of the rabbis Herzog and Ouziel sheds light on the halakhic approach that guided them, which resembles greatly the Ashkenazi Ban. This move of the Chief Rabbis, despite its overwhelming success, triggered severe criticism against them by various members of the Jewish community in Israel, in particular on the part of representatives of non-Ashkenazi communities.<sup>9</sup> It is clear that the rabbis made use of the criminal law of the state to impose their controversial halakhic views in a debate concerning all citizens of the country.<sup>10</sup>

In the present article I argue, based on an examination of archival material that has not been investigated to date, that a similar move occurred in the second half of the 1970s: a debate between the two Chief Rabbis concerning the permission of Jewish men to marry, which was decided in practice by a change in existing legislation, clearly favoring the position of R. Ovadia Yosef over that of his Ashkenazi counterpart, R. Shlomo Goren. But whereas the legislation initiated by rabbi Herzog and Ouziel greatly reduced the ability of a Jewish man to marry a second wife (with a further narrowing in 1959), 33 years later Israeli law acted to extend this ability.

I begin by analyzing the evolution of the language of the section quoted above, and I examine the discussions held around the change that occurred in the late 1970s, which remains in effect to this day. Next, I analyze the

7 Elimelech Westreich, “The Jewish Women’s Marital Status in Israel—Interactions between Various Traditions,” *Pelilim* 7 (1998): 273–374 (Hebrew); Elimelech Westreich, *Transitions in the Legal Status of the Wife in Jewish Law—A Journey Among Traditions* (Jerusalem: Magnes Press, 2002) (Hebrew); Mark Goldfeder, “The Story of Jewish Polygamy,” *Columbia Journal of Gender and Law* 26 (2013–2014): 234–315.

8 Amihai Radzyner, “The Wars of the Jews: The Shaping of the Criminal Law Against Bigamy Among Jews in Mandate Palestine,” in *One Law for Man and Women: Women, Rights and Law in Mandatory Palestine*, ed. M. Shilo, R. Halperin-Kaddari, and E. Katvan (Ramat Gan: Bar-Ilan University Press, 2010), 151–98 (Hebrew); *infra*, n. 13.

9 *Ibid.*, 188–90.

10 *Ibid.*, esp. 179.

debate between two Chief Rabbis, which had a dramatic influence on Israeli law in the matter of marriage permits. This instructive issue illustrates how a party to a halakhic and ideological debate tries to promote its position by attempting to influence criminal legislation.<sup>11</sup>

### Transformations of the permission to marry in Israeli law

As noted, the roots of the current arrangement reach back to mandatory legislation. The amendment to section 181 of the CCO in 1947,<sup>12</sup> in the shaping of which rabbis Herzog and Ouziel invested great efforts, imposed a prison sentence of five years on a man who marries a second spouse while already married to one, even if the second marriage is valid according to the applicable religious law.<sup>13</sup> Four defenses were granted, specifying cases in which a person is not convicted of an offense of bigamy. The fourth of these states:

Provided that it is a good defence to a charge under this section to prove:...

(d) that the law as to marriage applicable to the husband both at the date of the former marriage and at the date of the subsequent marriage was Jewish law and that a final decree of a Rabbinical Court of the Jewish Community, **ratified by the two Chief Rabbis for Palestine** and giving permission for the subsequent marriage, had been obtained prior to the subsequent marriage.

- 11 For additional prominent examples, see Amihai Radzyner, "The Israeli Legislation as Both Halakhic Problem and Its Solution: The Complicated Case of *Heter ha-Mekhirah*," *JSIJ* (forthcoming); idem, "The Impact of Supreme Court Rulings on the Halakhic Status of the Official Rabbinical Courts in Israel," in *Institutionalizing Rights and Religion: Competing Supremacies*, ed. Leora Batnitzky and Hanoeh Dagan (Cambridge: Cambridge University Press, 2017), 224–40.
- 12 Supp. 1 to the Palestine Gazette, no. 1563, 15.3.1947, 1–2.
- 13 The statement that there is no distinction between whether the new marriage is also valid (as in the case of Jews and Muslims) or it is not (as in most Christian denominations), was added at the request of the Chief Rabbis, because in the original section it was determined that the offense applies only to those whose second marriage is null and void according to religious law, which naturally excluded all Jews (including Ashkenazim) from the applicability of this section.

Two differences can be seen when comparing this section with section 179 (as amended in 1980). First, obtaining the permission is contingent upon both the first and second marriages having been conducted according to Jewish law. In the law that replaced this section in 1959,<sup>14</sup> this limitation was reduced, and even a man whose first marriage was not according to halakhah could now obtain permission in cases where the second marriage was according to halakhah. The bill explains, with clear logic,<sup>15</sup> that there is no reason for a man who was married abroad not according to Jewish law to be discriminated against relative to one who was married in Israel, and to be prevented from taking a second wife in Israel even if he holds a marriage permit granted under Israeli law. However, whereas this change affected a relatively small number of cases, the second difference was much more significant and affected each case in which permission was sought. According to the original section, the consent of both Chief Rabbis was required, not only of one of them (the one who serves as President of the Rabbinical Grand Tribunal), as decreed by section 179. The logic behind the demand for the consent of both rabbis is clear. Rabbis Herzog and Ouziel, who sought to reduce the number of bigamist marriages among Jews, decided that the two rabbis (the Sephardic rabbi, who naturally represents a halakhic tradition that is more lenient toward possible bigamy, and the Ashkenazi rabbi, who represents a stricter stance) must reach an agreement on the matter. It is clear that the two would not necessarily agree in every case.<sup>16</sup> This requirement appears also in the ordinances of the Chief Rabbinate that rabbis Herzog and Ouziel enacted at the beginning of 1950. These ordinances, which were designed to create ethnic uniformity with regard to four issues in marriage law, and which clearly leaned toward the Ashkenazi tradition,<sup>17</sup> decree, among others, that Jews of Israel shall not marry a second wife “without a marriage permit signed by the Chief Rabbis of Israel,” that is, **both Chief Rabbis**. It is clear,

14 *Penal Law Amendment (Bigamy) Law, 5719–1959*, sec. 5.

15 *Penal Law Amendment (Bigamy) Bill, 8.7.1957*, 311–12.

16 Westreich, “Jewish Women,” 310. In several instances the Supreme Court insisted that the legal requirement for the approval of the two Chief Rabbis was needed to reduce the number of marriage licenses that rabbinic courts might issue, were such approval not required. See, for example, the comments of Agranat in HCJ (En Banc) 10/69 Boronovski v. Chief Rabbinate, [1971] PD 25 (1) 7, 31–32.

17 Westreich, “Jewish Women,” 312–16.

however, that the penal law had a far greater effect on the legal situation in Israel than the halakhic ordinance.<sup>18</sup>

As noted, in 1959 a law was enacted explicitly dealing with the offense of polygamy, which replaced and canceled the mandatory section. The main purpose of the new law was “to extend the applicability of the crime of polygamy to all those cases that deserve to be included in this offense,” according to the memorandum of the bill submitted to the Knesset.<sup>19</sup> There is no doubt that in some ways the scope of the offense was expanded as far as Jewish men were concerned, and those who had been acquitted of bigamy, according to the wording of section 181, would have been convicted under the new law.<sup>20</sup> For example, section 1 of the new law declared that “‘marriage’ (*nisu’in*) includes *qiddushin*,” because previously men who performed *qiddushin* but did not wed the women had been acquitted.<sup>21</sup>

Section 5 of the new law discussed marriage permits. As noted, it contained one change relative to the situation that existed before, concerning a man whose first marriage was not according to halakhah. The section also retained the requirement for approval by both Chief Rabbis. The government perceived this requirement as essential for ensuring that the permits would be granted based on broad discretion, a concern shared by those halakhic decisors who required the approval of one hundred rabbis.<sup>22</sup> This is what

18 On the failure of the ordinances of the Chief Rabbinate to affect halakhah that applies in rabbinical courts, see Ben Zion Eliash, “The Limited Influence of Israeli Rabbinical Enactments on the Israeli Rabbinical Courts,” *Diné Israel* 11 (1983): 177–215 (Hebrew).

19 Memorandum of bill to amend the Penal Code (Polygamy), 1956, section 4 entitled: “The effect of the bill on existing law.” EM, File C -5423/2.

20 As Justice Minister Pinchas Rosen explained when he presented the bill in the Knesset: *Knesset Protocols*, 11.25.1957, 266–263. See also Menachem Elon, “The Offense of Polygamy,” *Hed Hamisphat* 12 (1957): 233 (Hebrew), which explains the deficiencies of section 181. Elon addressed the new law as part of his work in the legislative department of the Ministry of Justice (he signed several of the documents concerning the bill in the file mentioned in the previous note); Yitzhak Glasner, “The Bigamy Law,” *HaPraklit* 16 (1959–60): 274–80 (Hebrew); Adi Zalman (Rotem), “Criminal Legislation in Transition Periods” (Ph.D. diss., Bar-Ilan University, 2009), 152–54.

21 Eleazar L. Globus, “Does *Kiddushin* Without *Chupa* Amount to Bigamy?” *HaPraklit* 10 (1953–54): 55–68 (Hebrew).

22 For the various rationales offered for the requirement of a hundred rabbis, see Eliezer Halle and Michael Wygoda, “Mekoro u-Mahuto shel Heter Me’ah

MK Zerach Warhaftig, who at the time chaired the Constitution Committee, said during a Knesset debate:<sup>23</sup>

It has been asked here: Why is the approval of the two Chief Rabbis needed? It was part of the law until now. Halakhically, the same thing could be asked: Why is the permission of a hundred rabbis needed, why is a court ruling not sufficient, without permission from a hundred rabbis? The Knesset member who thought the bill cancels the permission of a hundred rabbis was wrong. This is not true. The court will not issue a ruling without the permission of a hundred rabbis.<sup>24</sup> The reason for a hundred rabbis is that this is a most important provision, and in provisions of this type we have a matter of a Great Sanhedrin of one hundred.<sup>25</sup> **If this is a most important provision, naturally the signature of the two Chief Rabbis is necessary. Anyway, it is in the same direction.**

To ensure that permission will always require the approval of two rabbis, even if for various reasons only one Chief Rabbi is in office, or one of the Chief Rabbis cannot grant his approval, the Constitution Committee<sup>26</sup> suggested adding the following sentence, which was included in the final wording of the section:

Rabbanim" (2012), <http://tinyurl.com/zmuuzhw>.

- 23 *Knesset Protocols*, 26.11.1957, 282. The comment was made in response to MK Yaakov Klivanov, who wondered why was it not sufficient to obtain the approval of one Chief Rabbi (p. 278), and to MK Ruth Katin (p. 272), who claimed that the clause shows great leniency in relation to the original rule that required the approval of a hundred rabbis.
- 24 These are true only for Ashkenazi men, to whom the ban applies in addition to the statutory prohibition. See *supra*, n. 7.
- 25 These appear to be based on the words of R. Naftali Zvi Yehuda Berlin in his *Responsa Meshiv Davar* 4:4, where he argues, based on *b. Hor.* 3b, that the Great Sanhedrin contained a hundred rabbis and therefore the enactment was not to grant permission "except by the most important provision of Jewish law, which is a Sanhedrin of one hundred."
- 26 KA, the protocol and the Constitution Committee dated 6.7.1959, 2–3. The committee rejected the proposal to settle for the approval of one Chief Rabbi, when it was raised again (see *supra*, n. 23), this time by MK Amos Dagani.

5.If the law applicable to the new marriage is Torah law, a man may not be convicted of an offense under section 2 if the new marriage was conducted after receiving a marriage permit in a final verdict of a rabbinical court and the verdict was approved by the two Chief Rabbis of Israel, **and if one should be prevented from discharging his office, by the person appointed for that purpose by the Chief Rabbinate.**

We know that this is what took place in practice. For almost five years, from the passing of R. Herzog and the appointment of his successor, R. Unterman, the position of Ashkenazi Chief Rabbi was not filled, and the Council of the Chief Rabbinate appointed R. Unterman, who served as a member of the Council and as the Ashkenazi Chief Rabbi of Tel-Aviv, to approve marriage licenses.<sup>27</sup>

In 1977, Israel enacted the Penal Code, which replaced the mandatory CCO and incorporated specific criminal laws enacted by the Knesset over the years. The law from 1959 was incorporated, without any change, and its sections became sections 175–183 of the new law. Section 5 has become section 179. In 1980, section 179 was amended, whereas the other sections remain unchanged to this day. The amendment changed the end of the section, stating that the permission of one Chief Rabbi was sufficient for the purpose of the said permit: the rabbi who served as the President of the Rabbinical Grand Tribunal. As we shall see, this was a dramatic change that increased the number of permits issued,<sup>28</sup> in contrast to the rationale of those who have initially conceived the section, rabbis Herzog and Ouziel, and contrary to the legislative process of 1959, which sought to reduce the possibility of bigamist marriages of Jews in Israel. What caused such a radical change, which some consider a regression in the protection that Israeli law grants to married women?

## Measures to amend section 179

Amendment of section 179 was accomplished through another law, the Chief Rabbinate of Israel Law, which the Knesset passed on 19.3.1980, stating in

27 Letter of R. Unterman to the Chief Rabbinate (29.5.1960), R. Unterman's Archive, Central Library, Bar-Ilan University.

28 See below, text adjacent to note 56.

section 27: "In section 179 of the Penal Law, 5737–1977, in the final portion, beginning with the words 'the two Chief Rabbis of Israel,' shall be replaced by the words 'The President of the Rabbinical Grand Tribunal.'" This amendment was part of the general separation that the law created between the roles of the two Chief Rabbis, perhaps the most significant innovation of the many innovations of this law, which regulates globally the selection and operation of the Chief Rabbis and of other members of the rabbinate.<sup>29</sup> The law stipulates that the term of the Chief Rabbis be limited to ten years (section 16).<sup>30</sup> Contrary to the situation in the past, the law decreed that one of the rabbis would serve as President of the Rabbinical Grand Tribunal and the other as President of the Chief Rabbinate Council, and switch positions in mid-term (section 17(a)).<sup>31</sup> There is no doubt that this division of roles was mainly due to the poor personal relationship between Rabbis Goren and Yosef and their inability to cooperate in the leadership of the Chief Rabbinate and of the rabbinical courts. Indeed, throughout most of their term in office, R. Yosef did not attend the meetings of the Chief Rabbinate Council.<sup>32</sup> Minister

- 29 For a broad analysis of the law and its innovations, see Aviad Hacoen, "Chief Rabbinate of Israel: Legal Aspects," in *The Chief Rabbinate of Israel—70 Years since its Establishment*, ed. Itamar Wahrhaftig and R. Shmuel Katz (Jerusalem: Hekhal Shelomoh, 2002), vol. 1, 159–219, at 180–203 (Hebrew).
- 30 The main reason for this change is a combination of lessons learned from the past, which involved unseemly struggles, the rabbis having to stand for election every five years (the new law decreed that they would be elected once for ten years), and political and personal considerations of Knesset members who did not want Rabbis Goren and Yosef to continue in their positions, and who later struggled against the attempts of the two rabbis to change the law so that they can continue in office. See Nitsan Hen and Anshil Peper, *Ovadia Yossef, Biography* (Jerusalem: Keter, 2004), 229–32; 249–52 (Hebrew); Shifra Mescheloff, "In the Eye of the Storm: The Public Image and Creative Torah Work of Rabbi Shlomo Goren, 1948–1994" (Ph.D. diss., Bar-Ilan University, 2010), 61–64 (Hebrew).
- 31 Until the enactment of this law, which amended the previous ones, the two Chief Rabbis served concurrently in both positions. Hacoen, "Chief Rabbinate," 180–81.
- 32 The rift between the rabbis began shortly after their election. Already at the end of 1973, R. Yosef announced that he was not going to attend the meetings of the Chief Rabbinical Council because R. Goren acted unilaterally and contrary to R. Yosef's opinion. See the correspondence between the two, which appears in the protocol of the Chief Rabbinate Council on 12.12.1973, file GL 43551/9. At the time, the media reported on these tensions, which affected both the routine activities of the rabbinate and its halakhic status. For most of his term in office, R. Yosef boycotted the meetings of the Chief Rabbinical Council, and R. Goren

of Religious Affairs, Aharon Abuchatzera, commented on it delicately when he presented the law to the Knesset. According to him, the purpose of the law was to restore public confidence in the rabbinate, and therefore one of the measures taken by the law was “to prevent conflicts and rivalries between the Chief Rabbis and members of the Council, and between themselves.”<sup>33</sup> In any case, one of the consequences of this separation was the amendment of the four laws that required action by the “two Chief Rabbis,” including the aforementioned section stating that the marriage permit no longer required the signature of both rabbis.

Given the importance of both rabbis supervising the granting of permission, which was the logic that guided the legal arrangement for granting the permits in the first place, this amendment speaks volumes. The other legislative amendments,<sup>34</sup> which dealt with the structure of the Grand Tribunal and with questions of disciplinary action, were inevitable after the separation of functions, but it is unclear why it was necessary to entrust the supervision of the granting of permits to one Chief Rabbi. Is this matter less important than, for example, the section that was not amended, and which provides that both Chief Rabbis will serve on the committee for the appointment of rabbinical judges?<sup>35</sup> When the bill was discussed in the Knesset Constitution Committee, MK Yehuda Ben Meir expressed reservations about the amendment:<sup>36</sup>

I’m against this. This section relates first of all to marriage permits. A marriage permit allows a person to marry two women, and this is an exceptional case. The logic of the [amending]

managed the Council alone (and there were cases where R. Yosef declared that he did not accept the decisions of the Council). See H̄en and Peper, *Ovadia Yossef*, 193–235; Mescheloff, “In the Eye of the Storm,” 56–61.

33 *Knesset Protocols*, 9.7.1979, 3405. Already earlier, this was formulated by the legal advisor of the Ministry of Religious Affairs, when he submitted the bill memorandum to the commissioner in charge of legislation at the Ministry of Justice. See Dr. Chaim Chefetz to Shlomo Guberman, 2.19.1979, section 6, ISA, file GL 21799/4: “To reduce friction and opportunities for controversy between the chief rabbis, to the extent possible, it is proposed to divide the functions of Chairman of the Chief Rabbinate Council and of the President of the Rabbinical Grand Tribunal, so that in practice only one Chief Rabbi serves in each function.”

34 Sections 25, 26, 28 of the Chief Rabbinate Law.

35 Section 6 of the Dayanim Law.

36 KA, Constitution Committee protocol, 5.3.1980, p. 11.

section is obvious, since they separated between the two, so they said, the President of the Grant Tribunal... [but] I think we should leave them both. It's not a conflict.

MK Menahem Hacohen, who supported the amendment, answered: "In these matters **there are many conflicts**," to which Ben Meir retorted, explaining the rationale of the original section: "This is a difficult problem. This is against the law of bigamy. This is an issue that has public implications. The intention here [in the original section] is to make it difficult." MK HaCohen responded: "After it passed the Court, why make it difficult?" Ben Meir's reservations were not accepted, as is well known, but Hacohen's remarks are instructive. First, when Ben Meir argued, correctly in my opinion, that there was no conflict between the overall intention of the law and retaining the existing section concerning the marriage permit, Hacohen answered that there was a great deal of conflict between the Chief Rabbis surrounding the granting of permits as well, and therefore the general separatist rationale of the new law should apply also to the granting of permits. His comment about the conflict between the rabbis is factually correct, and we shall see its depth below. His second response echoes statements made by Chief Rabbi Yosef a few months earlier, at the rabbinical judges' conference held in August 1979, in which he argued that the Chief Rabbis ought not exercise discretion in addition to that of the rabbinical court and must sign formally what has already been ruled by the court, because "it is not desirable to burden the poor people who remain childless."<sup>37</sup>

A similar discussion to that conducted the Constitution Committee, but more important and more instructive, took place between the two Chief Rabbis. We begin with R. Goren. Although already in 1977 R. Goren enthusiastically endorsed the separation of functions later proposed by the Chief Rabbinate of Israel Law and considered it a key to solving the conflicts between him and his colleague,<sup>38</sup> he was strongly opposed to changing the section concerning the permit. Even before the bill was introduced by the Minister of Religious Affairs for initial approval by the Ministerial Committee on Legislation,<sup>39</sup> R. Goren approached the minister asking to take part in

37 *Infra*, adjacent to n. 46.

38 R. Goren's letter to the Minister of Religious Affairs, Abuchatzzeira, 8.9.77, ISA, file G-7068/23. He also expressed his opinion in an interview published in *Hatsofeh*, 9.12.1977.

39 The proposal was submitted on 6.2.1979. It is found at the ISA, file A-8/7009.

drafting the new law.<sup>40</sup> His request was rejected, and he settled for sending comments on the proposal. R. Goren convened the Chief Rabbinate Council and passed a decision requiring several amendments to the bill, which he sent to the Minister of Religious Affairs one day after the proposal was submitted to the Ministerial Committee.<sup>41</sup> R. Goren ended the letter with the statement: "I will be grateful to you if you do everything in your power that all the above reservations... will be treated with the best consideration by the Knesset, and the version to be enacted will be in accordance with these reservations." One reservation is relevant to our topic. The wording of the proposal that was submitted to the Committee did not mention explicitly the section concerning the permit, but stated categorically, in section 21(c), that any legislative item in which "the Chief Rabbis are mentioned in the plural, should be understood as referring to one Chief Rabbi." R. Goren commented as follows on this statement: "Section 21(c): the following should be added to this section: 'Except the Polygamy Law, 1958, which allows marrying a second wife in addition to one's wife.'" In other words, the requirement for the approval of both Chief Rabbis should not be abolished. After R. Goren saw that his comments were not accepted, he instructed his secretary to contact Minister of Justice, Shmuel Tamir, who was chairman of the Ministers' Committee, by an urgent letter asking to convey the notes sent to the Minister of Religious Affairs and to the Committee.<sup>42</sup> The letter stated that R. Goren was even willing to meet with members of the Committee and explain the importance of his comments.

This reservation of R. Goren was not accepted by the Ministerial Committee, and therefore he tried again to influence the shaping of the law when it was being debated in the Knesset. To discuss the law, R. Goren once again convened a meeting of the Chief Rabbinate Council that he was heading.<sup>43</sup> Among others, the Council decreed that section 28 of the bill, which was identical with the final section 27, must be deleted.<sup>44</sup> The following

40 Goren to Abuchatzzeira, 18.1.79, ISA, file GL-43552/6.

41 Goren to Abuchatzzeira, 7.2.79, ISA, file GL-21799/4.

42 Zalman Kwitner, personal secretary of R. Goren, to Minister Shmuel Tamir, 17.5.79, ISA, *ibid.* The urgency of this letter is the result of the fact that the Committee was holding hearings on the bill during those days. See the minutes of the discussions from May 1979, ISA, *ibid.*

43 Minutes of meeting of the Chief Rabbinate Council, 30.1.80.

44 The Chief Rabbinate bill was introduced in the Knesset on 9.7.1979.

day the ruling of the Council was sent to the Minister of Religious Affairs,<sup>45</sup> presenting the argument for rejecting the change in the current situation proposed by the new law:

Article 28: Delete. The amendment is contrary to the main point of the enactment of Section 179 of the Penal Code, 1977, which requires the consent of a supreme religious authority from a public perspective and not from the same authority of the court that ruled to grant the marriage permit.

These arguments repeated the rationale that guided the legislations of 1947 and 1959, which considered the Chief Rabbis as yet another instance that examines the permission given by the court, and not an automatic confirmation.

R. Yosef's attitude was different, and he supported the proposed amendment to the new law. As noted, he did not attend the meetings of the Chief Rabbinate Council, did not agree with its decisions, and letters written by R. Goren and his secretary did not reflect his opinion. He expressed his opinion independently.

First, his basic concept regarding the requirement for approval by the two Chief Rabbis differed from the rationale presented above. In statements he made while the new law was in the legislative process in the Knesset, he argued that the requirement of the existing law should be fulfilled only formally and that the Chief Rabbis were not supposed to serve as an additional review instance.<sup>46</sup>

It was customary that if a person lives with his wife for ten years or more without children, and the woman does not want a divorce under any circumstances, she signs before the court that she agrees that the husband marry another woman, in a manner that can provide for both and in a way that everything

45 Yechiel Yitzhak Halevy, Secretary of the Chief Rabbinate, to the Minister of Religious Affairs, Abuchatzzeira, 31.1.80, KA, Chief Rabbinate Law file, Ninth Knesset.

46 Menashe Miller, ed., *Rabbinical Judges' Conference, 1979* (Jerusalem: Rabbinical Courts administration, n.d.), 72–73 (Hebrew). Note that the speaker who followed R. Yosef, R. Shalom Mashash, Sephardic rabbi of Jerusalem, stated the matter more sharply (*ibid.*, p. 73): “**I ask that the signature of the Chief Rabbis no longer be needed.** We are Sepharadim who rule according to the holy Maran in matters of the permission to marry. We do not have a Ban by Rabbenu Gershom, and that which the first court permits the last one should also permit.”

is settled in an orderly manner. It was customary in all courts to allow the husband to marry another woman in addition to his wife. And the Chief Rabbis of Israel signed the marriage permit.<sup>47</sup> **This was only a formality, after the regional court discussed and decided the matter.** I do not recall that the Chief Rabbis of Israel refused to sign such a marriage permit to date, and this is how the matter should also be handled in the future. The rabbinical courts deliberate seriously, and they do not issue the marriage permit immediately but after weighing the matter earnestly. **Therefore it is not desirable to burden the poor people who remain childless.** For the person who has no children is as good as dead. And we should not add grief to their grief, and therefore I suggest that all members of the court voice their opinion **that the Chief Rabbis of Israel sign every file concerning a marriage permit properly granted by the regional court.**

R. Yosef did not make this statement in a vacuum but in light of conflicts he had with his colleague, R. Goren, precisely in the situation he describes here, which I address in the next section. Clearly, given that the existing law required the approval of both rabbis, if R. Goren believed that the rabbis should exercise discretion in addition to that of the rabbinical court, then R. Yosef had a genuine interest in changing the requirement to allow him to grant marriage licenses more easily. This was not the first time that R. Yosef tried and succeeded to change policy that in his opinion was too strict in granting permits.<sup>48</sup>

47 The claim that the practice was that the Chief Rabbis would not decline approving the marriage permit issued by the courts, an argument that he repeated in his answer in which he accused R. Goren of deviating from this “custom” (*infra*, adjacent to n. 106), is inaccurate. Indeed, R. Goren was stricter than Ashkenazi rabbis before him, but there have been cases in the past when the Chief Rabbis did not approve marriage permits.

48 Ovadia Yosef, *Yabi'a 'Omer*, vol. 7 (Jerusalem: Midrash benei Tsiyon, 1993), *'Even ha-'Ezer* sec. 2, p. 307, where R. Yosef relates how as Chief Rabbi of Tel-Aviv in 1971, he managed to change the strict attitude of some rabbinical judges in the city with regard to the granting of a permit to a man whose wife was sick. Westreich, “Jewish Women,” 342 n. 259, suggested that R. Yosef took advantage of the fact that R. Goren, who was selected to serve with him as Ashkenazi rabbi of Tel-Aviv, had not yet taken office, and tried to regulate the activities of the rabbinical courts in accordance with his lenient stance on this issue.

R. Yosef's son, R. Yitzhak Yosef, the current Chief Sephardic Rabbi, described his father's position on the granting of permits and announced that he would follow in his footsteps and would not re-examine the permits granted by the rabbinical court. He also provided instructive information about his father's contribution to the current legal situation and the reasons for the change in legislation:<sup>49</sup>

When I took office, I was confronted with many cases referred to as "hearing" files. The hearing files are an innovation of Maran, my father, of blessed memory, when he was Chief Rabbi. **According to the law then, both Chief Rabbis had to sign the marriage permit.** His colleague, Rabbi Goren, never agreed to sign...<sup>50</sup> **The Rabbi [Yosef] persuaded the legislators and they changed the law, and today the law provides that the signature of the President of the Grand Tribunal is sufficient...** As part of the work of the Tribunal, I receive rulings of district courts that allow the husband to marry another woman on top of his wife and ask for our consent, under the regulations. **The tendency is usually, if there is no exceptional case, to approve, after the district court has already investigated and checked and carried out its duties.**

I have not found a document in which R. Yosef explicitly sought to change the section concerning the permit, but in light of the friction between him and R. Goren concerning the permits, it is clear that he supported this change. We do possess, however, a letter written by R. Yosef to the Ministerial Committee

49 Yitzhak Yosef, "Permit for a Second Wife and Its Terms," in *Rabbinical Judges' Conference, 2015*, ed. Shimon Yaakov and Yehiel Freiman (Jerusalem: Jerusalem Rabbinical Courts Administration, 2016), 147, 151 (Hebrew). He repeated this argument elsewhere. See Yitzhak Yosef, *The Weekly Lesson, 2015*, ed. Yitzhak Levy (Jerusalem, 2016), 189: "*Maran* persuaded the politicians and they changed the law so that one Chief Rabbi can sign and permit to marry a second wife, and he signed it." He repeated these comments in a personal letter to the author of the present article (20.12.16): "The law was changed at the time following the initiative and activities of *Maran*, to overcome the stubbornness of the Ashkenazi chief rabbi, who insisted at the time to rule for Sephardic Jews according to the Rema and the Ashkenazi rabbis and did not take into account the rulings of our Sephardic sages for many generations."

50 This statement is not accurate. See *infra*, n. 131.

when it debated the bill,<sup>51</sup> which contains completely different comments from those sent at that same time on behalf of the Chief Rabbinate Council, headed by R. Goren. In the letter, he naturally does not oppose changing the section concerning the permit, but he adds significant corrections and a related section. In the proposal submitted to the Ministerial Committee, section 21(b) determined how the decision is made regarding which of the two rabbis would be appointed as President of the Grand Tribunal and which as President of the Chief Rabbinical Council. According to the proposed arrangement, the matter will be determined by agreement between the two rabbis, but if they do not reach agreement within seven days, “the older of the two chief rabbis will have the right to choose the function he desires to discharge in practice in the beginning.” R. Yosef, who wanted the function of President of the Great Tribunal,<sup>52</sup> apparently feared that this role might be given to his colleague, who was older than he. Therefore, he suggested in his letter that:

5. In all laws, such as concerning rabbinical judges and judges, preference will be given, if they are equal, to the veteran.<sup>53</sup> In this law they made a change and wrote “the elder.” It is necessary to write the one who has more seniority as a rabbinical judge.

No similar correction was offered in comments concerning the Chief Rabbinical Council, but, nevertheless, the Ministerial Committee accepted R. Yosef’s position. In the final proposal, issued in June 1979,<sup>54</sup> as well as the bill submitted to the Knesset and in the final act, section 17 (b) states:

Within seven days from the beginning of their tenure, the Chief Rabbis of Israel shall determine the order of the discharge of their duties. If they fail to reach an agreement, **the one who served as a judge in Israel for a longer period shall serve as President of the Rabbinical Grand Tribunal**, and the same is true if only one of them served as a rabbinical judge in Israel. If their seniority as rabbinical judges is identical, or if neither

51 R. Yosef to the Ministerial Committee, (20.5.79). Cf. *supra*, n. 42.

52 *Infra*, n. 55.

53 He probably meant the provision in the Dayanim Law and the Judges Law, according to which the judge/*dayan* who serves longer in the post becomes the presiding judge of his tribunal.

54 Proposal dated 6.6.79, ISA, file GL-21799/4, section 23(b).

of them had served as rabbinical judges, the older shall have the right to determine the order in which they will discharge their duties.

Naturally, the clause decreed that R. Yosef, who was younger than R. Goren but had served for a much longer period of time as rabbinical judge, would be President of the Rabbinical Grand Tribunal, whom the same proposal appointed as the one who alone approves the marriage permits.

R. Yosef's success with this amendment,<sup>55</sup> and at the same time R. Goren's failure to retain the need for both rabbis to approve the marriage permit, made it possible for R. Yosef to realize his halakhic policy in the area of marriage permits, and as he himself avowed:<sup>56</sup>

Again, after many years of sorrow, **the secular law of the state has changed, and the law decreed that the signature**

55 Another change proposed by R. Yosef, which was accepted, concerned the wording in section 20(a) of the proposal discussed by the Ministerial Committee. The bill proposed that the rotation of the Presidency of the Grand Tribunal be held every two and a half years. R. Yosef wrote in his letter that this period was too short, "and will end up being a game of rights-snatching." Indeed, it was eventually determined that rotation of the Court would take place after five years. Eventually, after his tenure as President of Grand Tribunal ended, R. Yosef was not eager to leave his position, and the intervention of the Attorney General, Itzhak Zamir, was needed. R. Yosef's tenure as President of the Grand Tribunal was particularly short because under the new law, the tenure of the rabbis was set at ten years, and, because they had already served seven years when the law was enacted, they were expected to hold the rotation a year and a half after the law came into effect. See Zamir's letter to Haim Hefetz, the legal advisor of the Ministry of Religious Affairs, 02.10.81, ISA, file GL-2537/2; letter of Simcha Miron, director of rabbinical courts to the Chief Rabbis, 2.10.81, *ibid*. In this letter, Miron mentioned the unique authorities that the two functions carried, including the authority of the President of Grand Tribunal "to approve marriage permits issued by the rabbinical court to marry a second wife, so that the offense of bigamy does not apply."

56 *Yabi'a 'Omer*, *supra*, n. 48, 310. This is a later addition to the original responsum, and the author marked it within square brackets. Amir Zoarets, who has studied many of R. Yosef's responsa in the area of family law, wrote that R. Yosef rarely made use of expressions that betrayed his feelings, and the deviation from his practice in this case shows the intensity of his criticism of the situation before the change in law; see Amir Zoarets, "Judicial Policy and Halakhic Methods Used by Rabbi Ovadia Yosef to Reach Decisions on Family Law" (Ph.D. diss., Bar-Ilan University, 2015), 127 n. 101 (Hebrew).

**of one Chief Rabbi, who serves as President of the Grand Tribunal, is sufficient, and immediately I ordered for all the files of marriage permits granted by the rabbinical courts to be brought before me,<sup>57</sup> and I signed all of them, everything that had accumulated throughout the years, and where a final permit had been granted by the rabbinical courts, and the distress of all the people was relieved, and almost all of them married their wives, and later had sons and daughters from their two marriages. And the land was quiet. And we were enveloped by joy.**

The responsum to which this statement has been added attests to the halakhic confrontation that took place between the Chief Rabbis regarding the granting of permits and is indicative of the reason for R. Yosef's support for changing the section concerning the permit.

### The Makhlouf Biton case

We now turn to the case for the sake of which this responsum was written, which is what led to a change in the above section. The change illustrates how a halakhic dispute is decided in practice by the revision of secular law.

The last section quoted from R. Yosef's responsum and what he said at the Rabbinical Judges' Conference<sup>58</sup> show that his problem with the law before it was changed concerned especially cases in which a man asked permission to marry a second wife because he had no children. It is quite clear that R. Yosef responded to a concrete case. The identification of this case is confirmed also by the date of R. Yosef's responsum: Tishrei 5734.<sup>59</sup> There seems to be no doubt that this responsum, which starts with a clarification of halakhic law concerning the ability of a man of Eastern origin to marry a second wife after ten years of marriage with his wife without having had a child, was written with reference to the Makhlouf Biton case, which

57 A description of the delivery of all the files of the Grand Tribunal to R. Yosef appeared also in the press. See "The Rotation Law at the Chief Rabbinate Has Been Applied," *Davar* 26.3.80, p. 3 (Hebrew).

58 *Supra*, text adjacent to n. 46.

59 As shown below (n. 75), he signed the permit in the Biton case in Elul 5733.

eventually ended up before the Supreme Court.<sup>60</sup> The materials concerning this case, which are found in the State Archives<sup>61</sup> and in R. Goren's archive, shed a strong light on the fundamental debate between the two Chief Rabbis concerning bigamy.<sup>62</sup>

The course of events was as follows. In February of 1973, Makhlouf Biton approached the rabbinical court in Jerusalem with a request for a marriage permit.<sup>63</sup> The request provided three reasons. The main one was the fact that the couple had no children although they had been married for 16 years and exhausted all possible treatments. The request also added the claim that they were married in their home country, Morocco. The objective of this statement was probably to emphasize the fact that they were of non-Ashkenazi origin, and that they had not been married in a place such as Israel, where according to some of the decisors the local custom was to prohibit bigamy (so that those who were married there know that their ability to marry a second wife is limited).<sup>64</sup> In the petition to the High Court of Justice, the attorney representing Biton wrote that one of his claims was "that the petitioner is of Moroccan origin, to whom the Ban does not apply

60 H CJ 160/75 *Makhlouf Biton v. Chief Rabbi of Israel*, PD 30(1) 309–10. Benjamin Lau already identified the responsum with the Biton case. Benjamin Lau, *From "Maran" to "Maran": The Halachic Philosophy of Rav Ovadia Yosef* (Tel-Aviv: Miskal, 2005), 193 (Hebrew), based on Westreich, "Jewish Women." But Westreich avoided explicitly identifying the responsum as a response to the Biton case, both in this article, in which he discussed the argument between rabbis Goren and Yosef, as well as the Biton case before the High Court of Justice, and in another article in which he discussed both issues: Elimelech Westreich, "Husband's Claims in Matters of Infertility in the Rabbinical Court of Israel," *Mishpatim* 25 (1995): 241–90 (Hebrew).

61 ISA file B-9778/160. I thank the secretariat of the Supreme Court and Registrar, Gilad Lubinsky, for the opportunity to peruse this file.

62 Several researchers have already addressed the public debate between rabbis Goren and Yosef, as reflected in the ruling of the Supreme Court, but their only material was the brief High Court of Justice ruling that was published, and R. Yosef's responsum. As a result, some of the interpretations they offered are mistaken in my opinion, as I explain below. See Westreich, "Jewish Women," 317–18; Lau, *From "Maran,"* 319; Aviad Yehiel Hollander, "The Halakhic Profile of Rabbi Shlomo Goren" (Ph.D. diss., Bar-Ilan University, 2011), 312–17 (Hebrew); Zoarets, "Judicial Policy," 116, 126.

63 ISA, *ibid.*, "Request for Marriage Permit," 8.2.73.

64 The position of R. Ouziel was that in Israel the custom was not to marry two women. See Radzyner, "Wars of the Jews," 181–82.

at all.”<sup>65</sup> The third argument raised by Biton was that he wanted to continue living with his wife and not to divorce her. As we shall see below, the fact that the husband expected to live in full couplehood with two women at the same time was what made the case unique and problematic. At the bottom of the petition, his wife, Rachel, signed a declaration that she agreed with everything stated in the application.

At the first hearing, the rabbinical court determined that the permit ought not to be granted based on the claims in the application and that they needed information directly from the physician who treated the couple in order to learn about his opinion regarding the woman’s chances of giving birth.<sup>66</sup> Even at the next hearing,<sup>67</sup> after receiving the physician’s reply confirming Biton’s claim, the court was not eager to grant permission and suggested that the parties consider the possibility of divorce, giving the woman time to weigh her position. But even after the wife appeared in court and repeated her desire to stay with her husband and allow him to marry another woman, the court decreed that no permit should be granted before an agreement was arranged between the parties guaranteeing all the rights of the woman.<sup>68</sup> Such an agreement was presented to the court, addressing the wife’s rights and stressing again that she was interested in her husband receiving a permit, so that he would observe the commandment to procreate, “and the credit for the commandment would serve them both forever.”<sup>69</sup> Even after the agreement was filed in court, and the woman repeated that she wanted to continue living with her husband and did not want a divorce, the court did not act immediately, and stated that it still needed to examine the matter.<sup>70</sup> Only six months after the couple filed the request for the marriage

65 ISA, *ibid.*, Atty. Alfaya, “Main Points of the Petitioner’s Claims,” 19.10.75.

66 *Ibid.*, hearing protocol, 4.3.73.

67 *Ibid.*, hearing protocol, 30.5.73.

68 *Ibid.*, hearing minutes, 1.7.73. This was a rare agreement because usually a marriage permit is granted in one of two cases: when the woman was ordered to divorce and she is already likely to lose her rights (unless the court ruled otherwise, in which case it makes the granting of the permit contingent upon depositing immediately the amount of the *ketubbah* or compensation for the woman), or when the woman is sick and cannot accept the *get*, in which case the husband must unilaterally guarantee her rights. See Schereschewsky and Corinaldi, *Family Law*, 176–81.

69 *Ibid.*, agreement between the Biton spouses, 8.7.73.

70 *Ibid.*, hearing minutes, 31.7.73.

permit, the court determined that under the circumstances of the case and on the basis of the agreement between the parties it can grant a permit, subject to the approval of the Chief Rabbis, as stated in the law.<sup>71</sup> The slow and measured conduct of the court appears to attest to the fact that it indeed considered seriously the granting of the permit and sought to examine the extent to which the woman really stood behind the agreement to continue living with her husband while he married a second wife, and preferred not to dissolve the marriage.<sup>72</sup> Only after being persuaded that the woman believed the proposed arrangement to be best for her, and that she held an agreement guaranteeing her rights, did the court grant permission. This appears to be one of the cases to which R. Yosef referred when he said that “the district courts deliberate seriously, and they do not issue the marriage permit immediately, but after weighing the matter earnestly,” and therefore the signatures of the Chief Rabbis should be only a formality.<sup>73</sup> These remarks were made against the background of the subsequent developments in the Biton case, in which R. Yosef followed this course of action, but the opinion of his colleague, R. Goren, was different.

71 Ibid., verdict for case 1394/733, 9.8.73. Note that two of the three rabbinical judges (I was not able to decipher the signature of the third) were important Ashkenazi rabbis: Eliezer Yehuda Waldenberg and Yosef Cohen. In his responsa, *Tsits 'Eli'ezer*, R. Waldenberg referred to two cases in which a marriage permit was requested because of the infertility of the women. In one of them (*Responsa Tsits 'Eli'ezer*, part 7, section 48, *Orhot Hamishpatim* part 1), he refused to grant the permit primarily because the couple were Ashkenazi and because in his opinion, it was doubtful whether they had been married for ten years. Moreover, he relied on R. Kluger's opinion (*infra*, n. 133). The second case (*Responsa Tsits 'Eli'ezer*, part 17, section 55) was one in which it has been proven medically that the woman could not give birth, and the couple were Sephardic. But unlike the Biton case, the couple already had a daughter. The husband argued that in order to fulfill the commandment the couple must also have a son, but R. Waldenberg argued that in this case the husband cannot be allowed a second wife (contrary to the opinion of R. Yosef, *infra*, n. 146, and the adjacent text). The Biton case, however, was different from both of these, and therefore R. Waldenberg gave his permission.

72 One of the points raised by the state representative, Mishael Cheshin, in his arguments for rejecting the petition, was that Mrs. Biton did not sign the agreement wholeheartedly and with full understanding, although he had no genuine sources to support this claim. See *ibid.*, “Notice concerning the arguments of the Attorney General,” signed by Mishael Cheshin, 25.6.75; document entitled “Main points of the State Attorney's arguments,” signed by Cheshin, 19.10.75.

73 *Supra*, n. 46.

The judgment was sent to the Chief Rabbis to obtain their approval.<sup>74</sup> Within a few days, R. Yosef gave his permission to Biton, in accordance with the terms of the verdict.<sup>75</sup> But R. Goren did not respond for many months, causing Biton's attorneys to contact the secretary of the Chief Rabbinate asking that R. Goren give his ruling on the matter.<sup>76</sup> R. Goren delayed his response for almost a year. In view of the simple and unequivocal answer he eventually provided, it is difficult to understand why it took him so long; later this supported Biton's claim in his petition to the High Court of Justice, according to which R. Goren's motives were not purely halakhic. In June 1974, R. Goren's secretary wrote to the rabbinical court that in response to a request for a permit from August 1973, R. Goren answered by quoting R. Hayyim Palachi, as follows:<sup>77</sup>

Local rabbis who served previously have never given permission to marry a second wife, even if the first one allowed doing so, for fear that anyone who did not have children would ask to marry another, and the couple would end up in conflict and such. The rabbinical court can grant permission only if there is an additional reason for the request, other than the woman's infertility, for example a defect that developed in the woman, or such.

Following this quotation, he added: "In view of the above, the Chief Rabbi does not consider that a marriage permit should be approved in a case such as this."<sup>78</sup>

74 ISA, *ibid.*, letter from the secretariat of the rabbinical court in Jerusalem to the Chief Rabbinate, 20.8.73.

75 *Ibid.*, "Marriage permit: Makhlof Biton," signed by R. Yosef, 9.9.73.

76 *Ibid.*, Atty. Alfia to R. Gottlieb, Secretary of the Chief Rabbinate, 4.3.74.

77 *Responsa Hayyim Veshalom*, part 2, 'Even ha-'Ezer 16. Palachi was one of the greatest sages in the Sephardic world in the 19th century and served as President of the Grand Tribunal of Izmir and as its *Hakham Bashi*.

78 ISA, *ibid.*, Secretary of the Chief Rabbinate, Gottlieb, to the rabbinical court in Jerusalem, 12.6.74. As we will see below, this is not the only case in which Rabbi Goren relied on this responsum of R. Palachi. Indeed, a letter identical to the one presented above was sent by Gottlieb to the rabbinical court in Haifa (2.9.76) in order to explain why R. Goren refused to sign a marriage permit that was given by that court (ISA file GL-443/3). In the same file there is the copy of R. Palachi's responsum in R. Goren's handwriting, and above it he wrote: "Very important."

Biton and his lawyer did not give up and decided to transfer the discussion from the field of rabbinical jurisdiction to the civil domain, and filed a petition with the High Court of Justice.<sup>79</sup> The petition argued that R. Goren's refusal caused damage to the Biton couple, because it gave them a choice between divorce and the continuation of marriage without children, and it did not allow the third option, which was the best one for them, in which Biton married a second wife, in addition to the first one. According to the lawyer, this solution would benefit Mrs. Biton because of the agreement she holds, which represents an advantage for her over a situation in which she is forced to divorce her beloved husband and leave the marriage under terms that are worse than those guaranteed in the agreement. He added that by his refusal R. Goren acted contrary to the rationale of the law of bigamy in Israel. In his opinion, the objective of the law was to protect married women, whereas R. Goren's refusal would cause Biton to divorce his wife and harm a woman who did not want a divorce. Later he made the legal claim more poignant and argued, similarly to R. Yosef,<sup>80</sup> that the Chief Rabbi needs to act only as a formal authority that confirms the ruling, which is final, and therefore has no halakhic authority to strike it down. The law merely asks that the Chief Rabbis examine whether the permit "severely harms the objectives of the law," which, in his opinion, was the opposite of what was happening here.<sup>81</sup> He further claimed that R. Goren's position was based on a minority opinion, whereas most decisors would have allowed marrying a second wife in this case, an argument that is factually correct, certainly concerning a Sephardic man.<sup>82</sup> Later, he sharpened the argument and determined, again in the spirit of R. Yosef's writings, that R. Goren's opinion is not only a minority opinion but a single man's opinion, "that rises against halakhic sages since the imposition of the Ban to present-day halakhic sages, **including his colleague, the Chief Rabbi.**"<sup>83</sup> If so, what was the motive of R. Goren to oppose such a simple law? The lawyer answered this question as follows:<sup>84</sup>

79 Ibid., petition for order nisi, 24.4.75.

80 *Supra*, adjacent to n. 46.

81 *Supra*, n. 65.

82 *Infra*, adjacent to n. 96.

83 *Supra*, n. 65.

84 *Supra*, n. 79.

The petitioner fears that Rabbi Goren's refusal to approve the agreement is the result of an arbitrary judgment, which is also affected by the personal relations between the two Chief Rabbis, often manifest in opposing halakhic opinions.

This is an extremely sharp argument, according to which the Bitons fell victim to the battles between the Chief Rabbis. Although it is clear that the relationship between the rabbis was poor, a strong claim of this type still requires proof, and such was not provided. R. Goren rejected this argument in disgust, adding that the decision is based "on pure consideration and based on case law in the theory and practice of generations of sages."<sup>85</sup> R. Goren's representative at the legal hearing, Deputy Attorney General Mishael Cheshin, argued with regard to this claim that "the petitioner has no element of truth on which to base what he states, and his claim is void."<sup>86</sup> The Court accepted this response.<sup>87</sup>

Cheshin also rejected the other arguments of the petition. Particularly important was his claim that there was no reason for judicial intervention in R. Goren's judgment, because the law gave him broad discretion that could be interfered with only in rare cases. It is clear from his argument that the aims of the legislator were not to be satisfied with the opinion of the rabbinical court, but to add a further review instance, that of the Chief Rabbis, who are not obligated to accept the ruling of the courts, similarly to the argument R. Goren made later with regard to the change in the law.<sup>88</sup> Cheshin further cited several halakhic sources, which he apparently received from R. Goren,<sup>89</sup> to show that R. Goren's position was halakhically sound.

The verdict of the High Court, written by Justice Itzhak Kahan, was short and sharp.<sup>90</sup> R. Goren's position was fully accepted, and all arguments of the petitioner were rejected. Kahan stated that R. Goren was certainly aware of the halakhic arguments of the petitioner, but the law granted him discretion

85 ISA, *ibid.* R. Goren to Zvi Terlo, Deputy Attorney General, 19.6.75.

86 *Ibid.*

87 Notice of claims on behalf of the Attorney General, signed by Mishael Cheshin, 25.6.75.

88 *Supra*, adjacent to n. 45.

89 See *infra*, n. 95. In the archival file there are also photocopies of the various responsa mentioned by Cheshin.

90 HCJ 160/75.

whether or not to approve the permit. In this case, R. Goren's reliance on Palachi was entirely legitimate, and the Court cited Palachi's words in their entirety, as they appear in R. Goren's letter to Biton's attorney.<sup>91</sup> It is clear from the justice's remarks that he believed that the purpose of the law was to grant additional discretion to the rabbis, who are not committed to the ruling of the rabbinical court that issued the permit. It is possible to sense that the justice sympathized with R. Goren's position.<sup>92</sup>

In this round, the halakhic conflict between the Chief Rabbis was decided by the secular system in favor of R. Goren. But, as we have seen, this was only a temporary victory, and eventually the secular system ruled, this time in the Knesset, in R. Yosef's favor, and Biton received the permit he requested, as did other men in his situation.<sup>93</sup>

### Analysis of R. Goren's position and R. Yosef's response

The purpose of R. Goren's use of R. Palachi's responsum is clear. First, he was an important Sephardic decisor, which makes it difficult to argue that R. Goren applies Ashkenazi rules to Sephardic Jews. It is possible to glean this consideration from R. Goren's comment elsewhere, when he said that he would never allow a man to live with two women at the same time:<sup>94</sup> "This ruling by R. Palachi was decreed for our Eastern brothers who did not accept the prohibition of the Ban, and *a fortiori* for the Ashkenazi Jews who accepted and continue the prohibition of the Ban." Second, R. Palachi addressed a case that was identical to that of Biton: a man had no children and his wife agreed to him marrying another.

It is easy to understand the use R. Goren made of R. Palachi's ruling, but naturally, the question arises concerning the weight of this opinion in Sephardic halakhic law. R. Goren appeared to be aware of this question,

91 *Supra*, adjacent to n. 77.

92 Nevertheless, it is reasonable to accept the position that Kahan simply believed that there should be no interference with a halakhic authority. See Menahem Raniel, "A Man of Virtue—Itzhak Kahan, President of The Supreme Court, and His Perception of the Law and the Judge" (Ph.D. diss., University of Haifa, 2012), 170 (Hebrew).

93 *Supra*, adjacent to n. 56.

94 R. Goren's archive, letter to R. Levy Itzhak Rabinovich, 9.5.79.

and therefore in a document written for the purpose of the hearing of the petition filed against him by Biton,<sup>95</sup> after listing seven decisors (six of them Ashkenazi) who addressed cases in which a husband requested a permit to marry a second wife because the first one was barren, he mentioned R. Palachi as most important for the issue at hand. Before quoting R. Palachi, he wrote: "The last and foremost is the genius of Sephardic decisors, R. Ḥayyim Palachi, who wrote more than sixty books." But does his greatness make him the representative of Sephardic halakhah in general? R. Yosef already explained<sup>96</sup> that in this responsum R. Palachi admitted that his position differed from that of important decisors who ruled before him, including his grandfather, R. Ḥazzan, author of the *Ḥikrei Lev* Responsa. R. Yosef also explained that there was no evidence for R. Palachi's claim that rabbis of Izmir who preceded him "never wanted to grant permission," especially given that R. Ḥazzan himself was active in Izmir and his opinion differed from R. Palachi's. Note also that at the end of the statement, R. Palachi says that it is appropriate to grant the permit when there is an additional ground, other than infertility, "such as a defect that she developed." This statement appears to hint at a barren woman who went blind, in which case R. Palachi indeed agreed that her consent to her husband marrying a second wife and continuing in the first marriage made the permit allowable.<sup>97</sup> It appears that R. Goren would not have been swayed even if Biton were to raise a claim of such a defect in his first wife. Elsewhere, R. Palachi stated that the strict acceptance of the Ban applies in Izmir, but not necessarily in other places that did not accept it.<sup>98</sup> Note that R. Goren himself relied on this responsum

95 R. Goren's archive, document from 10.10.75 (about a week before the Court ruling), with the title: "Grounds and clarification for the High Court of Justice for not granting permission to marry another woman to a man who lived for ten years with his first wife and who did not give birth, if he intends to live with both." This document is not found in the High Court of Justice archival file, but it most likely served the representative of the state in the petition, Mishael Cheshin, when making his arguments before the Court. See *supra*, n. 72, in a document dated 19.10.72. The document mentions several of the halakhic sources that appear in the above document written by R. Goren.

96 *Yabi'a 'Omer*, *supra*, n. 48, 309.

97 *Responsa Ḥayyim Veshalom*, Part 1, section 5. *Ibid.*, section 6, where he permits a man whose wife fell sick to forcibly divorce her and marry another woman.

98 *Ibid.*, section 1. On page 6, '*Even ha-'Ezer*, he indicated that it was necessary to take into account the fact that the question was sent to him from Tiberias, where they tend to be lenient on this matter, unlike "in our city." In other words,

when he determined that it was possible to grant a permit to a husband to whom his wife is loathsome and refused to divorce, emphasizing that “Rabbi Ḥayyim Palachi belongs to the Oriental community that did not accept the Ban.”<sup>99</sup> In the part of the responsum that R. Goren did not quote, R. Palachi referred to one of his previous responsa,<sup>100</sup> where he allowed a man who wanted to emigrate to Israel and whose wife refused both to accompany him and to divorce him but agreed that he marry a second wife, to marry another woman in parallel with his first wife.

There is yet another problem. R. Goren mentioned another Sephardic decisor. He wrote:

Rabbi Eliyahu Mizraḥi (in his responsa, section 14), one of the greatest Sephardic decisors of the 15th century, who served as *Ḥakham Bashi* in Turkey, refused to allow marrying a second woman in case one lived [with one’s wife] ten years and she did not give birth, and ruled that even the woman’s consent does not make it possible.

This argument is extremely peculiar. Examination of the responsum shows that R. Mizraḥi claimed that even Ashkenazi Jews are not prohibited to marry a second wife if the first one is barren, irrespective of her consent.<sup>101</sup> In light of this, there is no doubt that R. Yosef was correct in his opposition to R. Goren’s reliance on R. Palachi. After he explained that this is an exceptional

in Sephardic communities in the land of Israel the status of the prohibition is weaker.

99 Appeal 122/732, 9 PDR 200, 211–12. Indeed, Biton’s attorney raised in Court the argument that in the same place “Rabbi Goren ruled that one need not rely on Rabbi Palachi in matters of the Ban because the Ban is not customary in his community.” *Ibid.*, minutes of the hearing on 22.10.75.

100 *Responsa Ḥayyim Veshalom*, Part 1, section 26.

101 R. Mizraḥi’s responsum also serves as a source for R. Yosef Karo to rule that the Ban does not supplant the commandment to procreate. See *Responsa Beit Yosef, Ketubbot*, section 14. Subsequently, however, R. Mizraḥi changed his position as far as Ashkenazi men are concerned, under pressure from Ashkenazi decisors. See Westreich, *Transitions*, 233–38. This may be the reason why Cheshin did not mention this source in the arguments submitted to the Court, see *supra*, n. 95. In any event, R. Yosef, in his polemic with R. Goren, relied several times on this responsum by R. Mizraḥi. See *Yabi’a ’Omer, supra*, n. 48, 305–6.

method in Sephardic halakhah, whose origins are unclear, R. Yosef wrote, clearly hinting at the Biton case:<sup>102</sup>

But my colleague, the Ashkenazi Chief Rabbi, may God preserve him, is of a different opinion, and placed all his faith in Rabbi Ḥayyim Palachi's Responsa, *Ḥayyim Veshalom*, and prevented himself from signing the rulings of rabbinical courts in Israel granting marriage permits to **Sephardic and Eastern Jews**, who spent more than ten years with their wives and did not have children from them.

It seems, then, that the real reason for R. Goren using R. Palachi's responsum is not the assumption that he is the pure representative of Sephardic halakhah, which is much more accurately represented by R. Yosef, nor that he ascribed to the author a particularly authoritative status. In another context, he sharply rejected the conclusions of a much more famous responsum by R. Palachi, arguing that it was false, bizarre, unique, and deviated from the sources that preceded it, and therefore it was not appropriate to use it,<sup>103</sup> comments reminiscent of R. Yosef's criticism of R. Goren's use of R. Palachi's responsum in the Biton case.

What, then, is the real reason behind R. Goren's position? It appears that from the point of view of R. Yosef, the answer is simple. In his opinion, the use of R. Palachi's responsum is a smoke screen for "Ashkenazi imperialism."<sup>104</sup> Immediately after concluding the halakhic summary, according to which, "all the more so in our country, where there is no doubt that certainly the Ban of Rabbenu Gershom was not accepted, there is no reason to take a strict approach with Sephardic and Oriental Jews, who are allowed to marry

102 *Yabi'a 'Omer*, *supra*, n. 48, 309.

103 See Appeal 122/732, *supra*, n. 99, 211–13; Appeal 67/734, 10 PDR 168, 173. The issue there concerns the rejection of R. Palachi's famous argument in the *Responsa Ḥayyim Veshalom*, part 2, section 112, where he states that it is possible to coerce a spouse who refuses divorce in case the couple have been separated for 18 months. For a discussion of this method and its resurrection in recent years at some of the rabbinical courts in Israel, see Avishalom Westreich, *No-Fault Divorce in the Jewish Tradition* (Jerusalem: IDI, 2014), 81–93 (Hebrew).

104 I borrow the expression from Westreich, "Jewish Women," 308. The manner in which R. Yosef perceived R. Goren's position as an "Ashkenazi" one is reflected also in his son's letter to me, *supra*, n. 49.

another woman to fulfill the commandment to procreate,"<sup>105</sup> he goes on to attack R. Goren who does not follow the simple halakhah that applies to "Sephardic and Oriental Jews."<sup>106</sup> He accuses R. Goren of adopting an even more extreme stance than preceding Ashkenazi Chief Rabbis, especially R. Kook, the founder of the Chief Rabbinate and certainly a figure admired by R. Goren, who thought that Sephardic Jews should not be prevented from marrying a second wife when the law allows it.<sup>107</sup> Thus, R. Yosef's conflict with R. Goren should be viewed as part of a broader conflict that he had with the Ashkenazi position within the rabbinate and the rabbinical courts, which imposed on Sephardic Jews the approach of the Ashkenazi law. This conflict is reflected elsewhere in the responsum at hand,<sup>108</sup> as well as in other responsa in which he opposed attempts to apply the Ban to Sephardic Jews, and the Chief Rabbinate ordinance in 1950,<sup>109</sup> which established a uniform prohibition against bigamy for all Jews of the country, without ethnic distinction.<sup>110</sup> This explanation, according to which, as far as R. Yosef is concerned, the struggle between the Chief Rabbis was mainly a halakhic-ethnic struggle, was accepted also by the scholars Elimelech Westreich and Benjamin Lau.<sup>111</sup>

Is it correct to argue that the basis for R. Goren's opinion is a commitment to the Ashkenazi tradition, similar to the commitment displayed by R. Yosef to the Sephardic tradition—a commitment that has led to "Ashkenazi imperialism" toward Sephardic Jews? According to Westreich, the answer is affirmative. In his opinion, "there is no doubt that R. Goren adopted an **extreme Ashkenazi approach**,"<sup>112</sup> which is not accepted by all Ashkenazi decisors, and applied it to the Sephardic Jews as well.<sup>113</sup> According to this approach, and along the lines followed by Ashkenazi *rishonim* and *aḥaronim*,

105 *Yabi'a 'Omer, supra*, n. 48, 309.

106 *Supra*, n. 102.

107 *Yabi'a 'Omer, supra*, n. 48, 309. For a discussion of R. Kook's position, see Westreich, "Jewish Women," 306–8.

108 *Yabi'a 'Omer, supra*, n. 48, 307.

109 *Supra*, adjacent to n. 17.

110 For a review of these responsa, see Ratzon Arusi, "The Clash Between Rabbinical Judges in Inter-Ethnic Halakhic Verdicts in Israel" (Ph.D. diss., Tel-Aviv University, 1987), 306–10 (Hebrew); Westreich, "Jewish Women," 337–47.

111 Westreich, "Jewish Women," 339; Lau, *From "Maran,"* 192–94.

112 Westreich, "Jewish Women," 339–40.

113 *Ibid.*, 318, 339.

“the commandment to procreate must be rejected outright in favor of the Ban, and even if the man had not fulfilled the commandment to procreate he was not relieved of the Ban.”<sup>114</sup> In other words, the focus of R. Goren’s problem in the Biton case was that it is not allowed to ease the Ban even if the husband has no children. Westreich had raised this claim in an earlier article, where he argued that the Biton case shows that in the opinion of R. Goren, the infertility of the wife is not a cause for divorce by the husband.<sup>115</sup> But is it possible to draw this conclusion based on the Biton case alone? Below I quote from documents that were not available to Westreich, showing that the focus of R. Goren’s considerations was not the matter of infertility. In my opinion, there is no way to prove that if Biton asked to divorce his wife because of her infertility, and she refused, R. Goren would not have coerced a divorce.<sup>116</sup> As we shall see below, if this had been the case, and if Biton left his wife and asked for permission to marry a second wife, there is reason to believe that R. Goren would have allowed him to do so, as did R. Herzog previously, whom according to Westreich R. Goren followed in the matter at hand.<sup>117</sup>

114 Ibid., 317.

115 Westreich, “Husband’s Claims,” 247.

116 It can be argued that even if he sought to coerce it, such coercion would not have been operational because rabbinical courts refrained from sending women to prison, and this was the only sanction available to them against *get* refusers until 1995. The practice of rabbinical judges was to allow husbands who have proved that their wives were infertile to marry a second wife. As I mentioned above, there is no good reason to argue that had Biton left his barren wife and she had refused to divorce, he would not have received a permit from R. Goren. Naturally, we do not know for sure, but Biton’s attorney raises the possibility of Biton divorcing his wife forcibly, which would have been harmful to her (*supra*, adjacent to n. 79). I assume that if he believed that R. Goren would have prevented this, he could have strengthened his argument and claimed that R. Goren does not allow any solution that would relieve the suffering of Biton: not coercing his wife to divorce and not granting him a permit.

117 Westreich, “Jewish Women,” 317. Contrary to Westreich’s argument about R. Goren, for R. Herzog sterility is certainly grounds for divorce, and the husband whose wife refuses to divorce is relieved of paying her alimony (Appeal 55/716, 4 PDR 353). If the infertility of the wife has been proven and she refused to divorce, R. Herzog suggested that the husband marry a second wife subject to divorcing the first one and giving her substantial financial compensation, or alternatively undertaking to pay her alimony for the rest of her life, and she “agreed to live alone far away from the place and agree to give him permission

Aviad Hollander suggested another explanation.<sup>118</sup> In his opinion, the explanation of R. Goren's position lies with his general outlook, which, according to Hollander, arises in other contexts as well. This position is that halakhic rulings must be such that are "acceptable to the general public and will forestall non-religious legislation, so that the people and the state do not distance themselves from the Halakha... It is a reasonable assumption that in R. Goren's view, a ruling that allows bigamy would be considered immoral by secular society."<sup>119</sup> As I argue below, underlying R. Goren's rulings there is indeed a certain worldview, but I am not sure that it is possible to argue that this worldview is derived from the perspective of the secular public. As shown below, R. Goren had no difficulty granting permits also in cases in which it was not at all clear that a secular view would see them as justified, therefore it is not clear that the quotations brought by Hollander from Supreme Court rulings,<sup>120</sup> upholding the idea of monogamy and the protection it grants to the first wife, do indeed underlie R. Goren's view. He cited Justice Silberg in the *Streit* ruling,<sup>121</sup> in which it was determined that a permit issued by the rabbinical courts and the Chief Rabbi should be cancelled, although in that case the Court ruled that it was doubtful whether the parties were married at all (because they were married in a civil ceremony), and that they should divorce, among other reasons, because they had lived separately for many years. As we shall see soon, R. Goren seems not to have had any difficulty granting a permit in such a case.

What, then, was at the heart of R. Goren's considerations? Archival material that was previously unknown to researchers until now (Westreich and Hollander reconstructed R. Goren's position based on the High Court of Justice ruling and based on R. Yosef's responsum, and have not seen a single source written by him) appears to provide a clear answer. For obvious reasons,

to marry another" (Isaac Herzog, *Pesaqim u-Ketavim*, vol. 8, ed. Shlomo Shapira [Jerusalem: Mosad ha-Rav Kook, 1996], 1134). In my opinion, the last part of the quotation indicates that R. Herzog's problem with marriage permits was not that he believed they should not be granted in cases of infertility but rather the fear that the husband will live substantively with the two women. Below I argue that this was also R. Goren's concern.

118 Hollander, "Goren," 312–17. Although he stresses there that his explanation does not disagree with Westreich, but adds another layer.

119 *Ibid.*, 314.

120 *Ibid.*, 315–16.

121 HCJ 301/63, *Streit v. Chief Rabbi of Israel*, PD 18 (1), 598, 627.

in the Biton verdict Justice Kahan wanted to present R. Goren's position as such "that is sufficiently based on the works of halakhic sages," especially R. Palachi's,<sup>122</sup> that is, as a formalistic argument that derives from the halakhic tradition. This is also how Westreich presents it. But beyond the difficulties that already surfaced regarding reliance on R. Palachi, the claim that this is not a purely formalistic decision arises also in the arguments presented to the Court by R. Goren's representative, Mishael Cheshin. According to him, the halakhic argument is an expression of the rabbi's worldview:<sup>123</sup>

In the matter of the refusal of the Chief Rabbi to grant the permit, it is necessary to consider the topic of discussion: this is not a case where the rule concerning a mentally ill wife may apply. Moreover, this is not a case where the woman is rebellious, or the spouses have been in the throes of a serious conflict for many years. Ours is a third type of case, which may be essentially different from the first two cases.

The reasons the Chief Rabbi named for his refusal to grant the permit are explained and detailed in his decision, and they express a deserving human and overall social view of life and of the world.<sup>124</sup>

In other words, according to this worldview it is necessary to distinguish between the Biton case and cases in which granting a permit is justified: when the woman is sick or refuses to accept the divorce. What is the distinction? The answer appears in a document written by R. Goren during the hearing against him, on which Cheshin most likely based his arguments.<sup>125</sup> After naming seven decisors on whom he relied, he wrote:

It should be explained that the refusal to grant a marriage permit in this case **is based on my conscience and on the halakhah, together with social, ethical, and human considerations, as it is not possible for a man to live with two wives at the same time.** Even if he has the ability to buy two separate apartments, it is intolerable, because the rabbinical courts do not allow this

122 HCJ 160/75, 310.

123 *Supra*, n. 86.

124 He repeated almost identically the last sentence in "Main arguments of the Attorney General," 22.10.75, in the file mentioned *infra*, n. 61.

125 *Supra*, n. 95.

to the poor, and they do so only to those who have means, resulting in discrimination between rich and poor. And all the more so, when the great Ashkenazi and Sephardi halakhic authorities alike forbid it, certainly it must not be allowed.

We sign dozens of marriage permits when it is not the case that the husband will live with two wives, as in the case when the woman is hospitalized and has no chance of recovery, or has been rebellious for many years, **but not when he intends to live with both of them under the guise of the woman's consent**, who, seeing no alternative, often gives her consent after receiving the "treatment" from her husband. In such cases R. Ḥayyim Palachi was correct in writing that this is an invitation for violence on the part of the husband,<sup>126</sup> and therefore the majority of decisors are of the opinion to prohibit it, and there is no reason to change their minds, which is the way of the Torah.

Beyond the hyperbole, claiming that this is the majority opinion, including the "Sephardi halakhic authorities," R. Goren does not hide the fact that these are moral and human considerations. In his opinion, we should distinguish between cases where the spouses will not live together—and it does not matter whether the woman is responsible for the separation (rebellious) or not (hospitalized), and R. Goren claims to have approved "dozens" of these—and a case in which the man intends to live with both wives at the same time. Such a case is completely unacceptable, and it makes no difference whether the woman consents, because R. Goren doubts the sincerity of such consent. Thus, the main problem in the Biton case was the fact that Biton sought to live in full matrimony with two women, and not opposition to the grounds of divorce due to infertility, as Westreich claimed. This issue is clarified also in the title of the document in question,<sup>127</sup> and in its opening lines:

The greatest halakhic authorities since the 13th century onward oppose granting a marriage permit for a man to marry a second wife **without divorcing the first, when his intention is to live**

126 The reference is to the words "and they will come to a fight and the like," but there is no need to interpret "fight" to mean violence by the husband, and R. Goren appears to deliberately make the situation sound more extreme.

127 *Supra*, n. 95.

**with both.** Even if she didn't give birth after ten years, and with the consent of the first wife, the permit is not to be granted.

In the same document, R. Goren clarifies later the meaning of this statement. Among the decisors he names as the sources of his position he lists:

A. The most prominent opponent of issuing such permits, R. Judah Minz of Padua. In his responsa (section 10) he holds that the matter does not depend on the wife's consent, because in his opinion, there is no permission to marry a second wife on top of the first one and live with both, **unless he divorces his first wife.**<sup>128</sup>

B. It also transpires from the comments of R. Mordekhai Ben Hillel (13<sup>th</sup> century)<sup>129</sup> that if he stayed with her for ten years, and she did not give birth, **they coerce her to divorce**, but they do not permit him to marry another woman on top of his wife.

In other words, infertility is not the main problem, but living together with two women is, which in any case must be banned, even if it is being justified by alleging infertility and the consent of the first wife. R. Goren repeats this argument again in a later letter:<sup>130</sup>

I am honored to inform you that the rabbinical courts do not permit marrying a second wife in addition to the first one, **but on condition that he does not live in matrimonial relations with both, but only with one of them.** Similarly to the case of a mentally ill or rebellious woman, etc., as explained by the *poseqim*. **And I do not sign under any circumstances a marriage permit when there is a risk that he will live with two women at the same time;** even if he was with his first wife for ten years and she did not give birth, and she agrees that he marry a second wife in addition to her without divorcing her, I do not sign the marriage permit.

Indeed, as R. Goren indicated, he did not refrain from granting permits in cases when it was clear that the couple did not live together. For example,

128 For an analysis of this responsum, see Westreich, *Transitions*, 202–8.

129 *Mordekhai to b. Yev.*, §48. Apparently, in *Mordekhai to b. Yev.*, §113, this claim is even more explicit, and it appears in Rabbenu Gershom's writing itself.

130 *Supra*, n. 94.

he allowed a husband to marry a second wife in a case in which his wife rebelled and they had been separated for a long time, and she refused to accept a divorce,<sup>131</sup> as well as in a case in which the woman was not even declared rebellious, but it was clear that the marriage was over, among other reasons, because of severe violence on the part of the husband, but the woman refused to divorce because of financial reasons. According to her, R. Goren even threatened her that if she did not agree to receive the *get*, “he would issue a cruel ruling that she will rue for the rest of life,” and indeed he granted her husband a marriage permit, which led to a petition to the High Court of Justice.<sup>132</sup> The fact that R. Goren had no objection in principle to the notion of a marriage permit, even when the woman raised claims that may appear justified in the eyes of the public, and even in a case in which she was not to be faulted for the divorce, as when she was ill. This makes it difficult to accept the claim that he tried to align himself with the moral view of the general public, as suggested by Hollander. It is necessary to distinguish the positions of R. Goren and R. Soloveitchik, who said that he never signed a marriage permit, even when its halakhic basis was sound, because an American Jew would not be willing to accept a distinction between the ability of the husband to take a second wife, and that of the wife, who in a similar situation remains “chained” (*agunah*).<sup>133</sup>

R. Goren’s unique method is evident from other sources as well, which he cited in the document he wrote at the time of the petition.<sup>134</sup> We have

131 Appeal 122/732, 213. See also Appeal 67/734, *supra*, n. 103, 172.

132 “Rabbinical approval that allows a husband to take another wife—blocked by the High Court,” *Yedi’ot Aharonot* 29.6.75, p. 5; “Order nisi against the Chief Rabbis and the Grand Tribunal,” *Davar* 29.6.75, p. 6. See also a letter from R. Goren to R. Caspar, the Chief Rabbi of South Africa, 21.8.80, in which he deals with a permit for a man whose wife rebelled and asked for money to accept a divorce.

133 Nathaniel Helfgot, ed., *Community, Covenant and Commitment: Selected Letters and Communications of R. Joseph B. Soloveitchik* (Jersey City, N.J.: Ktav, 2005), 216–17. This position is reminiscent of that of R. Shlomo Kluger (*Ha-Elef Lekha Shelomoh Responsa, Even ha-ezer*, section 7), who explains that because of the social reality of his generation he decided never to sign a permit, even if the rule is a simple one.

134 *Supra*, n. 95.

already seen that he cited a source that did not support his position.<sup>135</sup> Other sources that he cited are also problematic. For example:

C. The greatest of decisors, R. Yehezqel Segal Landau, is among those who forbid, and he indicates in a responsum that “it has not occurred in several generations to permit to someone who lived ten years with his wife” without children to marry another woman.<sup>136</sup>

But perusing this responsum reveals that in that very case the decisor allowed the man to marry a second wife. And again:

D. The great decisor and interpreter of centuries ago, R. Shelomoh Luria, in his responsa is of the firm opinion to prohibit marrying a woman in addition to his wife with whom he lived for ten years without her giving birth, and this is not to be allowed in his opinion even with her consent.<sup>137</sup>

This is true, but in the cited responsum, R. Luria claimed that it is not possible to grant a permit even in the case of a woman who is mentally incompetent, which is contrary to R. Goren’s position.

The fact that R. Goren cited sources that did not support his complex position reinforces the feeling that his was not a simple halakhic analysis. Rather, his position reflected a worldview according to which the consideration in granting the permit focused not on the grounds on which it was sought but on whether the man intended to live in full matrimony with two women. Thus, it is difficult to regard R. Goren as someone holding an extreme Ashkenazi position, even if this is how his Sephardic colleague perceived him.

In an earlier statement, R. Goren said that the Ban did not apply at all today, even in the Ashkenazi world,<sup>138</sup> which resulted in sharp criticism in the press.<sup>139</sup> In a letter to *Ha’aretz*,<sup>140</sup> he said that he favored the position

135 *Supra*, adjacent to n. 101.

136 *Noda be-Yehudah, Even ha-Ezer (tinyana)*, §102.

137 *Responsa Maharshal*, §65.

138 Nevertheless, it is possible that he changed his mind later. See citation adjacent to n. 94.

139 “The Ban of Rabbenu Gershom Expired,” *Ha’aretz*, 23.4.57 (Hebrew); A. Adam, “Quantity Is Not Quality,” *Ma’ariv*, 12.5.57 (Hebrew).

140 The original letter, undated, is located in the R. Goren Archive.

presented in the *Shulḥan Arukh*, according to which the Ban expired at the end of the fifth millennium, an opinion that many Ashkenazi decisors strongly oppose.<sup>141</sup> But he added:

We need not draw a conclusion based on the above whereby according to the *Shulḥan Arukh* there is no prohibition at present against marrying two women, because despite the fact that the Ban of Rabbenu Gershom has expired, R. Moshe Isserles ruled in the *Shulḥan Arukh* (*Even ha-Ezer*, section 1, 10), that “in all those countries the ordinance and custom are in effect,” and it is not because of the Ban but because of the rule according to which “things that are permitted but others used to prohibit them are not now allowable...” And the decisors also decreed that the Ban continues to be valid at this time. And the author of the *Shulḥan Arukh* also decreed (*ibid.*, 1, 11): “It is proper to enact an ordinance using bans and oaths against one who marries another woman in addition to his wife.”

It follows from the above that the prohibition against marrying two women is not based on the original Ban of Rabbenu Gershom, but on current practice not to marry two women, and on R. Yosef Karo’s recommendation, which attests to a dislike of the idea that a man lives with two women simultaneously. In other words, this is not an extreme Ashkenazi perception but a position that regards a reality in which a man lives with two women as wrong, certainly in a place where this is not customary. He therefore concludes by citing the *Arukha ha-Shulḥan*, which argues that this is obscene behavior, prohibited also in places where the Ban has not been accepted, probably because they understood “on their own” that this is not appropriate:

The *Arukha ha-Shulḥan*, *Even ha-Ezer* (section 1, 23), states poignantly the Jewish custom that continues the prohibition contained in the Ban, by saying: “And to such a degree they accepted this enactment that in the rare case when one deviates from its boundaries, he is held to be evil and dishonest, **and is loathed**”

141 The earliest source for the idea that the Ban has expired is a responsum by Rashba. On that responsum and the opposition to the theory it proposes, see Shlomo Zalman Havlin, “The Takkanot of Rabbenu Gershom Me’or Hagolah in Family Law in Spain and Provence,” *Shenaton ha-Mishpat ha-Ivri* 2 (1975): 200, 203–5, 226–29 (Hebrew).

**by all, and they stay away from him**, and some say that the Ban was not only until the end of the fifth millennium. In any case, then too, the Jews accepted and undertook for themselves and their descendants to observe this excellent ordinance, and even the gentile kingdom agonizes over those who violate this ordinance, and the ordinance is in effect until the coming of the Redeemer. **And even in countries to which the Ban had not spread, like in the Turkish lands and in African countries, by and large on their own they acted in accordance with it and did not marry more than one wife.**"

If this is the case, R. Goren's complex view does not rule out the granting of permits to men who need them, but they are contingent upon the fact that the man does not live with two women at the same time. This limitation does not originate in the Ashkenazi Ban but in the view that considers it abhorrent and unworthy of any Jew, regardless of his origin, to do so. It is this view that brought R. Goren to use R. Palachi's responsum, which fits the subject like a glove, and R. Goren was able to present it as a Sephardic source for his position.<sup>142</sup> Beyond what has already been said here about this responsum, it also reflects the public interest in maintaining the strength of the family, which overrules the individual's desire to propagate his seed: a permit should not be granted "even with the consent of the first wife because of the fear that everyone who did not have children would ask to marry another woman and conflict will beset the couple." This idea was reflected also in Cheshin's statement, when he explained why Mrs. Biton's consent is irrelevant:<sup>143</sup> "Consent in itself is certainly not sufficient to tip the scales, and at stake instead is the **public interest**, not only individual interests."

As noted, R. Yosef interpreted R. Goren's position as an extreme Ashkenazi one, and its reliance on R. Palachi as a move to impose this position on the non-Ashkenazi public. Consequently, he acted in two directions: on the one hand, he showed how marginal R. Palachi's position was in the world of Sephardic halakhah, and, on the other, he showed that R. Goren's approach was too extreme even in the Ashkenazi world and represented a deviation from the policy of the Chief Rabbis who preceded him.

142 Nevertheless, R. Goren's position was more extreme than that of R. Palachi. See *supra*, n. 97.

143 In the document mentioned *supra*, n. 124.

It is quite clear, however, that R. Yosef also opposed R. Goren's worldview, even if he may not have been entirely aware of it. Not only was R. Palachi's public consideration unacceptable and unreasonable as far as R. Yosef was concerned, but he believed that this view resulted in preventing the observance of a biblical commandment, and therefore he rejected it vigorously:<sup>144</sup>

I was very surprised at R. Palachi, who greatly exaggerated in what he wrote... I understand the fear that additional men who have no children will ask for a permit. So what? They deserve the permit by law, and those who out of severity refuse to grant it cause them not to observe the important commandment to be fruitful and multiply.

The implication is that R. Goren, who adopted the position of R. Palachi, prevented Jews from observing a commandment by virtue of the "secular law," which allowed him to do so:<sup>145</sup>

And one knows that according to the secular law of the State of Israel the husband is not entitled to marry another woman in addition to his wife, even after a marriage permit has been awarded by a verdict of the competent rabbinical courts authorized to do so, unless both Chief Rabbis of Israel approve the verdict by signing it. In the absence of the signature of one of the two these court rulings have no practical validity. If nevertheless the husband goes ahead and marries another woman in addition to his wife, in accordance with Jewish law and the rulings of the rabbinical courts, he will be punished with imprisonment by the authorities for bigamy. So, **if one of the Chief Rabbis refuses to sign the permit, he causes horrible distress to the husband, who cannot observe the commandment to be fruitful and multiply.**

In the opinion of R. Yosef, the commandment to procreate takes precedence over all other considerations, and immediately after he finished his attack on R. Goren, he went on to explain that the permit should be given not only to those whose wife is barren, but also to those who have children of one

144 *Yabi'a 'Omer, supra*, n. 48, 309.

145 *Ibid.*

gender only, and therefore they did not fulfill the commandment, a position that is not accepted by all Sephardic sages,<sup>146</sup> and certainly not by R. Goren.<sup>147</sup>

Two points need to be mentioned in this regard. First, this is not the only issue on which the two rabbis were divided regarding fertility. Close to the date on which the confrontation concerning Biton took place, another controversy occurred that appears to have been affected by the views of the rabbis. In December 1974, R. Goren was interviewed in a radio program concerning halakhah and stated that there was no prohibition against taking birth control pills when the couple already had a son and daughter and had agreed to use the pill.<sup>148</sup> Clearly, R. Goren did not intend this to be understood as a recommendation *ex ante* but felt that if the couple were experiencing financial and other difficulties, it was possible to use the pill for some time.<sup>149</sup>

A week later, R. Yosef strongly criticized this position.<sup>150</sup> According to him, there was a strict prohibition against using contraceptives, the only exception being cases in which there was danger to the life of the woman or exceptional birthing difficulties:

But for purely economic and social reasons, even in the case of utter poverty, the decisors have most vehemently prohibited the use of any contraceptives, with or without the husband's knowledge and consent... The commandment to procreate is in force so that the couple have a son and daughter, that is, at least two children, male and female. But the commandment

146 Ibid., 310–11 in the note. On R. Yosef's opinion on this topic and on the opinions of other Sephardic sages, see Westreich, "Jewish Women," 339–40; idem, "Husband's Claims," 273–75.

147 See Shlomo Goren, *Torat HaRefua – On Medicine and Halakha* (Jerusalem: ha-Idra Rabbah u-Mesorah la-Am, 2001), 190. In R. Goren's opinion, there is a religious value also to the birth of a single child, and in this case there is no reason to allow artificial insemination, which R. Goren rejected (*ibid.*, 188).

148 "The Pill and Jewish Halakha," *Ma'ariv* 10.12.74 (Hebrew).

149 R. Goren archive, letter from 14.7.77.

150 *Supra*, n. 148. For a broad discussion of R. Yosef's opinion on the use of contraceptives, see Yehudah Naki, *She'elot u-Teshuvot Ma'ayan 'Omer* (Jerusalem: Mishpaḥat Naki, 2011), 8:103–21. It is possible to see there the distinction between economic considerations or considerations of burden and such, and significant medical reasons. Only in the latter case is an exemption granted.

remains in force for as long as the couple can bring children into the world.<sup>151</sup>

This is yet another case in which R. Goren gave precedence to the integrity of the relationship between husband and wife, admittedly for couples that have already fulfilled the Torah commandment, over the value of having children, whereas his colleague believed that one should not renounce having children, except in cases of severe medical problems. Economic or emotional difficulties of the couple do not exempt them from the commandment. It is clear that R. Yosef did not accept modern social concerns, such as those reflected in the worldview of R. Goren, according to which monogamous marriage is the only kind of family structure that should be allowed, or the improvement of the woman's status, as weighty considerations, and certainly not when they conflict with Torah obligations. In his book, Ariel Picard showed how R. Yosef was aware of the changes brought about by modernity, including those relating to the conduct of women, and therefore he showed lenience in matters of lesser consequence. But in principle, in his outlook he opposed the linkage between halakhah and cultural and historical realities, which may lead to demands for changes in halakhah and harm the view concerning its stability.<sup>152</sup> In his rulings in family law, we encounter this opinion on several occasions, for example, in his sharp criticism of R. Ouziel, who helped cancel the possibility of carrying out levirate marriages in Israel, for reasons that according to R. Yosef were not acceptable (in R. Yosef's opinion, the levirate commandment remains valid, and the widow can be coerced to consummate the levirate marriage against her will).<sup>153</sup> The same is true with regard to forcibly divorcing a woman despite the opinions of important Sephardic decisors who prohibited it.<sup>154</sup> This opinion was stated explicitly in a debate R. Yosef held with R. Ovadia Hadaya in the late 1950s.<sup>155</sup> According to the latter, changes in women's dress in the last generations, and the decline in an emphasis on modesty, do not allow the use

151 About the rabbinic commandment to give birth to additional children beyond a boy and a girl, see Westreich, "Husband's Claims," 255.

152 Ariel Picard, *Philosophy of Rabbi Ovadya Yosef in an Age of Transition* (Ramat Gan: Bar-Ilan University, 2007), 252, 271 (Hebrew).

153 Westreich, "Jewish Women," 328–37.

154 *Ibid.*, 337; Zoarets, "Judicial Policy," 112–72. See *supra*, n. 59.

155 *Yabi'a 'Omer* 3, 21. For an analysis of the dispute see Picard, *Philosophy of Rabbi Ovadya Yosef*, 256–64; Raphael Etzion, "Rabbinical Laws with Rationales No

of “transgressing against Jewish religion” as grounds for divorce, as it was used in the past. But R. Yosef refused to accept the claim of changing social reality as an acceptable reason for halakhic rulings, even if it was clear that reality had changed. According to him, it was clear that at present, unlike in the past, promiscuous dress did not raise suspicion of prostitution but of following conventional fashion, “and in any case we do not have the ability to uproot, God forbid, in something enacted by the sages, which although it is possible that the reason is no longer valid the obligation remains valid, and they said that she who transgresses against religion ends up without her *ketubbah*.” It is clear that R. Yosef’s halakhic world could not accommodate R. Goren’s view regarding the need to maintain a monogamous couplehood and to protect it in all circumstances, and R. Yosef in many different cases allowed husbands to take a second wife.<sup>156</sup>

## Conclusion

The dispute between the Chief Rabbis appeared to have been resolved by the Supreme Court. It was this secular institution that served as the final arbiter in a rabbinic dispute that was much broader than appeared at first glance. It was not merely an ethnic conflict, as the dispute was presented and as apparently R. Yosef perceived it, but rather a dispute in principle on the question whether extra-halakhic considerations and changing times<sup>157</sup> can take precedence over Torah commandments. Not surprisingly, the Supreme Court sympathized with R. Goren and held that his position “is not arbitrary and is not due to improper considerations,”<sup>158</sup> and therefore that there was no reason for the Court to intervene.

This ruling appears to have reinforced the frustration of R. Yosef, who justifiably portrayed R. Goren and “secular law” as allies and collaborators

Longer Germane in the Rulings of Rabbis of the Recent Generations” (PhD. diss., Bar-Ilan University, 2008), 288–98 (Hebrew).

156 For a review of the various sources that appear in his responsa, see Zoarets, “Judicial Policy,” 116–50. Note that his son, Chief Rabbi Yitzhak Yosef, follows in his footsteps. According to him, whenever a man cannot divorce for several years he should be granted permission to marry another woman. See <http://www.inn.co.il/News/News.aspx/329833> and the recording found there.

157 See what R. Goren himself had to say, *supra*, adjacent to n. 125.

158 HCJ 160/75, 310.

which together caused Biton and similar men “terrible distress” and prevented them from fulfilling a Torah commandment.<sup>159</sup> R. Yosef’s portrayal of the relationships between the law and trends in the rabbinical world that sought to limit the number of bigamist marriages was correct. A historical examination of the arrangement that requires the agreement of both rabbis for granting the permit shows that the law served as an effective tool for imposing the halakhic position that it is necessary to limit considerably bigamy among Jews.<sup>160</sup>

Perhaps R. Yosef realized that if he wanted his religious position to become reality there was no alternative but to change the “secular law.” When the opportunity arose to change the law, even if it was within the wider framework of restructuring the Chief Rabbinate, the conflict between the rabbis resurfaced. It is clear that R. Yosef supported a change in the law and even acted so that he would be the one in charge of granting the permits. R. Goren tried hard to prevent a change in the law, and there is no doubt that he did so in light of his view that apart from purely halakhic considerations, there was also room for broad discretion, which, in his opinion, he alone represented. Now we understand what he said about the distinction between the rabbinical court granting the permit, and the Chief Rabbis, who are supposed to examine the case “from a public perspective,” consenting to it.<sup>161</sup>

Eventually, for its own reasons, the legislature opted for R. Yosef’s position. Perhaps the desire to separate the powers of the rabbis was too strong, and they wished to eliminate areas of conflict between the Chief Rabbis. It is also possible that some remembered the Biton case from a few years earlier.<sup>162</sup> Whatever the reason, the amendment to the law resolved decisively the halakhic controversy between the rabbis, and the secular law that was attacked by R. Ovadia Yosef became the one that allowed him to impose his halakhic policy and to “free” all those men who were not able to obtain a permit before, causing him great joy.<sup>163</sup>

The dramatic change in the law is reflected, among others, in a letter written two weeks before the enactment of the amendment by the legal

159 *Supra*, adjacent to n. 145.

160 *Supra*, adjacent to n. 10.

161 *Supra*, adjacent to n. 45.

162 Cf. the words of MK Hacoheh, *supra*, adjacent to n. 37.

163 *Supra*, adjacent to n. 56.

advisor of the rabbinical courts to a man who complained that Rabbi Goren was also required to sign his marriage permit and was quite likely holding up its signing.<sup>164</sup> The author cited the language of Section 179, which was in effect at the time, and emphasized the words “approved by the two chief rabbis of Israel.” He then explained: “Therefore, the requirement that a marriage permit be approved by both Chief Rabbis derives directly from the penal code, not from any order or regulation, and as far as the law is concerned it makes no difference whatsoever to which ethnic community a person belongs.”

R. Yosef’s position also prevailed within the rabbinical courts. In 2011, the Netanya Rabbinical Court issued a marriage permit, eventually published in 2016,<sup>165</sup> as part of a television investigation that created a public uproar.<sup>166</sup> The facts are similar to those of the Biton case: a couple of Sephardic origin had been married for many years; the woman underwent numerous treatments but was unable to conceive; she agreed that her husband could marry a second wife; the court made sure that an agreement was in place to guarantee the rights of the first wife. The court granted the husband the requested permit, stressing that its decision was based mainly on R. Yosef’s responsum discussed in this article, and concluded: “Since Maran Rabbi Ovadia Yosef permitted in this matter... and he is a high authority to rely on.” In accordance with section 179, the permit was sent to the President of the Grand Tribunal, R. Shlomo Amar, a prominent disciple of R. Yosef, who naturally approved it. The ruling and R. Amar’s approval make no mention of other positions, certainly not of that of R. Goren.

Here was yet another case in which the secular Israeli law served as a tool for the practical resolution of a long-standing halakhic dispute.<sup>167</sup>

164 Attorney Hilel Kolin to John Doe (14.3.1980), ISA, file GL-15234/2. This letter teaches us about the existence of other conflicts between the chief rabbis around the issue of the permits.

165 File (Netanya) 765725/1 (30.6.2011), <http://tinyurl.com/ja8ye3o>.

166 <http://tinyurl.com/zcrt8mj>. Following the investigation, the Constitution Committee of the Knesset (28.2.2017) held a special discussion, <http://tinyurl.com/yaj28y8v>.

167 *Supra*, n. 11.