

ISRAELI LEGISLATION AS BOTH HALAKHIC PROBLEM AND ITS SOLUTION: THE COMPLICATED CASE OF *HETER HA- MEKHIRAH*

AMIHAI RADZYNER*

1. Introduction

A decisor's attitude to using the *heter mekhirah* (hereinafter: "*heter*") in relation to land in Israel as a solution for agricultural labor during the *shemita* year¹ would appear to be a good litmus test for his attitude toward Zionism. The *heter* has become one of the more, if not the most, evident signs of halakhic creativity, shaped by a *weltanschauung* that has a positive view of the Zionist undertaking to resettle the Land of Israel, which began at the end of the nineteenth century.² Although the *heter* did not originate as a specifically Zionist idea, the decisor with whom the *heter* is most identified, and who wrote the most significant treatise surrounding this *heter* (*Shabbat ha-'Aretz*) and who defended it with all his might, despite his own reservations about it, was Rabbi Abraham Isaac Ha-Kohen Kook.³ Thus, it did not take long before the *heter* became identified with the Zionist outlook, leading in turn to the bitter struggle against the *heter* by those opposed to Zionism.

* Faculty of Law, Bar-Ilan University. I would like to thank Dr. Gilad Nathan from the Knesset Archives, and the Romie and Esther Tager Jewish Law Program at Bar-Ilan University Faculty of Law for their generous support of this research.

¹ Much has been written concerning the *heter*, its history and the debates surrounding it, see for example: Shlomo Yosef Zevin, *Le-Or ha-Halakha* (Jerusalem: Kol Mevaser, 2004), 138-58; Arye Edrei, "From Orthodoxy to Religious Zionism: Rabbi Kook and the Sabbatical Year Polemic", *Dine Israel* 26-27 (2009-2010): 45-145; Daniel Z. Feldman, "A Brief Overview of Some of the Issues Related to the *Heter Mekhirah*", *Tradition* 47:3 (2014): 8-30.

² See Edrei, *ibid.* and also: Arye Edrei, "*Shorshei ha-pesikah ha-zionit-datit: Rabbi Kook and the Sabbatical Year*", in *Al Da'at Ha-kahal: Avi Ravitzky Festschrift*, eds. B. Brown et al. (Jerusalem: IDI, 2012), 833-896.

³ See the abovementioned articles of Edrei, *ibid.* and also: Eliezer Malkiel, "*Ideologya ve-halakhah be-heter ha-mekhirah shel ha-Rav Kook*", *Shenaton Ha-Mishpat ha-Ivri* 20 (1997): 169-211; Hagi Ben-Arzi, *He-Hadash yitkadesh: Rav Kook ke-posek mehadash* (Tel-Aviv: Yediot Ahronot, 2010), 153-224; Benjamin Brown, "*Kedushat erez Israel be-rei pulmus ha-shemita*", in *Erez Israel ba-hagut ha-yehudit shel ha-meah ha-esrim*, ed. Aviezer Ravitzky (Jerusalem: Yad Ben-Zvi, 2005), 71-103.

In this article, I shall claim that decisors who, generally speaking, oppose the State of Israel and its laws have ascribed halakhic status to the latter in order to impugn the halakhic validity of the *heter*. This action has in turn spurred Religious Zionist elements to act towards amending legislation in such a way that would undercut the arguments of the *heter*'s opponents. This is an interesting case of using the law to advance a halakhic agenda, something that was raised—as we shall see, based on archival material—in discussions held in the course of the legislative process.

2. Deniers of the State of Israel Recognize its Sovereignty and its Laws

An example of the fact that the *heter* has become the ultimate test of a decisor's attitude to Zionism, and to the State that grew out of the Zionist Movement, may be found in the approach of *Haredi* (ultra-Orthodox) decisors who are prepared to make the rare exception of recognizing the sovereignty of the State and its statutes merely because such recognition serves their opposition to the *heter*. Thus, for example, Rabbi Avraham Yeshayahu Karelitz (hereinafter: "Hazon Ish") recognized the validity of the state laws solely for the purpose of negating the *heter*, as we shall see below; even more startlingly, this has been mimicked by the Satmar Rebbe, Rabbi Yoel Moshe Teitelbaum. The latter's opinion of the Jewish state in the Land of Israel is well known and requires no elaboration.⁴ Nonetheless, on one occasion the Satmar Rebbe was prepared, from a halakhic perspective, to recognize the sovereignty of the State of Israel. That occurred in the polemic he conducted in 1953 with an anonymous rabbi, whom he referred to as "one rabbi", who permitted the shaking of an Israeli *etrog* that had been grown during the *shemita* year, and held *inter alia* that the *heter mekhirah* could be relied upon.⁵ The Satmar Rebbe's

⁴ See for example: Zvi Jonathan Kaplan, "Rabbi Joel Teitelbaum, Zionism, and Hungarian Ultra-Orthodoxy", *Modern Judaism* 24 (2004): 165-78.

⁵ Joel Teitelbaum, *Kuntres Shalosh Teshuvot: be-in'yan etroge Erets-Yisr'ael bi-shenat ha-shemita*, (New York, 1953). Republished: *Idem, Responsa Divre Yo'el*, vol.1, Yoreh-Deah (New York, 1982), sec. 96-98. For the background on the writing of these responsa see: Menashe Fulop, "Yalkut Pesakim ve-Horaot be-Dinei Shmitah", *Pri Temorim* 31-32 (Kislev 5748): 71-182, 97-105. It is interesting to note that Rabbi Shlomo Goren reached an identical conclusion but emanating from a classical Zionist ideology which was diametrically opposed to that of the Satmar Rebbe, Shlomo Goren, "Tokpo shel Heter ha-Mekhirah ba-Shemita leahar Kum ha-Medinah", *Mahanayim* 26 (1959): 7-16. In his opinion the establishment of the State of Israel—something he viewed as a blessed event and a process in the advancement of the Redemption—led to all the land of Israel now being owned by the Jewish People through the instrument of the State, and as such it negated the possibility of making a *heter*, which had been possible before the founding of the State (as opposed to the

argument against selling fields to Gentiles as an acceptable solution assumes, *inter alia*, that the State of Israel is sovereign over the lands within its political borders, even if these are held by Gentiles and therefore this negates the reason for selling Jewish lands to Gentiles:⁶

And what has been cited from Rabbi Moshe Galanti's words and from the *Shemen HaMor* who permitted the sale...and even with regard to the first reason given by the *Shemen HaMor* that the land has been subjugated to the king and thus it is the property of a non-Jewish entity, even this reason is not relevant nowadays, since the land is subjugated to a Government which is bound by the laws of *Shemita*... and when I was in Israel last year during the *Shemita* year I was careful not to eat even from fields belonging to non-Jews for the same reason that fields of non-Jews are also subjugated to a Government bound by the laws of *Shemita*, and I cited proofs for this and spoke about this with the rabbinical elders of Jerusalem and they failed to raise any clear objection.

It would seem that the Satmar Rebbe was consistent in his views and therefore avoided eating any produce from Israel, even if it had been grown in fields belonging to non-Jews (and not only from fields sold to them for the purpose of *shemita*). However, before adopting this view, he proposed that non-Jewish produce in Israel be provided to *Haredim* in particular, but said that the evil State prevented this solution:⁷

...behold this Government is a heretical state, G-d save us from them, and they transgress the entire Torah, and all its laws and customs are non-Jewish statutes. They do not have one Law which accords with the Holy Torah, quite the contrary, they perform all types of tricks to violate religion ... it is unknown but one may speculate that approximately 20 percent of the State observe the Torah and Mitzvoth for whom there are sufficient fruits and vegetables from non-Jewish fields, for the number of non-Jewish fields basically follows the same proportion, and had the State wished to follow democratic principles and provide every person according to his desire... they could have seen to it that

Satmar Rebbe's position and other *Haredi* rabbis who viewed the *heter* as invalid and lacking force now and always). Rabbi Goren's position was bitterly attacked by Zionist rabbis, including Rabbi Zvi Yehuda Kook (below n. 78). I hope to return to this matter in another place.

⁶ *Kuntres Shalosh Teshuvot*, 83-84; *Responsa Divre Yo'el*, p. 372.

⁷ *Kuntres Shalosh Teshuvot*, 60-61; *Responsa Divre Yo'el*, p. 359.

observers of *shemita* would be given produce from non-Jewish fields and then there would be no need for any objection in the world. And it is well-known that under the law no field owner may sell to an individual; rather the State takes everything and arranges how the food should be distributed, and this causes tension since it is impossible to purchase directly from non-Jews but one must purchase from the government, and it is they who gave assurance at the beginning that they would arrange that *shemita* observers would be given produce from non-Jewish fields but in practice they did not do so since they plan to undo religion... And therefore it constitutes an offense for which one should rather die than commit it.

The Satmar Rebbe's inconsistent position was given similar expression by Rabbi Moshe Sternbuch, the current head of the Edah Haredith rabbinical court in Jerusalem. He too declares that the Israel's sovereignty has halakhic significance, but only in order to deny the *heter mekhirah's* validity. Thus he writes in the chapter on the *heter mekhirah* in his book on *shemita*:⁸

And in this respect it would appear necessary to explain further that since the government is currently in the hands of Jews, albeit non-observant ones... even non-Jewish landowners pay taxes and rates to Israel and their ownership is dependent on the government which sometimes by an appropriation order may appropriate their fields, and thus nowadays non-Jews do not exercise absolute ownership over their fields as they did in the past. This applies even more so to fields which Israel granted to them by the imaginary deed of sale, even if it is legal, especially since the State has the power to expropriate the land for use by the Jewish population. In such a case the non-Jew's acquisition certainly cannot expropriate the holiness of the land so that it is equivalent to land abroad, and since the non-Jew does not have complete ownership, Israel still retains rights in the field.

However, Rabbi Sternbuch—who, after writing these words notes the aforementioned Satmar Rebbe's opinion and the stringency he took upon himself because of Israel's sovereignty—has no interest in

⁸ Moshe Sternbuch, *Ha-shemita ke-hilkhatah* (Bene Berak, 2007), 130. These words appear verbatim in the earlier editions of this work.

forbidding non-Jewish produce in Israel, the primary source of food for his flock during the *shemita* year. Thus, he tries to justify the “simple custom today in Israel of allowing even those who are punctilious in their observance” to eat non-Jewish produce and not to assign such produce any sanctity of *shemita*, “even though the rates are paid to Israel, which is sovereign”—an argument which in his opinion is sufficient to prevent using the *heter mekhirah*.⁹ An additional problem with Rabbi Sternbuch’s position is that in other contexts unrelated to *heter mekhirah* he does not actually recognize the principle of the State of Israel’s inherent ownership,¹⁰ nor its halakhic ability to impose mandatory taxes; even non-Jews are not subject to such taxes.¹¹

This is not the only place in which Rabbi Sternbuch grants halakhic status to Israeli law when waging his battle against the *heter mekhirah*, and where his attitude is at odds with his general approach that there is no concept of *dina de-malkhuta* in the Land of Israel.¹² He does so in two other contexts, to which this article will be dedicated. Thus, he writes:¹³

Dina de-malkhuta: It is an accepted law in our country that one may not transfer ownership in land unless the transfer is registered in the Land Registry Office (hereinafter: *Tabu*—

⁹ *Ibid.* 131 and see also p. 133. This is not the place to outline the convoluted position adopted by Rabbi Sternbuch, through which he tries to distinguish between these two issues. The person who noted these difficulties in Rabbi Sternbuch’s thought process was the Satmar Hassidic personality, Rabbi Fulop, above n. 5, 140-1.

¹⁰ Moshe Sternbuch, *Resp. Teshuvot ye-hanhagot*, vol. 3 (Jerusalem, 1997), sec. 338. Regarding the possibility of taking a universal separation of *terumoth* and tithes from produce that has been preserved in government warehouses, “The current Government of heretics has no ownership rights and even more so they cannot expropriate ownership, since the Government does not have the status of an entity.”

¹¹ *Ibid.* sec. 476, regarding the obligation to pay taxes: “What has been stated here applies specifically to a non-Jewish government since we are subject to their taxation laws and municipal rates by decree of our Sages, but in Israel, aside from the fact that we do not say we are under their rule, as I have heard that a lot depends on favoritism and on clerks who are like customs officials who have no set fee, where everyone makes arrangements according to his abilities, in this case we also do not apply the law of *dina demalkhuta dina*, even concerning a non-Jew.”

¹² *Ibid.* sec. 462: “And even though we do not say *dina de-malkhuta dina* in the Land of Israel.” Also *ibid.* vol. 4 (Jerusalem, 2002), sec. 309: “And also here in the Land of Israel where there is no *dina de-malkhuta dina*.” Also from the responsum mentioned above in n. 10 it emerges that there is no *dina de-malkhuta dina* in the Land of Israel, and this also appears explicitly in the contents of this volume for this section. For the halakhic views which distinguish between the application of this rule in Israel and overseas see: Eliav Schochetman, “*Hakarat hahalakhah be-ḥukei medinat Israel*”, *Shenaton ha-Mishpat ha-Ivri* 16–17 (1990–1991): 417–500, 434-7.

¹³ *Ha-shemita ke-hilkhatah*, 124-5. These words also appeared *verbatim* in an earlier edition of this book.

the name of this office in the Israeli legal system; from the Turkish word *tapu*) even if the land is sold for a limited period and *dina de-malkhuta dina*.

From the statements of some of the greatest decisors it appears that one ought not be too punctilious about the principle of *dina de-malkhuta* in a sale, and it is sufficient if the sale accords with the laws of the Torah—and this is so when the authorities are not strict about this. However nowadays ... a sale has no validity if there is no precise registration of it in the *Tabu*, and thus the Hazon Ish of blessed memory held this to be the *halakhah* ... for nowadays the Government insists that there be a registration especially of lands sold to a non-Jew, and there is no acquisition without a registration in the *Tabu*...

Moreover, since the Government is strict about preventing the sale of land to non-Jews, the non-Jew cannot acquire anything which he has no right to acquire, and a person cannot acquire anything lost which he has no actual right to acquire, therefore there is no acquisition whatsoever ... It emerges therefore that the sale of land by a deed of sale executed by the Rabbinate has no validity whatsoever, neither under Torah law nor under the state laws.

However, by the time these words were published, both of Rabbi Sternbuch's "legal" arguments had been irrelevant for many years, owing to special legislation which shall be analyzed below.¹⁴ I shall argue that the Religious Zionist proponents of the *heter mekhirah* used their political power to influence the drafting of Israeli law in a way that would strengthen the halakhic validity of the *heter*. In other words, I shall show how a secular state legislature—the Knesset—used its power to solve halakhic problems that were and still are raised by the *heter*'s opponents, as we saw in the case of Rabbi Sternbuch, and others, as we shall see below.¹⁵

I will actually begin with the second "Law" mentioned by Rabbi Sternbuch, because it was enacted in the Knesset before the first one,

¹⁴ Rabbi Sternbuch's lack of familiarity with Israeli law also finds expression in his statements claiming that Israeli law permits the sale of land for a limited period. This is in fact only possible for the purposes of *shemita*; in every other case it is not possible to sell land for a limited time period. See below n. 24.

¹⁵ Below notes 96-100. The ignorance (or lack of knowledge) of the Law which permits selling land to non-Jews may also be seen in Fulop, 161

and it marked the first attempt at strengthening the *heter mekhirah* through secular legislation.

3. The Israel Lands Law and the Problem of Selling State Land

In the State of Israel there is no law specifically prohibiting the sale of land to non-Jews.¹⁶ Therefore, it appears that Rabbi Sternbuch was referring to Basic Law: Israel Lands of 1960,¹⁷ which in its very first section titled “Prohibition on Transferring Ownership” proclaims:

The ownership of Israel lands, being the lands in Israel of the State, the Development Authority or the Keren Kayemet Le-Israel, shall not be transferred either by sale or in any other manner.

In practice, this Law applies to 93% of the lands in Israel, including many lands that are leased for the purpose of agricultural work. Consequently, we are faced with a reality in which the Law makes it practically impossible to use the *heter mekhirah* for the overwhelming majority of agricultural plots in Israel. This is because if ownership in the land cannot be transferred, irrespective of whether the purchaser is a Jew or Gentile, it follows that one cannot implement the *heter*. Hence, any sale of lands is devoid of legal significance and as such has no halakhic validity, and as Rabbi Sternbuch phrased it, “The non-Jew cannot acquire anything he has no right to acquire ... it emerges therefore that the sale of land with a deed of sale that is executed by the Rabbinate has no validity whatsoever.”

However, even if we disregard the fact that two pages earlier, Rabbi Sternbuch actually assumes that from a legal perspective one may sell state lands (even to non-Jews),¹⁸ his reliance on this Law as an

¹⁶ It is possible that Rabbi Sternbuch was referring to a section in the bylaws of the Jewish National Fund (JNF) which owns a large portion of state lands and is only permitted to lease these to Jews alone. However the real problem with JNF land is the same problem that we shall deal with forthwith concerning Israeli land, and it is that this land cannot even be sold to Jews, but only leased. In other words the legal problem, insofar as there is one, is the fact that State or JNF lands may not be sold, regardless of whom it is sold to. Regarding the JNF’s handling of the *Heter Mekhirah* see at length: Amit Gil-Bayaz, *Shikuley idiologya ve-halakhah be-heter ha-mekhirah uve-imuzo al yedey ha-keren ha-kayemet u-medinat Israel*, MA Thesis, Bar-Ilan University 2005. See esp. 81-99. On the relationship between the JNF Bylaws and the Israel Lands Law which shall be discussed immediately below see: Yosi Kats, “*Veha-arets lo timakher li-tsemitut*”: *Moreshet Keren Kayemet le-Yisra’el ye-hanhalat ‘ekronoteha be-hakikah be-Yisra’el* (Jerusalem: ha-Makhon le-ḥeker toldot KKL, 2002).

¹⁷ Basic Law: Israel Lands, *Sefer Ha-Hukkim* No. 312 of the 29th July, 1960, p. 56.

¹⁸ *Ha-shemitaḥ ke-hilkhatāh*, 123. There he assumes that the problem lies not the Law’s provisions but in the fact that the sellers, including the State, do not genuinely intend to sell

argument against the validity of the *heter mekhirah* stems from only a partial knowledge of the law. Section 2 of the Basic Law states that there may be exceptions to the provisions of sec. 1, if they have been established by law. Indeed, at the very time of the enactment of this Basic Law, the Israel Lands Law¹⁹ was also enacted, establishing exceptions to the provisions of the Basic Law. Section 3 of the Israel Lands Law stated as follows:

The Basic Law shall not affect acts designed solely to enable observance of commandments on the Sabbatical year.

Therefore, the Israeli statute that established a prohibition on the sale of state lands proclaimed at the same time that this prohibition does not apply to the sale of lands within the framework of the *heter*. Obviously one cannot have one's cake and eat it too by saying that the prohibition of the sale of land is *dina de-malkhuta* which is halakhically binding, whereas the exception that appears in the Law and is intended to clarify the prohibition lacks any halakhic significance. One must choose: either Israeli law has the status of *halakhah* or it does not, but one can in no way claim that there is a legal problem in the very sale of lands to a non-Jew because of the prohibition on the sale of state lands.

Obviously, the exception that permits the sale of state lands within the framework of the *heter* was not created *ex nihilo*. It was supported by elements who understood that without this exception, a legal impediment would be created, which in turn would create a halakhic impediment to implementing the *heter*. In other words, the section was inserted into the Law precisely to avoid arguments of the kind raised by Rabbi Sternbuch. Unsurprisingly, those mainly responsible for enacting this section belonged to the stream of Religious Zionism, which on the one hand supports the *heter*, but on the other hand assigns religious significance to the State of Israel and grants halakhic status to its laws—a status which, generally speaking, Rabbi Sternbuch denies. Let us trace the history of this section.

In a Bill submitted to the Knesset by the Ministry of Justice,²⁰ the exception of “upholding the observance of *shemita*” does not appear

the lands and are even opposed to the idea that Arabs will acquire them. In other words, it involves pure deception. In this regard see below in notes 38 onwards.

¹⁹ Israel Lands Law 5720-1960, *Sefer Ha-Hukkim* No. 312 of the 29th July, 1960, pp. 56-7.

Both Laws were submitted to the Knesset simultaneously. In the explanatory comments to the Bill (*Hatza'ot Hok* 1960, 35) it was stated: “This Bill comes to establish the types of lands and transactions to which the provisions of the Israel Lands Bill, concerning a prohibition on sale shall not apply”.

²⁰ Above n. 19.

at all. Neither was this subject raised during deliberations in the Knesset plenum at the first reading of the Law.²¹ It was raised, in a draft version similar to that adopted in the Law, by MK Michael Hazani in the Finance Committee of the fourth Knesset, which discussed the Law after it had passed its first reading. Hazani, a member of the Religious Zionist Party, had previously worked in agriculture, contributing significantly to the religious agricultural enterprise in Israel, and this issue was therefore close to his heart. Hazani had already managed to raise the issue of *shemita* in the deliberations of the Finance Committee in the third Knesset when discussing the previous version of the Bill, a bill that also regulated exceptional cases in which state lands could be sold.²² In his words,²³ the Law should establish that there is no problem in a case where -

... [t]here is a temporary sale concerning the laws of *shemita*. I shall explain my request: There is no farmland in Israel, including that belonging to *Ha-Shomer Ha-Tsair*, which does not take the trouble to draw up a deed of sale for its lands ... in order that this matter conform to the Law, I recommend inserting this supplement.

Hazani's recommendation was opposed by the Attorney General, Haim Cohn, who raised a fundamental legal objection:²⁴

There is a fundamental difference between the laws of the Torah and secular law in this regard. While the laws of the Torah recognize a sale where ownership is restored, and as I understand your version, you speak about a temporary sale. This is unknown in secular law. If you make a temporary sale this is called a rental or lease.

Indeed Hazani's recommendation was rejected by the Committee after additional fierce opposition on the part of Haim Cohn.²⁵ Hazani did not give up on this issue. He reintroduced his previous recommendation after the elections, and once again faced the well-known argument, this time from MK Yohanan Bader, who aside from

²¹ *Divre HaKnesset*, 22.2.1960, 675-6; 680-9.

²² National Lands Bill, *Hatsa'ot Hok* 1959, 42

²³ Minutes of the Finance Committee of the Third Knesset, 23 September, 1959, p. 5.

²⁴ *Ibid.* p. 10. Indeed, as opposed to the halakhah whereby a sale for a limited period is considered a sale for all intents and purposes (see for example: Mishneh Torah, *Mekhirah* 23:5), the Israeli legal concept of sale was consistent (and remains so) that there can be no predetermined limited-time ownership. See Joshua Weisman, *Dine kinyan: ba'alut ye-shituf* (Jerusalem: Sacher Institute of the Hebrew University, 1997), 71-6.

²⁵ Minutes of the Finance Committee of the Third Knesset, 14 October, 1959, p. 6.

his fundamental position that the sale was a fiction and one could not allow the Law to take cognizance of fictitious sales, added:²⁶

I would caution MK Hazani of the danger into which he places this very transaction [in the Law] ... we would be inserting into Israeli law an expression which does not currently exist: “temporary sale”.

Hazani, however, never gave up hope, and he adopted a different direction that did not refer to a “temporary sale”. In a meeting of the Finance Committee on 6 July, 1960²⁷ Hazani suggested adding another exception to the list of exceptions in the Israel Lands Law which would make it possible to sell state lands, and in his words: “Adding a sentence saying: ‘The actions needed to allow the observance of *shemita*’.” MK Yosef Sapir of the General Zionists Party immediately understood that there would be a conflict between the *heter* and the principle underlying the Law: “I understand that regarding *shemita* there is a need to sell ownership. How is it possible to sell ownership in land, assuming it belongs to the Jewish National Fund and its sale is forbidden?” However, at this stage it was decided to postpone the discussion on this question. Hazani again raised the issue of *shemita* at the next session.²⁸ He argued that he could not support the Law if it did not make an exception for *shemita*, which then led to a dispute in which some of the members clearly distanced themselves from this recommendation. A few days later,²⁹ however, the Committee passed a recommendation made by Hazani which was virtually identical to the section that was eventually enacted: “Adding section 3: Observing the commandment of *shemita*—The Basic Law shall not affect acts designed solely to enable the observance of the commandment concerning the Sabbatical year.” The word “solely”, which eventually appeared in the final version of the Law, was inserted at the initiative of MK Yohanan Bader, who was extremely dissatisfied with the fact that a religious issue had found its way into legislation, and who replied that there was absolutely no room to discuss the issue of *shemita*. According to him, it was essential to emphasize that the exception applied solely to maintaining

²⁶ Minutes of the Finance Committee of the Fourth Knesset, 2 June, 1960, p. 6. It should be noted that Israeli law eventually recognized a temporary sale for *shemita* purposes, see below alongside n. 82.

²⁷ *Ibid.* 6 July, 1960, p. 5.

²⁸ *Ibid.* 10 July, 1960, pp. 11-2.

²⁹ *Ibid.* 18 July, 1960, pp. 9-11.

the observance of *shemithah*, but there would be no transfer of ownership as far as other matters were concerned.³⁰

It is very interesting to note Hazani's response to Bader's reservations regarding the fact that *shemithah* was raised at that discussion:

From its own perspective, *halakhah* does not require the law's consent or legal approval. However, *halakhah* does seek something else: not to do something that could contravene of the laws of the State. All that we wish for is that the action we take—which we consider an acquisition—not be in conflict with the law of the State. For if it were to be in conflict, then even from the halakhic perspective there is no acquisition. Since this is the case I need not enter into a dispute with anyone as to whether or not this has the validity of an acquisition from the perspective of the law. I only wish that the law would not affect these actions, or that these actions do not in contravene the law.

This essentially is the idea underlying this section: *halakhah* does not require the State's approval, nor do halakhically valid acquisitions require the law's approval, although they cannot contravene the law, because then they lose their halakhic validity.³¹ If the law explicitly states that one cannot sell state lands and provides no exception for the purpose of executing the *heter mekhirah*, the latter will be useless in upholding the observance of *shemithah*. Therefore it was important for Hazani, who was obviously in favor of the *heter* and wished it to have the validity of *dina de-malkhuta*, to add this section, and he indeed succeeded in doing so.

This was the first case in which a Religious Zionist MK enlisted state laws to strengthen the foundations of the *heter mekhirah*. We shall now proceed to the second case, which is even more significant and interesting.

4. The Problem of Registration in the Tabu and the Israeli Lands Law

As stated, Rabbi Sternbuch mentioned an additional problem relating to the *heter mekhirah* under *dina de-malkhuta*: the problem that the sale

³⁰ Hazani agreed to this, however below we shall see that subsequently, the restrictive word "solely" was considered problematic when the Knesset discussed a similar proposal. See below alongside n. 89.

³¹ The question as to whether there is halakhic validity to an act of acquisition when the state laws establish that it is invalid will be the focus of the next section.

of lands during *shemita* is not executed through registration of the transfer of ownership in the Lands Registry Office, and thus apparently has no validity under Israeli law.³² It is noteworthy that in contradistinction to his statements regarding the *heter mekhirah*, when it comes to the sale of *ḥametz* (leaven, the consumption of which is prohibited on Passover) Rabbi Sternbuch holds that one need not consider the land laws of the state,³³ even in relation to the land laws of foreign countries, where the status of *dina de-malkhuta* is much stronger than in Israel (certainly according to Rabbi Sternbuch's position)!³⁴ Is it then the case that there is an added stringency for negating the *heter*?

Below I shall discuss Israeli law; now, however, it would seem appropriate to open the discussion with a perusal of the views of probably the greatest opponent of the *heter mekhirah* i.e., the Ḥazon Ish. His was the view upon which Rabbi Sternbuch relied, and one which also appears to be based on the fundamental opposition to the *heter*.

4.1 The Ḥazon Ish's view regarding the *heter mekhirah*

³² Land Law 5729-1969, sec. 7(a): "A real estate transaction requires registration; the transaction is completed by registration." Below we shall see that the Israeli Law did not innovate such a requirement but that it existed already in the nineteenth century.

³³ *Resp. Teshuvot ye-hanhagot*, vol. 1, sec. 295: "It appears that *dina de-malkhuta* only applies to a law where the State has a specific concern, but here it appears that for religious reasons since everyone knows that it is only for a few days and is basically fictitious the State is not punctilious and one does not have to be concerned about it at all." The question was asked regarding South Africa where an Apartheid-era act prohibited the sale or rental of rooms in white areas to blacks, yet the Jews would sell *ḥametz* to their black domestic help. As is known when selling *ḥametz* one also sells the place where the *ḥametz* is stored (*Mishnah Berurah* 448:12). It should be noted further that according to Rabbi Sternbuch there apparently is no problem with everyone knowing that the sale of *ḥametz* is a fictitious act, however when selling lands he sees such fictitious act as a significant flaw which negates the validity of the sale. See his *Ha-shemita ke-hilkhatah*, 124. Later on Rabbi Sternbuch adds in the aforementioned response: "The late period rabbis wrote that they regarded there to be a deed of sale even where there were no revenue stamps, even though under contractual law a deed of sale requires revenue stamps, since in such a sale the authorities would give their consent and were not punctilious and therefore one should not doubt the sale and it applies." Below (alongside n. 73) I shall discuss the source for this rule, from which it emerges that if the authorities have no problem with a sale that does not follow the ordinary rules of sale, the sale is valid, and this is precisely what has happened with Israeli law regarding the sale of lands in *shemita*.

³⁴ See above n. 12.

In a very famous letter (hereinafter: the “letter”) quoted by many of the opponents of the *heter* to this very day, the Ḥazon Ish outlines three objections to the *heter*:³⁵

...And the sale of the entire land of Israel to Arabs is nothing and is completely unrelated to the sale of *ḥametz*.

1. Because the lands are sold by an agent, and there cannot be a valid agency for committing an offence; 2. Because they were not transferred to them in the *Tabu* and if the Arab was to enforce the bargain we would say to him that even according to your own law [the law of the State], without registering at the *Tabu* there is no acquisition; 3. Because every person knows in his heart that there is no real acquisition. With the sale of *ḥametz* we say that a person will not want to violate [the prohibition against] having *ḥametz* on his property and therefore is committed to the sale, but here, [just] because they want to render the ordinance of *shemitaḥ* obsolete, they cannot sell the entire land to a non-Jew. Quite the contrary: it is much better for us to observe *shemitaḥ* rather than sell all the land to a non-Jew.

The rationale I shall focus upon is obviously the second one. However I would like to comment briefly on the two other rationales. The first rationale is based on the assumption that the sale of land is forbidden by the Torah under the prohibition of *lo teḥonem* (“show no favor to them”) which disallows the sale of land in Israel to non-Jews (“do not give them a foothold - *ḥanayah*”).³⁶ Since the sale, generally speaking is executed through an agent appointed by the landowner, the agency is null and void according to the *halakhah*, since it goes against the Torah, and therefore the sale is invalid. The prohibition of *lo teḥonem* was the central argument of opponents of the *heter*, and one which was already challenged by Rabbi Kook and his predecessors who favored the *heter*. This is not the place to discuss this issue. It is sufficient to state that in this instance too, the positions of the parties

³⁵ *Ḥazon Ish – Zeraim*, (Bene-Berak, 1972), 306 (*Shevi'it*, addendum to sec. 27). The letter was already published in 1954: *Ḥazon Ish – Hoshen ha-mishpaṭ*, part 3 (Jerusalem, 1954), 77 (Likutim, 35:9). According to the Ḥazon Ish's brother-in-law, R. Ya'akov Israel Kanievski, the letter was written during the *shemitaḥ* of 1951-1952 (see the letter in the introduction to the book Izhak Yehiel Gross, *Milhemet Mitzyah* (Jerusalem 1959)).

³⁶ B. Avodah Zarah 20a; *Mishne Torah*, Laws of Idolatry 10:4; *Shulḥan Arukh Yoreh Deah* 151:1. This rationale against the *heter* was already expressed by Naftali Zvi Yehuda Berlin, “*Kuntres Devar ha-Shemitaḥ*” in: *idem*, *Responsa Meshiv Davar* (Warsaw, 1894), 115.

are influenced by their world view with respect to the Zionist enterprise of settling the land.³⁷

The third rationale establishes that the sale is invalid because the seller (and apparently the buyer as well) does not relate to it seriously and is not truly interested in transferring ownership in the land (which is in contrast to the similar case of selling *ḥametz* to a non-Jew on Passover eve).³⁸ It seems that the Law that will be analyzed later on assists in rebutting this claim.³⁹ Supporters of the sale agreement raised arguments against the distinction made by the Hazon Ish between selling *ḥametz* and the *heter* (even he himself did not always hold that there was a problem of subterfuge in the *heter*⁴⁰), especially when it is the Chief Rabbinate which sells most of the *ḥametz* in the State of

³⁷ The technical rationales for Rabbi Kook were that nowadays *shemita* is only a rabbinic prohibition and that the sale is one to Muslims, whereas the prohibition only applies to idol worshippers. According to most halakhic decisors, Muslims do not fit into the latter category. He added further that the prohibition does not apply to selling to a non-Jew who already has some ownership of land in Israel. Nonetheless he does not hide the fact that the primary basis for his opinion is that if one were to uphold the laws of *shemita* because of a stringency concerning the prohibition, it would harm the goal of the commandment—strengthening Jewish occupation of the Land of Israel. Obviously in the view of many decisors, including opponents of the *heter*, such instrumental rationales in general, and this one in particular, are not strong enough to cancel the prohibition and it is not up to us to discern the aims of the Torah. What is more, some of these opponents certainly did not share Rabbi Kook's positive position concerning agricultural settlement and cultivation of the land. Needless to say, this argument continues today between proponents of the *heter* and opponents thereof []. For further exploration see Edrei (above n. 1), 82-6; Malkiel (above n. 3), 194-200 and 209-11; Ben-Arzi (*ibid*). For further defenses against the argument of *lo teḥonem*, see Zevin (above n. 1), 148-51.

³⁸ Sternbuch, *Ha-shemita ke-hilkhatah*, 123-4 obviously accepts this argument and develops it. This is not the place to dwell on this claim, which is factually incorrect and which claims that most of the lands are sold by the rabbinate without knowing who the owners are. This was certainly not the case with the sale of lands by R. Ze'ev Weitman who served as chair of the *Shemita* Committee of the Chief Rabbinate for the 5768 *shemita* year, and on the eve of which his book was published. See Ze'ev Weitman, "*Heter Mekhira be-Shmita 5768*", *Tzohar* 32 (2008): 83-94, 85: "The significant change lay in the fact that the sale was made directly between the Land Administration and the buyer as one would execute any real and serious sale of land, and not through a delegated agent of the sellers to the rabbinate in order for the latter to execute the sale in their name—something which is only practiced in halakhic sales". Thus the *heter mekhirah* on this point is more serious than the sale of *ḥametz*. For more on the legal status of a sale contract see the judgment in CAA 6932-06-08 *Eli et al v. Israel Land Administration*, Central District Court, 8 February, 2009. What the judgment says there strengthens Rabbi Weitman's statements concerning the legal status of the *heter* and contradicts Rabbi Sternbuch's claim that the sale may be performed without the knowledge of those holding the land. Here too a secular authority strengthens the halakhic position. Rabbi Weitman himself related to the court's decision in his article: Ze'ev Weitman, "The Validity of the *Heter Mekhira* in light of the Court Ruling", *Hama'yan* 49:3 (2009): 43-6.

³⁹ See below n. 90.

⁴⁰ See below n. 53.

Israel. Does it really enter anyone's mind that the seller and the buyer truly intend exercising the agreement?⁴¹ Furthermore, with regard to our general discussion it is important to note that here too, Israeli law was used to significantly minimize the argument of a problem of intent. The sophisticated contract which was used is described in detail in R. Ze'ev Weitman's article. As he states:⁴²

These changes brought about a situation in which one could no longer distinguish between this sale of land and other halakhic sales and arrangements which were carried out for various purposes (the sale of *ḥametz*, *mavkirot* [beasts that had not previously given birth], *heter iska*, *pruzbul* etc.) but rather the opposite is true. The sale is done with the full intent and understanding of its significance on the part of the sellers and the buyer, and the sale is also performed in the most efficient and valid way from the legal statutory standpoint pursuant to the state laws; thus a legally binding contract is signed between the Israel Lands Administration, which owns the land, and the buyer. It must be reiterated that there is no longer the possibility of raising the argument that it is a legal sham, that the intent to enter into a contract is lacking or that it desecrates G-d's name.

As stated, I am primarily interested in examining the second rationale and the way in which Israeli legislation has dealt with it. This rationale was proposed long before the Ḥazon Ish mentioned it, and I shall discuss its history immediately below. However, it may also be contended here that quite possibly, the ideology opposing the *heter* has shaped this rationale.

First, on the broader plane of the attitude to the state laws, it should be borne in mind that the Ḥazon Ish, who wrote these things in 1951 or 1952, here grants binding status to a law of the State of Israel. It is difficult to find another place where he makes a similar argument. On

⁴¹ For an extensive discussion see: Shemarya Gershuni and Eitam Henkin, "L'Amitah shel Shemitah", *Alonei Mamreh* 121 (2008): 39-47, 45-6. For Rabbi Kook's response to this claim see Zevin (above n. 1), 146-7, and see other sources which refute the argument of a legal fiction Israel Rosen, "Haaramot Hilkhatiyot keTakkanot Tzibur", *Teḥumin* 21 (2001): 209-22, 216-22; Yair Ben-Dov, "Gemirut Daat beHeter Hamekhirah baShevi'it", *Teḥumin* 21 (2001): 22-27; Ze'ev Weitman, "Tokef Heter Hamekhirah miBehinah Hilkhaitit uMishpatit", *Teḥumin* 27 (2007): 13-28, esp. n. 1. For further problems with the distinction made by the Ḥazon Ish and others between the *heter mekhira* and the sale of *ḥametz* and other legal fictions see: Benjamin Brown, *Ha-Ḥazon Ish: ha-posek, ha-maamin u-manhig ha-mahapekha ha-ḥaredit* (Jerusalem: Magnes 2011), 757-9.

⁴² Weitman, *Shmitat* 5768, above n. 38, 85.

the contrary, there is evidence attesting to the fact that he held a very different opinion in a case very similar to the *heter mekhirah*: the sale of *mavkirot* to a non-Jew to avoid the sanctity of a firstborn animal,⁴³ written soon after the writing of our letter.⁴⁴ According to what has been said in the name of the rabbi involved in the episode, the Ḥazon Ish was asked:

In the first years after the State was founded, the Arab minority was still living enclosed in the territorial jurisdiction of the military administration and Arabs were forbidden to travel freely throughout the country. It was therefore impossible to bring a non-Jew into the *Moshav* in order to sell the *mavkirot* by both a monetary sale and a physical delivery of the animals as required by *halakhah*...[therefore the rabbi of the *Moshav* asked the Ḥazon Ish] whether it suffices to register the sale in the animal registry of the Ministry of Agriculture, where it would be recorded that the owner from this day onwards was such and such a Gentile—a registration which would grant legal validity to the sale—from the halakhically recognized convention that a deed of sale may be completed under the principle of *dina de-malkhuta*. The Ḥazon Ish replied: “Here in the Land of Israel there is no concept of *dina de-malkhuta*. Here the State is nothing more than a self-appointed tax collector.”⁴⁵

It is very difficult to reconcile this evidence of the Ḥazon Ish’s position with what has been above quoted from the Ḥazon Ish’s letter regarding the *heter mekhirah*. Both these cases involved a non-Jewish buyer who assisted a Jew in avoiding a prohibition; however, whereas the *heter mekhirah* is invalid if not executed according to the state laws, the sale of *mavkirot* is invalid precisely when it follows the laws of the State! We could, perhaps, have dismissed such evidence as nonbinding were it not for the fact that there is additional evidence to the fact that the Ḥazon Ish regarded the laws of the State of Israel as laws having

⁴³ *Shulhan-Arukh*, Yoreh Deah 320:6

⁴⁴ Shlomo Cohen (ed.), *Pe'er ha-dor: perakim mi-masekhet hayay yi-yetsirato shel Avraham-Yesha'yahu Karelits*, vol. 3 (Bene-Berak, 1970), 294-6. It is noteworthy that the letter discussed above negating the *heter mekhirah* appears roughly 60 pages before, at 227-8.

⁴⁵ This terminology comes from B. Nedarim 28a and Baba Kamma 113a and it is ruled there that a self-appointed tax collector does not operate with the permission of the king.

the status of a “self-appointed tax collector”.⁴⁶ This position taken by the Ḥazon Ish is strengthened by the position on state laws held by some *dayanim* who view themselves as his followers, especially his nephew Rabbi Nissim Karelitz, who also heads the Kollel Ḥazon Ish.⁴⁷ It is therefore interesting to note the words of the Ḥazon Ish’s brother-in-law and confidante, Rabbi Israel Jacob Kanievsky.⁴⁸ In a chapter titled “In re Fields of Non-Jews during *Shemittah*” the author discusses the question of whether there is a problem with the fact that the ownership of the non-Jewish fields might be in the hands of the Jewish government in Israel, which would perhaps prohibit their produce.⁴⁹ He suggests that one should possibly take cognizance of this fact, for the Israeli law might have the status of *dina de-malkhuta* vis-à-vis non-Jews (but not vis-à-vis Jews) and this apparently is the view of his brother-in-law, the Ḥazon Ish.⁵⁰ In summing up, however, he does express some doubt: “However I do have some thoughts especially regarding *dina de-malkhuta* in our era (here) and these things have not been clarified at this time.” We see then that the clear validity of *dina de-malkhuta* in relation to denying the *heter* becomes quite blurred when speaking about another matter relating to lands in the State of Israel during *shemittah*.

The second point bearing analysis concerns the Ḥazon Ish’s position on the specific issue of requiring registration in the *Tabu* for transferring ownership in the land. The Ḥazon Ish’s basic position was that one could transfer ownership in the land without registration in the *Tabu*, even if the buyer was a non-Jew.⁵¹

⁴⁶ Shemu’el David ha-Kohen Munk, *Responsa Pe’at šadkha*, vol. 1 (Haifa, 1974), sec. 90-91. In both chapters he writes, regarding the laws of the State of Israel: “And in the name of the Ḥazon Ish of blessed memory, it has been said/I heard that these laws are akin to a ‘self-appointed tax collector’”; Isaac Jacob Weiss, *Responsa Minhag Yitshak*, (Jerusalem, 2009), vol. 9, sec. 109: “And it has already been stated in the name of the Ḥazon Ish of blessed memory that this State’s laws are akin to a ‘self-appointed tax collector’.” Further evidence of the Ḥazon Ish’s use of this expression towards the laws of the State are cited in the article: Zalman Menahem Koren, “*Mamlakhtiyut Israelit - Mashmauyot Hilkhatiyot*”, in *Mamleket kohanim ye-goi qadosh: kovets ma’amarim le-nishmat David Kohen*, ed. Yehudah Shaviv (Jerusalem: Rubin Mass, 1996), 181-249, 197-8 n. 29; Yonathan Ushinsky, *Sela Medinah* (Jerusalem, 2011), 32.

⁴⁷ El’azar Nidam, *Darkhe mishpat – Hilkhote Shechenim* (Bene Berak, 2004), 214-5; Ushinsky, 32-3; Yehoshu’a Hīlu, *Mishnat Yehoshu’a-Ani haMehapech B’hararah* (Jerusalem, 2013), 300 n.2.

⁴⁸ *Kitve Kehilot Ya’akov ha-ḥadashim: Seder Nashim* (Bene-Berak, 2003), 393-4. The parentheses are in the original.

⁴⁹ Compare above to the view of the Satmar Rebbe, alongside n. 6.

⁵⁰ See his opinion, below n. 58.

⁵¹ *Ḥazon Ish – Ma’asrot* (Jerusalem, 1938), sec. 10 (=Ḥazon Ish-*Hoshen ha-mishpat* part 3 (Jerusalem, 1954), 466 (Likutim, 16:8)). R. Shmu’el Greineman who edited the letters of the

Where a Jew sells a non-Jew a field with a deed of sale and money but does not register it in the *Tabu*, it appears that the field is considered to belong to the non-Jew with regards to *ma'asrot*. This is because whenever a non-Jew finds it convenient to use Jewish law when making the purchase, he need not follow *dina de-malkhuta* which could result in a loss for the non-Jew... and therefore the sale of rooms of *ḥametz*⁵² is effective even if it was not registered in the *Tabu*.

It would appear that in light of this position, the Ḥazon Ish held that ex post facto one could use *etrogim* from an orchard that had been sold to a non-Jew during *shemitah*:⁵³

And those who sell their orchards [personally and not through an agent] to a non-Jew, even though they are violating the prohibition against “giving them a foothold”, nonetheless it is considered a real sale and in the opinion of the *Sefer Hateruma* the sanctity of *shemitah* has been removed from this produce. Even though it is problematic to rely on this, as I have written, nonetheless they have sources on whom they may rely, and therefore there is no prohibition with these fruits ex post facto.

Indeed only the first reason which appears in the Ḥazon Ish's letter appears here as well (and even then it is in square brackets, signifying that it is something extra), whereas the other two reasons—the lack of registration and the fictional nature—are completely absent!

The problem is that this is only the beginning of the confusion in discerning the Ḥazon Ish's latest opinion. The last-quoted excerpt appeared in a book about *shemitah* which the Ḥazon Ish published while he was still alive in the *shemitah* year of 5712 (1951/2), and one can see that it contradicts what was stated in his letter, which as mentioned is also attributed to that year. Furthermore, only after the

Ḥazon Ish insisted that these words were published in the *shemitah* year, and therefore other researchers have already speculated that these words were said in relation to the *heter mekhirah*, see Brown, *Ḥazon Ish*, 756-7 (however we should correct what he stated there for what was published in 1938 is what has been cited here, and not the Ḥazon Ish's later position, which will be discussed below); Ron S. Kleinman, *Darkhe kinyan u-minhage mishar ba-mishpat ha-Ivri* (Ramat-Gan: Bar-Ilan University Press, 2013), 221. For a discussion of the Ḥazon Ish's view regarding why registration for transferring ownership is unnecessary see Kleinman, 221-8; Michael Baris, “*Hirhurim odot mirsham ha-mekarkein al -pi ha-Halakhah*”, *Mishpetei Eretz* 3 (2010), 222-36, 230-1.

⁵² See above n. 33.

⁵³ *Ḥazon Ish – Hilkhot Shevi'it* (Jerusalem, 1952), sec. 10:6 (=Ḥazon Ish-Zeraim, *Shevi'it*, sec. 10:6, p. 233).

author's death was this letter added by the editor, Rabbi Greineman, to the book *Hazon Ish – Shevi'it* as Chap. 27, which did not appear at all in the 5712 edition.⁵⁴

Nonetheless, in his book on *Hoshen Mishpat* which was published in 1950, the *Hazon Ish* expresses a different opinion, which apparently is the basis for the second argument in his letter.⁵⁵

And in *Hazon Ish Ma'asrot* Chap. 10 we wrote that a Jew who sells land to a non-Jew in Israel, even though according to State law there can be no purchase of land unless it is registered in the *Tabu*, nonetheless since according to religious law someone may purchase with a deed of sale or with money, this will be considered a purchase... and now that we have gained what I wrote above, I retract my previous opinion... and indeed that non-Jew has not purchased anything. **And with regard to *terumot, ma'asrot and shemitah***, so long as it is not registered in the *Tabu* it belongs to the Jews as Israeli law prescribes... and if according to Israeli law there is no purchase without a *Tabu* then nothing has been purchased from the Jew without the *Tabu* requirement.

However, it is difficult to understand why, in light of this, the *Hazon Ish* did not correct what he had written in his book on *shemitah*. It would appear that the *Hazon Ish*'s opinion is somewhat vague, and thus there are those who have assumed that his letter was designed to combat the *heter mekhirah* but does not reflect his true position that ownership may indeed be transferred to a non-Jew without registration. I shall elaborate.

First, aside from the fact that his *shemitah* book was left uncorrected, there is an additional problem in the *Hazon Ish*'s statements themselves. In his statements of 1938—which he retracted here—the *Hazon Ish* does not explicitly mention the *heter* but he does mention the sale of *hametz*. Apparently, according to his new understanding a problem would arise with the sale of rooms in which *hametz* is stored if the sale were not registered in the *Tabu*. However, the *Hazon Ish* does not mention such a problem, as opposed to the problem of the sale for the

⁵⁴ See above n. 35.

⁵⁵ *Hazon Ish – Hoshen ha-mishpat* part 2 (Jerusalem, 1950), Baba Kamma, sec. 10:9, p. 35a (emphasis added). It is unclear whether this paragraph was written after the founding of the State. Even if it was (and see Koren above, n. 46), it is difficult to see how this would have affected the *Hazon Ish*'s view, and why in particular he would give more validity to the laws of a secular Jewish state than to the laws of a British mandatory government.

purpose of *shemitah*, and we do not know of any doubts he harbored regarding selling *ḥametz* without registration. Moreover, in his letter he only distinguishes between the two cases in his third reason (subterfuge), but not in the second (state law)! Furthermore, those who held that the sale of *ḥametz* does not require registration relied on these original statements, even after this letter was published.⁵⁶

Secondly, according to Rabbi Nissim Karelitz, at the end of his life the Ḥazon Ish retracted what he wrote in his letter. According to Rabbi Karelitz, the Ḥazon Ish's opinion was that only when it came to a purchase between two Gentiles was registration necessary, but not with regard to an act of acquisition between a Jew and non-Jew.⁵⁷ It also appears from the statements of another of the Ḥazon Ish's relatives, Rabbi Haim Kanievsky, that ex post facto the *heter mekhirah* is valid.⁵⁸

Indeed, it appears that there were those who ignored the Ḥazon Ish's letter and only presented his first opinion (as well as those who presented both opinions side by side without settling the issue).⁵⁹ The most noticeable example the letter being ignored is provided by Rabbi Zevin, who cites only the original words of the Ḥazon Ish:⁶⁰

⁵⁶ See for example Shemu'el Eli'ezer Shtern, *Mekhirat ḥametz ke-hilkhatō* (Bene Berak, 1989), 108 n. 11. Though there was an attempt to claim that one should distinguish in general, and in what the Ḥazon Ish writes in particular, between the sale of *ḥametz* where the State does not require registration in the *Tabu* and the sale of *shemitah* land, where there is such a requirement, see Re'uven Sofer, *Kuntres 'Al isur ha-mekhirah ba-Shevi'it* (Jerusalem, 1987), 56-8. But when these words were written, Sofer's understanding of Israeli law in respect of the *heter* was incorrect, as we shall see immediately.

⁵⁷ Shemaryahu Yosef Nisim Karelits, *Huṭ shani-Ribbit* (Jerusalem, 2014), 111 n. 4. For an attempt at denying this evidence see: Ya'akov 'Ades, *Divre Ya'akov-Gittin* (Jerusalem, 2009), 507-8, 515-6. In general, Rabbi 'Ades makes a concerted effort to reconcile the contradictory statements of the Ḥazon Ish on this issue. See *ibid.* 506-9 and *idem*, *Divre Ya'akov vol. 4 – Masechet Shevi'it* (Jerusalem 2012(?)), 31-4.

⁵⁸ Hayim Kanievsky, *Derekh emunah* (Bene Berak, 1996), 128b in sec. 213. He quotes the Ḥazon Ish's letter of 5712 and immediately thereafter his words in *Hilkhot Shevi'it*, above n. 53, where it states that "ex post facto we should not prohibit their fruits." Nevertheless in a book of errata published later, this issue was corrected to accord with the words of the author's father. See *Kuntres Hosafot ve-Tikunim ha-Shalem la-Sefer Derekh Emunah vol.4* (Bene Berak, 2008), 26: "It should be added that in the book *Kitvey Kehilat Ya'akov Hahdashim – Shvi'it* he wrote that the Ḥazon Ish retracted what he wrote and did indeed prohibit the fruit."

⁵⁹ See for example Avraham Zvi ha-Kohen, *Halakhah 'arukhah: hilkhot shevi'it* (Bene Berak 2007), 46.

⁶⁰ Zevin, above n. 1, 147. Though these words appeared already in the first edition of this book in 1946 (pp. 92-3), Rabbi Zevin did not correct them in the next edition which was published in 1957, despite the fact that the Ḥazon Ish's letter and his retraction in his book on *Baba Kamma* had already been published years before that. He even repeated his words in a special conference celebrating the Oral Torah in 1966: Shlomo Yosef Zevin, "Shabbat ha-Aretz", *Torah shebe'al peh* 8 (1966): 11-20, 18.

And with respect to *dina de-malkhuta* it is interesting that a reference for dismissing such a claim may actually be discerned in the words of the person most opposed in our day to the sale—the Ḥazon Ish (and he indeed attacks the sale but not for the reason of *dina de-malkhuta*)! In one of his books he discusses “someone who purchased land from his friend in the Holy Land and purchased it with money, a deed of sale, and by taking possession or by *kinyan sudar*, whether or not the purchase is valid without registering it in the *Tabu*...”

Is this because he held that the Ḥazon Ish’s retraction was not a genuine retraction, but was only made in order to refute the *heter*?⁶¹

Nonetheless, the Ḥazon Ish was not the first person to raise the argument concerning the problem of registration in the *Tabu*. This problem followed the *heter* almost from its very beginnings, and therefore its supporters sensed a need to solve it. I shall now turn my attention to a short survey of the discussion on this topic.

4.2 *The Historical Argument surrounding the requirement of registration in the Tabu*

The argument that the *heter* is problematic, *inter alia* because it contravenes *dina de-malkhuta*, was already raised in the polemic that took place the first time that the *heter* was invoked for the benefit of the new colonies in the Land of Israel: the *shemitah* of 5649 (1889).⁶²

Underlying the argument is the *halakhah* concerning an acquisition between a Jew and non-Jew: “If the law of the king and his legal system is such that one could only acquire land if one wrote the details in a document or one gave money for it, etc. then one must follow the law

⁶¹ Compare also the words of Rabbi Isaac Jacob Weiss, the head of the Edah Ḥaredith Rabbinical Court in *Responsa Minḥat Yitshak*, vol.6 sec. 170:22, where he explains that failure to register in the *Tabu* does not impede transfer of ownership, especially where the parties have agreed to waive registration. Why can we not assume this rule regarding the *Heter*? However in this regard he writes: “There is no force to the *heter mekhirah* without a *Tabu* registration” neither under Jewish law nor under civil law, and he explains how this is different from the sale of *ḥametz* (*ibid.* vol. 8, sec 96). However based on his own view, one may ask why does it not have any validity, at least in Jewish law, if the parties have agreed to waive the *Tabu* requirement. For the view of the Ḥatam Sofer see below alongside n. 75.

⁶² For an analysis of the polemic and the many sources concerning it see: Avraham Schreiber, “Heter Hamekhirah– Pulmus ha-*Shemitah* 1889”, *Mayim miDalyo* 1993, 59-80; Gil-Bayaz, above n. 16, 4-12.

of the king.”⁶³ Indeed, as of 1858, in the Land of Israel the Ottoman Land Law required that land be transferred through registration in the *Tabu*.⁶⁴ We see this argument articulated by the rabbis of Jerusalem who opposed the *heter*. Thus Rabbi Jacob Mordecai Hirshensohn wrote:⁶⁵

The second reason is *dina de-malkhuta*, and the king can nullify all acquisitions in the world whether they are done by Jewish law or whether by civil law. We see that even if he explained it does not help and there is nothing valid in his words, because of *dina de-malkhuta dina* and the land belongs to him, and if so anyone who did not transfer property in the deed registry of the Registration Office has done nothing ... and it appears that in our case regarding releasing ourselves from the prohibition of *shemita*, everyone acknowledges that it must be done specifically through the Registration Office, and even if the buyer said he was buying without registration, it is of no avail.

That same year the argument was also made by Rabbi Samuel Salant, who was considered the Ashkenazic Chief Rabbi of Jerusalem. His words are cited by Rabbi Yitshak Elhanan Spektor, who as is known supported the *heter mekhirah*; from his letter we can also see his approach to this argument.⁶⁶

I must notify him that a letter arrived from the great sage, R. S. Salant who writes that when Dr. Goldberg came to Jerusalem as an agent of the well-known donor from Paris [Baron de Rothschild] and asked that they issue a deed of sale at the rabbinical court, he told them that he does not agree to it because any deed of sale that does not comply

⁶³ *Shulhan-Arukh*, Hoshen Mishpat 194:2. The source of this *halakhah* may be found in B. Baba Batra 54b. For a discussion of the question whether *dina de-malkhuta* applies between two Jews see the sources in Kleinman, above n. 51, 215-42.

⁶⁴ For sources on the Ottoman Land Law and on the dispute as to whether it is halakhically binding see Amihai Radzyner, “Judaism and Jewish Law in Pre-State Palestine”, in: *Judaism and Law: An Introduction*, ed. Christine Hayes (forthcoming).

⁶⁵ Itzhak Hirshensohn, *Devar ha-Shemita* (Jerusalem, 1888), 109. Interestingly, *ibid*, 106 he cites the letter of R. Yaacov Shaul Elyashar, whom a number of years later was appointed Sephardic Chief Rabbi, and held that there was no problem, and that if the sale cannot be executed under the law it could be executed through other means. Regarding the *shemita* of 5649, the argument against the sale that it does not comply with *dina de-malkhuta* was also raised by R. Akiva Yosef Shlezinger, *Shnat Shabbaton* (Jerusalem, 1986), sec. 7.

⁶⁶ Yitshak Elhanan Spektor, “Mikhtavim be-Inyaney Shevi'it”, *Nitzaney Aretz* 6 (2008): 9-18, 14. The letter was sent in the summer of 1888 to Rabbi Samuel Mohliver in Bialystok. He too was a supporter of the *heter*.

with the civil courts has no validity whatsoever. Therefore the sale may only be done in the civil courts. And I replied to him that it was sufficient if the sale was performed in a rabbinical court...and immediately thereafter letters from all the rabbis of the *Perushim Kollel* and the *Badatz* signed by seventeen rabbis arrived at my desk loudly protesting that in this way I had issued a *heter mekhirah* and rebuking me, claiming there was no fear of a food shortage and quite the opposite, it was for the good of the land and the *Kollel*. They continued in their usual way and usual claims, and I did not answer them at all.

Nevertheless, the source most often quoted to this day, with the exception perhaps of the *Hazon Ish*, is the statements of Ridbaz (Rabbi Yaakov David Wilovsky), one of the greatest opponents of Rabbi Kook on the issue of the *heter*:⁶⁷

...and behold, aside from the fact that it is prohibited to sell land in Israel and aside from other prohibitions connected therewith, there is a very simple *halakhah* when it comes to the actual sale (explicit Talmud and in *Hoshen Mishpat* chap. 194) where it states that one cannot sell land if the sale is not performed in the civil courts, and therefore conclude for yourself whether the Rabbi from Jaffa [a reference to Rabbi A. I. Kook] who wrote a deed of sale on a piece of paper to a barefoot Arab that all of Israel in possession of the Jews now belongs to him, whether that Arab really purchased the land and thus removed the sanctity from the Land of Israel? All this paper is fit for is to cover the opening of his flask (*latsur al-pi tseluhito*). One who truly wishes to make a sale would do it by ...a *Tabu* like here, and the lawyers told us that the cost is one and a half million francs, and since this is impossible the land is not transferred from the Jew's possession and its sanctity remains intact...

Rabbi Kook himself related to this argument already in 1910:⁶⁸

⁶⁷ Ridbaz, *Beit Ridbaz on Pe'at ha-shulhan* (Jerusalem, 1912), introduction 5-6. For an analysis of all the correspondence between the Ridbaz and Rabbi Kook on the subject of *heter mekhirah* see Ben-Arzi, above n. 3, 189-224.

⁶⁸ In his letter to Rabbi Haim Berlin, where he justifies the *heter*: R. Abraham Isaac Kook, *Responsa Mishpat Kohan* (Jerusalem, 1937), sec. 70. Regarding a possible source for the argument that it involves a religious matter that does not require registration, see the discussion below alongside n. 75.

And in truth, even from the perspective of the sale one should not raise doubts because of *dina de-malkhuta* since in a sale such as this it is not done for commercial purposes but rather, it is a religious enactment where the government is not at all meticulous that the sale be performed in the courts, so that even when the buyer is a non-Jew buying from a Jew they approve the acquisition even without the courts.

Moreover, this argument was later given a variety of answers, the best-known of which were penned by Rabbi Zvi Pesah Frank⁶⁹ and by Rabbi Shlomo Zalman Auerbach (and before him by his father, Rabbi Haim Judah Leib Auerbach).⁷⁰ In brief, the arguments go in a number of directions, including that the sale could be valid according to Torah law exclusively; the Law does not apply to a sale for religious purposes; the sale is limited in time and space and therefore the Law does not apply to it.

The various answers did not satisfy the opponents, and therefore this argument has been repeatedly raised, before and after the establishment of the State of Israel. It could be said that the central motivation for upholding this argument was a desire to deny the validity of the *heter mekhirah*. This apparently is true in various cases, and later on we will see that this argument continues to be cited, despite the fact that it is clear that there is no problem nowadays with the state law. However, we find the argument was also stated by Rabbi Herzog, who personally stood behind the *heter* when serving as Chief Rabbi.

Unlike the others who cited this reason for opposing the *heter*, Rabbi Herzog's problem with the *heter* arose precisely because of his Zionist *weltanschauung* and because of the fact that he viewed the civil legislation in the State of Israel as valid law. In his opinion, the

⁶⁹ Zevi Pesah Frank, *Responsa Har-Zvi*, vol. 8 (Jerusalem, 1994), sec. 94. For a summary of the arguments of Rabbi Frank and of R. S.Z Auerbach see: Shlomo Dichovsky, "Beayot Hilkhatiyot u-Mishpatiyot b-Heter ha-Mekhirah", *Torah shebe'al-peh* 28 (2007): 104-14, 106-8.

⁷⁰ The words of Rabbi Haim Judah Leib Auerbach were published by his son in his book, see: "Miley de-Aba Mary", in: Shlomoh Zalman Auerbach, *Ma'adane erets-Shevi'it* (Jerusalem, 1944, 181). For R. S.Z Auerbach's own views see *Ibid.* sec 18. After his death, this section was printed in the Haredi journal *Yeshurun*, vol. 15 (2005): 286-304, under the title "*Beurin u-birurin b-Miktzoa ha-Kinyanim*" but it chose to leave out the opening and closing paragraphs as well as the places in which the author relates his discussion to *shemita*, so that it is impossible for the reader to know that it was written in support of the *heter*. This of course is pursuant to the worldview of the editors in terms of which it would be improper to mention that Rabbi Auerbach supported the *heter*.

establishment of the State in fact strengthened the force of this argument:⁷¹

It should be added that the very force of the sale is now more tenuous than it was before, because then we had a sale transaction which was recognized by Torah law in a way that was not recognized at all by the *Tabu*... for even though according to *dina de-malkhuta* this sale has no validity, we already discussed that the laws of non-Jews as they have been imposed in Israel have no validity...but a Jewish state certainly does have validity in the Land of Israel, and according to *dina de-malkhuta* as it applies to land, a sale with a marked deceptive element does not exist, and additionally any sale of land which was not registered in the governmental *Tabu* has no intrinsic force.

As stated, Rabbi Herzog himself decided, with a heavy heart, to continue implementing the *heter*;⁷² however, the argument of *dina de-malkhuta* was conceived by him as creating a real problem, precisely because of his Zionist outlook. It goes without saying that this argument has been repeatedly raised by the opposition to the *heter*, which was spearheaded by the Hazon Ish whose words we have seen. These words, like those of the Ridbaz, continue to be quoted every *shemita*.

It appears then that the best solution would be to amend the State Law; however, such amendment was delayed for many years.

4.3 *The Land Transactions Law—Observing the Commandment of Shemita*

The halakhic responsum of the Hatan Sofer regarding the sale of *hametz*⁷³ is quoted a number of times in the sources dealing with our subject. It appears both in the writings of those opposed to the *heter*

⁷¹ R. Isaac Herzog, *Pesakim u-ketavim* vol. 3 (Jerusalem: Mossad ha-Rav Kook, 1989), sec. 48. Those words describe the deliberations of the Chief Rabbinic Council which were held on the eve of the *shemita* of 5712. Following the excerpt cited above Rabbi Herzog explains that even for those who hold the view that *dina de-malkhuta* does not apply to Israel, “nonetheless the kingdom of Israel has the power, even under Torah law, to rule that any sale which was not performed in accordance with the practice which it established is null and void.”

⁷² For a summary of his rulings on *shemita* and the *hs33eeter* see: Yaakov Ariel, “*Piskei ha-Gri Herzog ba-Shemita*”, in *Ma’u’ah le-Yitshak*, eds. Shulamit Eli’ash, Itamar Warhaftig, Uri Dasberg, (Jerusalem: Yad ha-Rav Herzog, 2009), 321-31.

⁷³ Moshe Sofer, *Teshuvot Hatan Sofer – Orah Haim* vol. 1 (Jerusalem, 1970), sec. 113.

mekhirah who invoke the *dina de-malkhuta* argument,⁷⁴ and those who support the *heter*.⁷⁵ Below is the text of the responsum:

And behold when the great sage Rabbi Barukh Frankel⁷⁶ of blessed memory was still the head of the rabbinical court in Leipnik, when he lived there, an incident occurred in which informers went to ministers of the State of Moravia and told them that Jews were selling their *ḥametz* with deeds of sale that did not have the Emperor's stamp, and when this came before the Emperor, he said that it was well-known that that this was not real trade negotiations but rather a religious transaction and therefore it did not require a stamp. This incident implanted a seed of doubt in R. Frankel's mind since it seems that based on *dina de-malkhuta* the deed of sale was invalid. And I do not feel likewise since the deed is valid both in Jewish law, which holds that if a non-Jew were to try and enforce the sale through a court it would be considered his, and even in non-Jewish law it is valid, provided that if a claim was made to uphold possession one would first have to pay for the stamp; but the Emperor in his kindness and integrity has said that for such a sale he will not impose the expense of a stamp since there is no reason for the buyer and seller to trade and it is solely transacted in order to rid oneself of the prohibition of *ḥametz*, and for this he has not imposed stamp duty.

From the above it emerges that the Ḥatam Sofer held that there was no problem with the fact that the deed of sale of *ḥametz* did not comply with state laws, but there were those who were concerned about it. This concern diminished, however, when the Emperor—who determines what qualifies as *dina de-malkhuta*—held that the ordinary laws of sale, which require that that stamp duty be paid, do not apply to the sale of *ḥametz*.

If this is the case, then perhaps the best solution would be a determination that the Israeli law requiring registration does not apply

⁷⁴ For example: Rabbi Weiss, above n. 61, in his second responsum: “And nevertheless even the Ḥatam Sofer was scrupulous that the deed of sale of *ḥametz* follow *dina de-malkhuta*”.

⁷⁵ For example Rabbi Frank, above n. 69, 116.

⁷⁶ Baruch ben Yehoshua Yechezkel Feivel Fränkel-Te'omim, Galicia and Moravia (1760–1828).

to the sale of land for *shemita*?⁷⁷ Indeed on the eve of the *shemita* of 5740 (1980), MK Rabbi Haim Druckman—one of the more prominent Religious Zionist rabbis and a favored disciple of Rabbi Zvi Yehuda Kook, who fought for the *heter* with which his father's name was well associated⁷⁸—introduced a bill which was designed to solve the legal problem, and as such also the halakhic issues, of the *heter*.⁷⁹ The following is the final version of the special law that was enacted for the *shemita*.⁸⁰

1. (a) The Minister of Justice and the Minister of Religious Affairs may, with the approval of the Constitution, Legislation and Juridical Committee of the Knesset, make regulations as to land transactions for the purpose of observing the Sabbatical year, which shall apply notwithstanding anything provided in the Land Law, 5729-1969, or in any other law.

(b) Regulations under this Law relating to taxes shall be made with the consent of the Minister of Finance.

⁷⁷ Indeed at the first discussion of the Bill which took place in the Constitution Committee of the Knesset (Minutes 144 of the Constitution, Legislation and Juridical Committee 30 July, 1979, p. 9), Nahum Rakover (the head of the Jewish Law Department in the Ministry of Justice) mentioned the responsum by the Hatan Sofer as the basis for the Bill before us: “This was a unique permission from the Austrian government, that in a certain sense gave halakhic validity to the deed of sale of *hametz*, in contravention of the general provisions of the State with regard to certain registration requirements, which was the practice in Austria during those years.”

⁷⁸ On various occasions Rabbi Zvi Yehuda Kook replied very sharply to rabbis who cast doubt about the possibility of using the *heter* at the present time. See for example: “*He'arot be-Inyan Heter ha-Mekhirah ba-Shevi'it*”, *Nitzaney Aretz* 14 (2001): 28-35; “Selling the Fields after the Establishment of the State”, *Tehumin* 7 (1986): 23-27. The latter article was penned against Rabbi Goren's opinion, above n. 5. It is noteworthy that in order to preserve the *heter*, Rabbi Zvi Yehuda, apparently against his general stance, underplayed the halakhic-proprietary significance of Jewish sovereignty in the Land of Israel (*Ibid.* pp. 23-4). Once again we see the extent to which the *heter* is a factor which is likely to override the general outlook of the spokesperson regarding the State. The religious ideology that guided Rabbi Druckman may be derived from his words in the Knesset when his Bill was raised for preliminary discussion (*Divre HaKnesset*, 25.7.79, 3824). There he spoke about the national value of the commandment of *shemita* and of the redemption process in which we find ourselves, and he ended his words with a quotation from the statements of Rabbi Kook in his book *Orot*.

⁷⁹ In the journal of the Hesder Yeshiva which was headed by Rabbi Druckman, the Law he initiated was cited and was prefaced with the following remarks: “We hereby bring you the Law which was passed in the previous Knesset at the initiative of our Rosh Yeshiva and the regulations attached thereto—which strengthens the *heter mekhirah* and which provides an answer to the reservations about it” (*Orot Eztion* 12 (1987): 119.

⁸⁰ Land Transactions (Observance of the Sabbatical Year) Law, 5739-1979, *Sefer Hukkim* No. 943 of 1 August 1979, p. 150.

We see that the Law does not prescribe a specific solution, but establishes that generally speaking, special rules may be set for land transactions that are designed for “the purpose of observing the Sabbatical year”. Indeed, about a month after the passage of this Law, regulations were promulgated by the Minister of Justice and Religious Affairs.⁸¹ The Regulations establish as follows:

A transaction in land which was made for the purposes of observing the Sabbatical year which was performed with the approval of the Chief Rabbinical Council shall be valid, notwithstanding anything stated in the Land Law, 5729-1969, or in any other law, and even if it is for a limited time, and it may be completed even without registration.

In other words, the Regulations establish that the sale of land within the framework of the *heter* is valid despite it not being executed through registration in the *Tabu*. Likewise, it is valid despite it being a sale with a time limit—something that Israeli law does not recognize in other cases.⁸² They further establish that there is no need to make the official payments associated with other transactions in land.⁸³

What were the metamorphoses of the law which apparently—and in a most elegant fashion—solved the problem of *dina de-malkhuta* raised by the *heter*'s opponents (and also by Rabbi Herzog who supported the *heter*)?

In the bill submitted by Rabbi Druckman,⁸⁴ one section appeared which mirrored section 1(a) of the law which was eventually passed, with one significant difference:⁸⁵ the word “solely” appeared after the words “for the purposes of observing the Sabbatical year”—a difference which I will address below. In the short explanatory comments, it is explicitly stated that the aim of the Law is “to give validity to a sale for a limited time and to establish that such transactions will not require registration, in order to enable observing

⁸¹ Land Transactions (Observance of Sabbatical Year) Regulations 5739-1979, *Kovetz Takanot* 1979, 1822. The Regulations were passed on 29 August, 1979.

⁸² See above n. 24.

⁸³ This is obviously reminiscent of the case the Ḥatam Sofer speaks about in his responsum mentioned above.

⁸⁴ Land Sale Bill, *Hatsa 'ot hok* 1979, 262 (30.7.79).

⁸⁵ Another difference, much less significant, is that in the Bill it states: “Regulations in respect to the **Sale** of Land”, whereas in the final version of the Law it states: “Regulations in respect to Land **Transactions**”. According to Rabbi Druckman (minutes of the Constitution Committee No. 145, 1 August, 1979, p. 2), the Amendment was required “to include, for instance, also rentals. I took another look at the deed of sale of the Rabbinate and I saw that sometimes one could also rent out trees.” In this regard see for example: Weitman, above n. 41, 20.

the Sabbatical year in our times”. The person who went into further detail about these matters was in fact MK Dov Shilansky of the Likud, during the deliberations on the first reading of the Bill:⁸⁶

The Land Law did not give any consideration to the problem of *shemita*, and as we have learnt this resulted in many good Jews who are scrupulous about keeping all the commandments, lenient and stringent alike, being obstructed in their observance when they tried to transfer land for the purposes of *shemita* during the last Sabbatical year, and it emerged that they inadvertently failed. MK Druckman, who is also a talmudic scholar, has initiated the Bill before us.

In their statements to the Law and Constitution Committee, both Rabbi Druckman and his colleague from the NRP faction, Pinchas Sheinman,⁸⁷ raised the argument that this amendment is necessary because many rabbis had attacked the *heter* on the grounds that it contravened state law. The problem and its solution were dealt with more exhaustively by Nahum Rakover (the head of the Jewish Law Department in the Justice Ministry), who, like Rabbi Druckman, had been a student of Rabbi Zvi Yehuda Kook. The religious Zionist outlook underlying the proposed amendment reverberates in his words:⁸⁸

There have been myriad claims that a sale not registered in the *Tabu* has no halakhic validity because, from many perspectives, the *halakhah* takes into consideration the activities of Members of Knesset. Perhaps not everyone is aware of this fact, but *halakhah* does indeed take into account what is done in this chamber and what is done in the

⁸⁶ *Divre HaKnesset*, 31.7.1979, 3920. In his statements Shilansky discussed the urgency of proceeding with the discussion of the Bill as a result of the coming *shemita*. Indeed the time period that elapsed between the submission of the Bill and its enactment as a law was extremely short. See Gil-Bayaz, above n. 16, 110. At pp. 112-3 she discusses those opposed to the original Bill in the Knesset whether for minor reasons (opposing the fact that the section would be inserted into the main Land Law, opposition which eventually was accepted and the section was enacted as an independent Law, or a further hearing on the problems of a limited time sale) or for major reasons (the opinion of MK Shulamit Aloni, that the State should avoid dealing in the issue of *shemita*, which is essentially a religious matter). A noteworthy position is that of the Deputy Attorney General, Uri Yadin on these two issues, as cited there by Gil-Bayaz.

⁸⁷ Above n. 77, 5.

⁸⁸ *Ibid.* p. 9. According to the information that appears in Yitshak Yosef, *Yalkut Yosef-ha-Shevi'it ye-hilkhoteha* (Jerusalem, 2014), 802, it was Rakover who initiated the Bill which was submitted by Rabbi Druckman.

Knesset plenum. These things have halakhic force. I would not say that the Knesset has the power, for example, to annul a marriage, but in monetary matters there is definitely significance to these activities, and, if the State establishes that a sale may only be completed by registration, the *halakhah* cannot ignore this fact. Consequently, this sale for the purpose of *shemita* must be valid also from the perspective of the law practiced in the State. There are those who are uninterested in what the State does, but Rabbi Druckman and many fine people like him are greatly interested in what is done here and intend therefore that there be harmonization between *halakhah* and the Knesset activities in a way that there be no contradiction between the two, but rather they support one another.

However, after he attained the support of the Committee members, Rabbi Druckman decided that there was room to improve on his proposal. As mentioned, the Bill inserts the word “solely” after making the statement that the Law applies to the *heter*. Rabbi Druckman tried to persuade Committee members to expunge the word that blunts the halakhic force of the Law by stressing how unusual the *heter* is as compared with a sale of land in every other instance:⁸⁹

I propose to delete the word “solely”. Despite our intentions to designate this Law as relating to the commandment of *shemita* and not for anything else, I propose to delete the word, since it hints at subterfuge, whereas we are interested in it being a perfect sale.

Rabbi Druckman goes on to explain that although he used this word in his bill, it is now unnecessary since in any event the Law requires the issuing of regulations by the Ministers, and therefore there is no concern that the Law would allow registration to be waived in other cases. It is fair to assume that the amendment requested by Rabbi Druckman stemmed from a concern about a claim that this Law, which was meant to negate the halakhic argument that the *heter* contravenes *dina de-malkhuta*, would face a counter-argument: that by saying ‘solely’ it strengthens the third argument raised by the Hazon Ish—the claim of subterfuge that undermines the validity of the intentions of the parties to the transaction.⁹⁰

⁸⁹ Minutes, above n. 85.

⁹⁰ Above, alongside n. 38. Interestingly this claim was eventually raised against the Law, ironically from none other than Rabbi Ze’ev Weitman, who headed the *Shemita* Committee

These things were clearly enunciated by Nahum Rakover, who tried to assist in getting the acceptance of the amendment, in light of the position of the members of the Committee who were afraid of deleting the word “solely”:⁹¹

The problem of subterfuge is not only a problem of aesthetics but it is a halakhic problem. Many of the halakhic discussions relating to the validity of the sale have concentrated on the problem of subterfuge. There were also those who did not wish to rely on a deed of sale, claiming it was subterfuge. We are searching for ways to reduce the subterfuge and not to increase it. Therefore this word is halakhically unhelpful, and goes against our aim of bridging *halakhah* and the law. The word “solely” is bound to undermine the benefit we wish to extract from this Law from a halakhic perspective. Unfortunately those seeking a halakhic solution are denied it because of this aspect of subterfuge.

These words apparently failed to persuade the Committee members and the amendment was rejected; however, Rabbi Druckman eventually succeeded in passing it when the Law was brought for a second and

of the rabbinate which operated the *heter mekhirah*. In his book *Likrat shemīṭah mamlakhtit bi-medinat Ísrael* (Alon Shevut, 2000), 46 n. 10, he remarks: “This Law does not solve the more serious problem—the halakhic problem—that in his heart and in everyone’s heart the sale means nothing...the Amendment to the Law has not helped in this matter, but rather it has done the opposite; the Amendment merely proves that the legislature, too, does not view the sale as a sale which has legal force, and therefore it does not fear establishing that this sale does not require registration in the *Tabu*.” Obviously Rabbi Weitman will have to explain the responsum of the *Ĥatam Sofer*, which we rely upon for the sale of *ḥametz*, according to the same logic, but he does not relate to this. Nonetheless it was the same Rabbi Weitman who defended the *heter* when it was claimed in the Haredi world that the *heter* was merely a deception, even according to Israeli law: see his articles above n. 38 and below n. 100. For an opposing view of what appears in Rabbi Weitman’s book see the booklet *Mah nokhal ba-shanah ha-shevi’it* (Jerusalem, 2014), 22 n. 2, which is based on the rulings of Rabbi Ovadiah Yosef and which argues that the Law does in fact dismiss the argument of deception by explicitly stating that the sale is valid. The fact that Israeli law could assist in refuting the argument of deception is discussed by Zerah Warhaftig in relation to the Israel Land Law which was dealt with above. In his article: Zerah Warhaftig, “*Temurot u-Gmishut ba-Halakhah*”, *Shanah beShanah* Year 5735 (1975): 143-61, 150-1, he writes: “Behold they attack this *heter*, this deception from right and left. However I believe that in the State of Israel the *heter* has been given new force and the patent deception has been greatly reduced—since we now have a State law where the legislature, the Knesset, accepted and approved the idea of the *heter* of *shemīṭah* in an explicit section of the statute... the *heter* of *shemīṭah* by a fictitious sale has thus been given validity by a state law—reinforcement that was not available to those who have permitted it and have forbidden it up to now.”

⁹¹ Minutes, above n. 85, 3.

third reading, where he repeated the reason that from a halakhic perspective, the Law would better fulfill its role if the subterfuge was less obvious.⁹²

Thus, we see how a Knesset law may be used as an instrument for solving a halakhic problem, at least according to those who support the *heter*. Furthermore, a perusal of the minutes of the sessions reveals that the discussions of the Bill were very serious and many concerns were raised.⁹³ This demonstrates that it is difficult to argue that “even the legislature does not view this sale as a sale which has legal validity.”⁹⁴

4.3.1 Reactions to the Passage of the Law

Unsurprisingly the Law was very graciously received amongst the *heter*'s supporters. Thus, for example, Rabbi Shlomo Goren, who was serving as Chief Rabbi when it was passed, after proposing various reasons for rejecting the second argument of the *Hazon Ish*, writes:⁹⁵

However for this *shemitah* we do not need all the aforementioned. Thanks to a worthy act by a worthy individual, an MK, who is one of the select disciples of the disciples of Rabbi A.I. Kook of blessed memory, namely Rabbi Haim Druckman who initiated a new law which was recently passed in the Knesset titled “Land Sale (*Shemitah*) Law 5739” which declares as follows: “The Minister of Justice and the Minister of Religious Affairs may, with the approval of the Constitution, Legislation and Juridical Committee of the Knesset, make regulations as to land transactions for the purpose of observing the Sabbatical year, which shall apply notwithstanding anything provided in the Land Law, 5729-1969, or in any other law”... In light of the Law and these Regulations the aforementioned argument by the great sage the *Hazon Ish* has been completely removed. Now there is no need to explore the margins of the *halakhah* regarding the legal and halakhic force of the sale.

⁹² *Divre HaKnesset*, 1.8.79, 4001: “Since the aim of the Law is religious, in order to enable the observance of the Sabbatical year, we must take care to ensure that the Law does not obstruct this aim. The word ‘solely’ is completely superfluous from a legal perspective and therefore it is halakhically harmful. About this it is stated, ‘He who adds, detracts’.”

⁹³ See above n. 86.

⁹⁴ See above n. 90 and below n. 100.

⁹⁵ Shlomo Goren, “*Yesodot ha-Heter leShmitat 5740*”, *Meorot* 1 (1980): 1-60, 6. As stated above in n. 5, Rabbi Goren’s basic position was against the *heter* being applied in the State of Israel, but nevertheless he applied it when serving as Chief Rabbi.

However, as we already saw previously in the words of Rabbi Sternbuch, some of the opponents of the *heter* do not give up easily on the strong argument of *dina de-malkhuta* and do not relate at all to the simple fact that *dina de-malkhuta* itself does not require registration in the *Tabu* in this case. It appears that this fact strengthens the argument which was already raised above that the problem has never been that of according state laws the status of *dina de-malkhuta* (as we saw, Rabbi Sternbuch and others do not think that the state laws have such status in other cases. Moreover, it is doubtful if they even recognize the Law). There is a desire here to negate the validity of the *heter*. Therefore, every time *shemita* comes along, they ceaselessly repeat the old argument of registration in the *Tabu*, even when it has not been relevant for many years.

Thus in an article from 1987, devoted entirely to delegitimizing the *heter*, which contains a number of pages quoting sources relating to the claim of the *Tabu*,⁹⁶ no mention is made of the changes to the Law. Thus in 1996, Rabbi Haim Kanievsky, who quotes the Ḥazon Ish's letter, writes as if nothing had happened since 1952;⁹⁷ thus too an article from 2001, which quotes the opinions of Ridbaz and the Ḥazon Ish at length, confidently concludes that this sale is not genuine, inter alia "because it was not done in the *Tabu* and a sale transaction must be done through *dina de-malkhuta*"⁹⁸; and likewise an article from 2007 quotes the argument as if it is still valid according to the laws of the State,⁹⁹ and likewise in many other sources.¹⁰⁰

⁹⁶ Above, n. 56.

⁹⁷ Kanievsky, above n. 58.

⁹⁸ Shalom Pollack, "Be-Inyan ha-Pulmus be-Heter ha-Mekhirah" Or Israel 6(4) (2001): 123-35, 129-32 - this quote is from p. 132.

⁹⁹ Above n. 59, 45.

¹⁰⁰ I found two articles which negate the *heter* despite being aware of the existence of the new Law: Menahem Meir Weissmandel, "Hilufei Mikhtavim im ha-Rav Ze'ev Weitman", Or Israel 7(2) (2002): 136-60. There he is not prepared to waive the argument of the *Tabu* as it is cited by the Ḥazon Ish and decisors who preceded him (140-1). In order to solve the problem that this Law exists nowadays, he declares—as his correspondent did in other correspondence (above n. 90) that the Law itself reflects the lack of seriousness of the sale in the eyes of the legislature, see for example at p. 151: "While it is true that the Government may establish that for the purposes of *shemita* one may sell land in a way which would have been invalid in any other setting, nonetheless if they declare that registration in the *Tabu* is unnecessary, common sense would dictate that they do not regard it as a sale at all." A perusal of the discussions which were held in the Knesset would appear to make it difficult to raise such an argument.

The second article is Yitshak Shemu'el Kasirer, *Shemita ke-mitsyatah* (Bet Shemesh: 2007), 155. The author is aware of the existence of this Law but declares that it would still not solve the problem since the seller does not really intend to sell his land, and thus he attempts to distinguish intent in this *heter* from that in the sale of *ḥametz*. Nonetheless, on

5. Conclusion

This article has focused on one of those interesting cases in which Israeli law and *halakhah* intersect. Generally speaking, the term “religious legislation” is used to describe laws which impose halakhic norms on the State’s citizens, whether or not they subscribe to them in their daily lives, as in the example of the Israeli law establishing that marriage and divorce between Jews in Israel be conducted in compliance with the “laws of the Torah”. The case of these two Laws that are intended to support the *heter mekhirah* is different. Here the legislation is not a form of “religious coercion”; instead, it uses statutory law as an instrument for settling a halakhic dispute. And this is not some random halakhic dispute, but one of the most acrimonious disputes surrounding the validity of the *heter mekhirah*, which is one of the most significant issues, if not *the* most significant issue epitomizing what has been termed “Zionist *halakhah*”, and it has been closely identified with the most senior figure in the Religious Zionist rabbinate: Rabbi Abraham Isaac ha-Cohen Kook.¹⁰¹

The necessity for this unique legislation stems from the distinctive use some halakhic decisors have made of the Israeli Land Laws as a legal argument against the *heter*. We have seen that in other cases these halakhic decisors do not, for the most part, accept the premise that Israeli law is legally binding or that Israel’s statutes have the status of *dina de-malkhuta*. Thus, for example, Rabbi Isaac Jacob Weiss, who cites with approval the words of the Ridbaz on the “simple *halakhah*”¹⁰²—“There is a simple *halakhah* (in an explicit Talmud and in the *Hoshen Mishpat*, Chap. 194) that one of the essential elements in the Law of Sale as it pertains to land is that the sale shall be of no effect if it is not performed in a duly authorized civil court”—expresses doubt in another case where a question was raised pertaining to Israeli land laws as to whether Israel’s laws may be compared to those of other countries:¹⁰³ “and further discussion is required whether it is at all appropriate to apply *dina de-malkhuta dina* to this country, since, as a result of our many sins, its laws have been derived from the laws of the gentiles.”

pp. 245-6 he tries to strengthen the Ḥazon Ish’s argument with respect to the need to register the sale in the *Tabu* (while discussing the contradiction in his words, which I discussed above) but he does not discuss the existence of the Law.

¹⁰¹ See above notes 2-3. This issue also applies to his son, Rabbi Zvi Yehuda Kook, see above n. 78.

¹⁰² *Responsa Minḥat Yitshak*, vol.8, sec. 96. For the words of the Ridbaz see above n. 67.

¹⁰³ *Responsa Minḥat Yitshak*, vol.7, sec. 138, and see further above notes 46 and 61.

Obviously this attitude towards the *heter* as *sui generis* to Israeli law, a law which generally speaking is not given the status of binding *halakhah*, merely raises the suspicion that it is not the status of the *heter* in Israeli law which affects their position, but rather, their opposition to it. It appears that this is also the reason why the *heter*'s opponents have not stopped using this argument even when the legal argument is no longer relevant as a result of new legislation..

Nonetheless, the Religious Zionist Members of Knesset understood that formulating legislation could contribute in this case to dismissing the argument of the *heter*'s opponents. As stated, the legislation only convinced those who anyway recognized the importance of the *heter*,¹⁰⁴ and not those who oppose it irrespective of the argument of *dina de-malkhuta*. Still, it appears that from their perspective, these Knesset members created an unassailable response to the oft-quoted words of the Hazon Ish:¹⁰⁵ "Because it was not given to them in the *Tabu* and if the Arab was to enforce the bargain we would say to him that even according to your own law [the law of the State] without registering at the *Tabu* there is no acquisition."

¹⁰⁴ As in the attitude represented by Rabbi Herzog, above n. 71.

¹⁰⁵ Above n. 35.