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An open letter to Rav Mendel Zilber

Rav Mendel Zilber, Yosheiv al me'din

Having served since 2004 on *zabla* (acronym for "zeh boreir lo ached"-one chooses one) panels in the Hassidic, Modern Orthodox, Sephardic and Yeshiva communities, where each party chooses their *dayan*, rabbinic arbitrator and the two select a third *dayan*, approximately a decade ago, I had the opportunity to serve with you as the third *dayan* (the *sholish*) in a rabbinical proceeding, a *din torah* dealing with a claim regarding the entitlement of a real estate commission billed by a New Jersey real estate agency. Much was learnt by me during those sessions.

More recently, our community had the privilege of reading in Ami Magazine dated December 25, 2019 your exposition regarding the *halakhic* propriety of rabbinical courts and rabbis engaging in the technique of *bittul kiddushin*, voiding

a marriage, freeing without a *get*. The purpose of our reply to your position is *le'hagdil Torah*, to make lofty the words of Torah.

1. IBD *beit din* procedure

Before we address the technique of “marriage in an error” (*kiddushei ta'ut*) which you presented as a means to void a marriage, we need to briefly outline a fundamental procedure of the International Beit Din for Matters of Personal Status (hereafter:IBD).

Regarding the IBD, your honor (kevodo) represents to the reader that “we aren't issuing a *get*; they're busy with *hetterim* (voiding marriages-AYW)”

As we communicated in June 2019 to Rabbi Avraham Blum, the Kashua Rav and a colleague of yours, we have persuaded directly and indirectly over 55 husbands to give a *get* to their wives. These wives live in three different countries around the world and two of them were *agunot* for fifteen and a half years and twenty five years.

Procedurally at the IBD before we address whether there are grounds to void a marriage in a particular situation, we address the matter of the *get*, regardless of whether another *beit din*(or *battei din*) or rabbis were unsuccessful in facilitating a *get*. Let me give a few examples of what has transpired. In one case, a woman requested that we schedule a hearing for the express purpose to void the marriage. After thoughtful review of her decision, she changed her mind and wanted to cancel the hearing. We responded to her, “don't cancel the hearing because we can have a hearing only regarding the matter of the *get*”. A hearing took place and as is our procedure (*sefer ha'din*), we decided whether we would obligate a *get* (*hiyuv le'garesh*) or issue a judgment of a duty to give a *get* (*mitzva le'garesh*). We handed down a ruling (a *psak*) to her spouse that a *get* ought to be given and in the event it would not forthcoming within a prescribed period of time, we would direct the community to religiously, socially and economically isolate him (*harhakot of Rabbeinu Tam*).With the assistance of different types of communal pressure without a public demonstration, within three months from the issuance of the ruling, a *get* was executed.

In another instance, a woman who was married a few times and in her present marriage separated from her husband within three months of their wedding day, she contacted us “to please void her marriage”. Our reply was that we first address the matter of the *get* and if a *get* isn’t forthcoming we look into the propriety of voiding a marriage. In that case, the wife was living in the United States and the husband moved to Europe to live with or live near his parents and informed us that it would take at least a year to give a *get*. We persuaded the wife that she should contact one of the rabbinical courts in this city and we asked them to intercede on her behalf of the couple. The *beit din* agreed to become involved. Unfortunately, after approximately three months nothing happened and then we suggested a few reasons that there may be basis for marital reconciliation (*shalom bayit*). We actually suggested steps in order for the couple to reconcile. Regretfully, after approximately four months, she insisted that she wanted her *get*. A hearing took place and a decision was handed down, similar to the above one. To date, a *get* has not been executed and there are no grounds for voiding the marriage. In short, in dealing with this case for a year we have summoned the husband to the IBD to address the matter of the *get*, speaking with the couple, we have been interacting with an overseas *beit din* regarding the *get*, submitting a *halakhic* advisory opinion (*havat da’at*) to this *beit din* for permitting a rabbinical court session(s) via skype or zoom, advising regarding marital reconciliation, and addressing the matter of the *get*.

We have offered dozens of consultations for men and women alike around the world how to address their *halakhic* and sometimes legal issues that confront them in the process of becoming divorced and hopefully, *be’ezrat Hashem* receiving or giving a *get* respectively. In one instance, there was a woman on Long Island who had contracted terminal cancer who desperately wanted a *get* from her husband before she died. We communicated our suggestion to her family how to persuade her husband to give a *get* and within four days a *get* was forthcoming. Regretfully, the young woman passed away a month later. In another instance of a Long Island woman who was unsuccessful in her efforts to receive a *get* with the assistance of a local *beit din* in NY, we wrote a letter to the

husband, an attorney and within 3 days, a *get* was executed by a Brooklyn *beit din*.

2. Distinction between annulling a marriage (*haf'kaat kiddushin*) and voiding a marriage (*bittul kiddushin*).

As you may have noticed, we described earlier your presentation as one which addresses the voiding of a marriage. However, upon reading the title of your thoughts as well as your entire exposition, you continuously employ the word “annulment” or “annulling a marriage”. It is clear to me that your honor is well aware that there is a difference between annulling a marriage (*hafka'at kiddushin*) and voiding a marriage (*bittul kiddushin*). I assume that your interview was given in either *lashon hakodesh* (Hebrew) and/or Yiddish and the responsibility for the mistranslation lies with another individual.

Since laymen as well as rabbis in our community frequently say that freeing a woman without a *get* entails the annulling of a marriage, it is important for us to clarify to our community, the difference between these two Torah concepts.

The four scenarios (in six discussions in the Talmud Bavli: i.e. Ketuvot 3a, Yevamot 90b and 110a, Gittin 33a and 73a, Bava Batra 48b) serve as the Talmudic precedents for empowering our rabbis (“*kol ha'me'kaadesh adata de'rabbanan me'kadesh*”) to annul a marriage. One type of annulment addresses a husband who instructed a *get* ought to be delivered to his wife and either granted it to her contingent upon the fulfillment of a certain condition or forwarded it to her via an agent and subsequently changed his mind and attempted to annul the *get*. Under such circumstances, *Halakhah* allows for the retroactive annulment of the marriage (“*afk'ihu rabbanan le-kiddushin minei*”). A second type of annulment transpires *after* the *kiddushin* (*halakhic* engagement) and/or the marriage (*nissuin*) where a *get* was drafted and delivered either to an agent of the wife or to the wife herself but was subsequently invalidated. In both instances, the annulment is contingent upon the wife receiving a *get* (a *get kol de'hu*) even if the giving of it is against the husband's will. See Rashi, Ketuvot 3a, s.v. kol

hamekadesh; Rashi, Gittin 33a, s.v. adatei de'rabbanan mekadesh; Tosafot Ri ha-Lavan, Ketuvot 3a, s.v. kol ha-mekadesh; Hiddushei ha-Rashba, Ketuvot 3a; Teshuvot ha-Rashba 1:1162; Hiddushei ha-Ramban, Ketuvot 3a; Shitah Mekubetzet, Ketuvot 3a in the name of Ritva; Beit ha-Behirah, Ketuvot 3a; Ri Megas, Beit ha-Behirah, op.cit.; Hiddushei ha-Ra'ah, Ketuvot 3a; Pnei Yehoshua, Ketuvot 3a; Yam shel Shlomo Ketuvot 3:5.

Nonetheless the two Talmudic cases recorded in *Yevamot* 110a and *Bava Batra* 48b dealing with annulling a *kiddushin* due to a prospective husband acting inappropriately during the time of the *kiddushin* does not require the giving of a *get*. Lest one argue that we are empowered to annul a marriage without a *get* in other situations such as an *agunah* where a husband refuses to give a *get*, our authorities rule that annulment is limited to the cases memorialized in the Talmud. See Hiddushei ha-Rashba, Ketuvot 3a, s.v. kol de'mekadesh; Teshuvot ha-Rashba 1:1185; Teshuvot ha-Radakh, page 19, s.v. ve'ain lomar; Teshuvot Hakham Tzvi 124; Teshuvot Zekhor Simha 177; Teshuvot Melamed le-Hoeil 3:22.

On the other hand, there are various techniques recognized *under certain conditions* by our Rabbis for voiding a marriage such as one of them noted during your interview. If a husband intentionally or unintentionally fails to disclose to his prospective wife before the marriage a major defect (*mum gadol*) such as being mentally dysfunctional, gay, a criminal, impotent, or sterile. In other words, it is "a marriage in error" (*kiddushei ta'ut*) and if the marriage is voided the wife is free to remarry without a *get*.

In sum, whereas invoking marital annulment mandates the giving of a *get*, voiding a marriage has no such requirement. Whereas, marital annulment is premised upon a bona fide *halakhic* marriage, voiding a marriage is predicated upon the conclusion that there never was a *halakhic* marriage.

This distinction between voiding a marriage and annulling a marriage is clearly articulated in an Israeli *beit din* ruling. See File no. 905457/10, Tel Aviv-Yaffo Regional Beit Din, 20 Ellul 5777(September 11, 2017).<sup>1</sup>

### 3. Rav Yosef B. Soloveitchik's endorsement of voiding a marriage

In your honor's interview, the writer's representation that was advanced was that Rav Yosef B. Soloveitchik (hereafter: the Rov) rejects the notion of voiding a marriage, thus prohibiting the freeing a woman to remarry without receiving her *get*. In the wake of a husband's *get* recalcitrance, the Rov cites one of Rabbi Feinstein's rulings (EH 1:80) that if a husband fails to disclose a major defect (a *mum gadol*) one may void the marriage.<sup>2</sup> In other words, under certain conditions, one may void a marriage when dealing with "a marriage in error".

Yet, as aptly noted by the writer of the AMI Magazine column, the Rov rejected utilizing annulment (*haf'kaat kiddushin*) as a means to free a wife without a *get*.

### 4. Rav Herschel Schachter's endorsement of voiding a marriage

Contrary to the writer's representation that Rav Schachter "partnered with Rav Zilber in his mission against annulment (read: voiding- AYW)", the facts on the ground are quite different. Years ago, Rav Schachter wrote a brief essay for Torahweb regarding the propriety of voiding a marriage under certain conditions. The essay can be accessed at [https://www.torahweb.org/torah/special/2001/rsch\\_nissuin.html](https://www.torahweb.org/torah/special/2001/rsch_nissuin.html). In early June 2015, in the presence of three rabbis, I met with Rav Schachter and he told me that "only *gedolei Yisrael* (Torah giants) such as Rav Yitzhak Elhanan Spektor may void a marriage". His position was memorialized in a public statement issued in the summer of 2015. A few years later, a few weeks before Pesach 5778, one of his rabbinic colleagues from Eretz Yisrael voided the second marriage of a woman and the approval of the voiding was given by Rav Schachter. Unlike other Rabbis

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<sup>1</sup> There are instances when our Rabbis utilize language of annulment when engaging in voiding a marriage; we leave this matter for further discussion.

<sup>2</sup> See R. H. Schachter's collection of Rov's rulings entitled *MiP'ninei HaRav* , page 212.

such as Hisachdus Harabonim who placed their signatures on public proclamations in both the Philadelphia and Borough Park cases opposing in principle the voiding of any marriage, Rav Schachter's signature is on a public statement issued in Sivan 5779 that opposes the reasoning employed by the IBD in arriving at decisions (*piskei din*) to void a marriage. It is our understanding that in the Spring/ Summer of 5779 he was approached by some rabbis to sign a proclamation which opposed in principle voiding marriages and Rav Schachter's refused to sign such a public statement. In short, following in the footsteps of his Rebbe, the Rov, Rav Schachter supports under certain conditions voiding a marriage.

#### 5. The authorization of voiding marriages by *halakhically* credentialed rabbis

With all due respect, prior to two hundred fifty years ago, there were responsa (*teshuvot*) authored by well-known authorities who voided marriages. See Teshuvot Rashi, Elfenbein ed. 198 (in principle); Teshuvot Ba'alei Tosafot 133; Ohr Zarua 761; Teshuvot Harashba 6:2, Teshuvot Tashbetz 1:1 (in principle); Terumat Hadeshen, Pesakim u'Ketavim 138 and Halakhoth Ketanot 2:197.

Yet, as you noted, generally speaking we have no evidence that marriages were being voided prior to that time. One explanation may be attributed to the fact that in the medieval ages, the secular government may have authorized the Jewish community to physically coerce husbands to give a *get* and/or *get* recalcitrant husbands were subject to social excommunication and consequently there was no need to address whether there were grounds to void marriages. Just as in medieval Spain and North Africa, the civil government authorized the Jewish community to mete out capital punishment<sup>3</sup>, similarly, *get* coercion may have been sanctioned in certain places.

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<sup>3</sup> See some of the medieval responsa of Rashba, Rivash, Yakhin u-Boaz, and others where the Rabbis address the halakhoth regarding capital punishment during the Middle Ages.

Consequently, it is unsurprising that Rabbis Y. Spektor, E. Klatzkin, Zvi P. Frank and M. Feinstein state in their respective responsa that if *get* coercion cannot be imposed legally (and therefore *halakhically*); then under certain conditions, marriages ought to be voided. See Teshuvot Ein Yitzhak 1 EH 24, Anaf 6 (38); Teshuvot Dibrot Eliyahu 48; Teshuvot Har Tzvi EH 2:181; Iggerot Moshe EH 1:79.

Who is empowered to void a marriage under certain conditions?

Rav Yitzhak ben Dovid of nineteenth century Kushta exclaims,

“If every Torah scholar would refrain from responding and say “how can I enter this flame of a mighty blaze due to the severity of the prohibition of illicit relations (“*ervah*”)?” . . . each man, a minor one like a great one (every Torah scholar, one of minor stature like one of major stature –AYW) is obligated to seek with candles, a careful search in holes and cracks possibly he will find relief for the benefit of the daughters of Israel to save them from *igun* . . . “(Teshuvot Divrei Emet 9).

See also Helkat Mehokeik, Shulhan Aruch EH 17:78; Beit Shmuel, Shulhan Aruch EH 17:124; Be’uir Hagra, Shulhan Aruch EH 17:131; Ketzot ha-Hoshen HM 3:2 and many others who require that the rabbi must possess the credentials to render a decision a ruling which would include matters of marriage and divorce. See Shulhan Aruch, Yoreh De’ah 242:14, Shulhan Aruch EH 49:3; Teshuvot Noda Beyehuda, EH 2, Teshuvot Nosafot 9 (Machon Yerushalayim edition)/

Though clearly many of the past rulings of voiding a marriage have been authored by Torah giants (*gedolei Yisrael*), nonetheless, for example, the majority of rabbinical court rulings under Israel’s Chief Rabbinate who have addressed the propriety of voiding a marriage have been handed down by *halakhically* credentialed rabbis who were not necessarily Torah giants. See *Piskei Din Rabbanayim* (hereafter:*PDR*) 3:225,10:241, 15:1,20: 239, File no.

1-14-1393, Yerushalayim Regional Beit Din, March 5, 2003; File no. 1-22-1510, Beit  
Din ha-Rabbani ha-Gadol, September 7, 2004; File no. 2433-21-1, Beit Din  
ha-Rabbani ha-Gadol, February 3, 2010; File no. 589138/2, Haifa Regional Beit Din,  
June 7, 2011; File no. 861252/1, Beit Din ha-Rabbani ha-Gadol, January 23, 2012;  
File no. 373701/10, Tel Aviv-Yaffo Regional Beit Din, March 12, 2012; File no.  
861974/1, Tzfat Regional Beit Din, January 21, 2013; File no. 861974/2, Tzfat  
Regional Beit Din, May 20, 2014; File no. 996047/2, Beit Din ha-Rabbani ha-Gadol,  
December 25, 2014; File no. 870175/4, Haifa Regional Beit Din, December 29, 2014;  
File no. 818315/7, Be'air Sheva Regional Beit Din, September 21, 2015; File no.  
1061015/2, Haifa Regional Beit Din, February 16, 2016; File no. 1068330/1, Haifa  
Regional Beit Din, January 12, 2017; File no. 932006/1, Be'air Sheva Regional Beit  
Din, February 1, 2017; File no. 1097040/10, Haifa Regional Beit Din, June  
6, 2017; File no. 905457/10, Tel Aviv-Yaffo, September 11, 2017; File no.  
1097040/10, Haifa Regional Beit Din, November 6, 2017; File no. 989812/1, Haifa  
Regional Beit Din, February 2, 2018 (*mamzerut*); Haifa Regional Beit Din, 5  
Tammuz 5778 (Rabbis Shloush, Edrei and Hazan- unpublished opinion); File  
1227676/1, Ashdod Regional Beit Din, August 1, 2019.

## 6. The rulings dealing with “a marriage in error”.

The writer of this column says,

“there were *gedolei Yisrael* who relied on the concept of *kiddushei ta'us* in  
specific cases, meaning that the marriage contract was deemed to have been  
based on a mistake and thus was able to be annulled (read: voided-  
AYW), although it was usually done concurrently with other reasons to be matter.”

And then your honor states,

“Additionally, this reasoning was mainly used for a *yevamah* whose husband had died and couldn’t get *chalitzah* from his brother. It wasn’t used to be a matter of a married woman...”

There are approximately 40 responsa (*teshuvot*) which voided *marriages* due to *kiddushei ta’ut* and numerous times this was the sole reason for voiding the marriage. For rulings which were based solely on *kiddushei ta’ut*, please see some of the responsa of R. A. Kriger, Kedushat Yisrael, R. Shalom Schwadron, Maharsham, R. A. Shapiro, Sefer Minhat Avraham, R. Frank, Har Tzvi and Iggerot Moshe.

Whether one can utilize the *halitzah* ruling to conclude that one can equally void the marriage of a husband is open to much debate. Even though a *shomeret yavam* (a widow waiting for her deceased husband’s brother to perform *halitzah*) is biblically prohibited to anyone else and her status is not as stringent as the status of a married woman who is biblically prohibited to anyone else, one may nonetheless apply *halitzah* rulings to marriage cases in matters of *kiddushei ta’ut*. See Yevamot 119a (Rava’s dictum); Teshuvot Terumat ha-Deshen 250; Teshuvot Noda be-Yehudah, Mahadura Tinyana EH 66(end) and compare with Mahadura Kama OH 21; Teshuvot Har Tzvi, EH 1: 95, 99.

Compare Teshuvot Torah Hessed OH 29; R. Safran, Teshuvot Rabaz 88(3) and Iggerot Moshe YD 2:46 who would reject such an application of *halitzah* rulings to marriage situations in light of the stringency of the status of a married woman. Based upon the above, there will be Rabbis who draw the analogy (*hekesheh*) from levirate marriage to marriage and others who reject it.

## 7. The Borough Park case

Though a well-known Satmar rov approved of our decision, *psak*, of voiding the marriage, nevertheless, subsequent to his approval, his *beit din* retracted the approval. Interestingly enough, the written statement of the *beit din* was authored by other Rabbis.

Concerning, your honor's statement,

“What the husband had done only contravened what we call *derech hamussar* and it was based on a Radvaz that wasn't related to the *sh'eilah*”

As we demonstrated, through a meticulous citation of rulings (including the Radvaz) is that there was a basic *halakhic* infraction regarding his relations with his wife. And as we quoted, in accordance with Rav Hayyim Sofer and Rav Hadaya he is to be deemed a rebellious husband (a *moreid*) for this infraction. The four citations which are labeled as “*derech hamussar*” reflect this basic infraction rather than a stringency (a *humra*). In addition to the cited rulings, see Beit Shmuel EH 76:18; Helkat Mehokeik EH 76:20; Hazon Ish, Ketubot 69:20. Based upon the foregoing as elucidated in detail in our decision and relying upon various authorities who endorse employing *umdana de'mukach* (the clear expectation), we invoked the *umdana de'mukach* (the clear expectation) that “with this understanding” she never would have been betrothed to him.

Regarding your observation that the husband was absent from the hearings and therefore he was unable to respond to his wife's allegations. Given the particular circumstances of this case as well as the nature of the wife's allegations, please be advised that we followed the procedural requirements mandated by Halakhah which allowed us to arrive at our ruling.

#### 8. The dynamics of a decision of “*kiddushei ta'ut*”

In your interview, your honor states,

“There's a harsh teshuva from Rav Chaim Berlin, who asks the rav who sent him the *she'ilah* to please not involve him, because the consequences were so far reaching”

We would assume that your honor is referring to Teshuvot Nishmat Hayyim 126.

The impression left with the reader of your interview is that Rav Berlin refuses to void a marriage.

However, in two other cases, he enters what is described above Rav Yitzhak ben Dovid “this flame of a mighty blaze due to the severity of the prohibition of illicit relations” and voided two marriages based upon *kiddushei ta’ut* and another reason. See Teshuvot Nishmat Hayyim 84 and 128.

If we travel to the Sephardic world, we encounter that Rav Shalom Messas in a few teshuvot opposes using *kiddushei ta’ut* to void marriages. See Shemesh Umagen 3, EH 27-28,57; 4, EH 18,94 and 110. However, in other places such as Shemesh U’Magen 4 EH 9-10 Rav Messas voided the marriages based upon *kiddushei ta’ut* and another reason.<sup>4</sup>

As your honor noted, a permission ( a *heter*) in a case is specific to the circumstances of that case. Consequently, in certain situations Rav Berlin and Rav Messas gave permission and in others they refused.

## 9. The nature of a Teshuva (responsum)

Regarding the teshuvot of Rabbi Feinstein, your honor observes,

“that he wasn’t making any *hetterim* (permissions-AYW) or *chumros* (stringency) for *Kll Yisrael* (the Jewish community-AYW) he was only providing *marei mekomos* (source references-AYW) so that people would know where to find answers to contemporary questions, and they shouldn’t rely on what he wrote for *Halachah l’maaseh* (practical halacha-AYW). For that you should consult a *rav* (rabbi-AYW).”

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<sup>4</sup> Even though in Shemesh U’Magen 4, EH 102, R. Messas deals with mamzerut and rabbinical prohibitions, it is clear from his teshuva that he freed the wife based upon a double doubt (i.e. Possibly the *kiddushin* were invalid and also possibly this case was a “*kiddushei ta’ut*”).

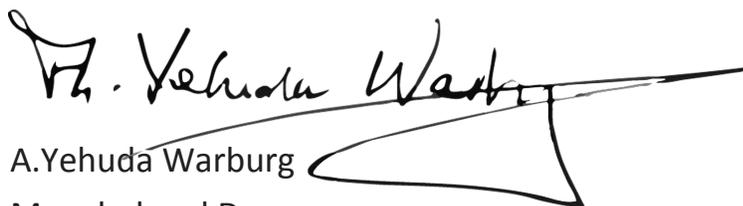
As noted by Your Honor, absolutely one should have a rabbinic authority who will answer one's halakhic questions. And clearly, as Your Honor notes a teshuva is an advisory halakhic opinion rather than a ruling of practical Halakhah (a psak din-a decision) However, your conclusion is limited to monetary matters where there is generally speaking a procedural rule that one cannot listen to the words of one party in the absence of the opposing party. Consequently, the substance of a teshuva which is a response to a question posed to one party without hearing the opposing party is viewed as an advisory opinion rather than a judgment. See Teshuvot Harashbash 230; Teshuvot Maharshal 24..

However, in matters of prohibitions such as marriage and divorce, responsa embody decisions in real-life situations. Whereas, the rulings of the restatements, Alfasi, Rambam, Rosh, Tur, and Shulhan Aruch are based on theoretical study, teshuvot deal with the interface between halakhah and reality. Consequently, if there exists a conflict between what a rabbinic authority rules in his restatement and his ruling in his responsa, we follow the ruling in his teshuva which is addressing a real-life problem. See Teshuvot Maharil 72; Rabbi Moshe Beneviste, Pnei Moshe, Helek 1,12; Rabbi Hayyim Volozhin, Teshuvot Meishiv Davar 24; Teshuvot Hut Hasheni 18.

In short, though we are mandated to ask our questions to a rabbinic authority, nevertheless, the rabbi renders a decision based upon the Talmud, the restatements, commentaries and on teshuvot. Given that there is neither an explicit Talmudic discussion regarding kiddushei ta'ut as it relates to a husband's defects nor is there any discussion in the restatements (Alfasi, Rambam etc.) and commentaries, we must rely on the teshuvot which have been written to deal with kiddushei ta'ut and under certain conditions furnish the grounds for voiding a marriage.

Be'ezrat Hashem, hopefully, some of the matters have been clarified.

Kol tuv and birkat Hatorah,



A. Yehuda Warburg  
Menahel and Dayan