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Is Freeing an Agunah a Leniency or a Stringency?

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Practical Halakhah exists in constant dialogue with the world around it. Competent poskim know and respond to the social, political, and economic realities of their communities. In turn, halakhah shapes those realities in important ways. Consider for example the effect of capitalism on the laws of interest, and the effect of halakhah on the price of ungrafted citrons.

Igrot Mosheh EH 1:49 was written when Rav Moshe Feinstein was living in Luban, Belarus. According to the biography printed at the start of Igrot Mosheh vol. 8, most of Rav Moshe's teshuvot written in that period were lost in transit. The ones that survive often establish themes that recur in his halakhic decisions. In general, while Rav Moshe's specific halakhic positions sometimes shifted over time, his underlying commitments were rock-solid. One of those commitments was to freeing agunot, and more, to an expansive notion of what constitutes a situation of *figgun*.

Belarus had joined the USSR in 1922, and Stalin had come to power in 1924. The combination of ideological opposition to religion and totalitarianism changed the reality of agunah cases in three ways. First, many women had a real option of leaving the religious community if the rabbis refused them permission to remarry. Second, even women who stayed within the community might see halakhah on this issue as an obstacle course rather than as a substantive moral guide. Third, husbands might very well be "disappeared" forever without notice and without record. Each of these factors potentially altered the classical calculus of credibility.

Mishnah Yebamot 15:1 states that if a couple goes abroad, and the woman returns alone claiming to be a widow, she is believed, even if her ground for the claim is hearsay. Ordinarily, two valid direct witnesses are necessary to undo a presumption of marriage. The Talmud offers a complex explanation for why the standards of evidence are relaxed here. There is a stick: if a court allows the remarriage and the husband turns up alive, she is forbidden to both men, and her children from the remarriage are now considered

mamzerim. There is a motive: the Rabbis were lenient in order to free women from being agunot. And there is a rationale, framed as a *chazakah* or legal presumption: a woman investigates (her husband's alleged death) comprehensively before remarrying.

Rav Moshe's interlocutor questions whether the *chazakah* is still applicable. He notes that in the Talmud, a woman is believed if she claims in her presumptive husband's presence that he has divorced her. The ground for believing her is a *chazakah* attributed to Rav Hamnuna that "A woman is not brazen in the presence of her husband". But RAMO EH 17:2 codifies the position that because of societal changes, this *chazakah* no longer generates the credibility necessary to allow remarriage. Perhaps the same is true for the *chazakah* that women investigate comprehensively before remarrying?

Rav Moshe responds with an emphatic no. The changes that led RAMO to sideline Rav Hamnuna's *chazakah* regarding divorce have no necessary implications for the *chazakah* regarding death. Rav Moshe ignores entirely, and I suggest deliberately, the question of whether changes specific to his own time and place have weakened the latter *chazakah*. Everything he says could have been written identically in the late 16th century.

Two halakhic issues remain, however.

The first is that the Mishnah says that the widow is believed only if "there is peace in the world and peace among them". If there is war, then perhaps the husband is alive and prevented from returning or communicating. If there was marital strife, then perhaps the husband is maliciously staying out of contact precisely to make his wife an agunah. Rav Moshe notes that even by the woman's account, the husband had been completely out of touch for twenty years before his death. That seems to show clearly that he was in fact willing and maybe eager to leave her an agunah, so why is she believed?

He offers three responses.

The first is entirely technical. Talmud Yebamot 116a limits “lack of peace between them” to the extreme case in which the wife has previously made a false claim of divorce. RAMO EH 17:48 cites a position that adds the case of a husband who apostasized. Rav Moshe argues that RAMO does not intend to broaden the category to cases like those two cases, but only to add that one case. He contends that this is a better reading of RAMO’s source in Shiltei Gibborim. (I am not sure why.)

Rav Moshe’s second response is that in this case, there are witnesses that the woman behaved as a widow the moment she reported the husband’s death. He contends that this enhances her credibility. (I am not sure why.)

The third response is that even the extension to apostasy is controversial.

Rav Moshe does not address the question whether the gulag might play the same role as “lack of peace in the world”.

Overall, Rav Moshe’s responses seem weak if his goal is to convince us that the woman is obviously being truthful. However, they make a great deal of sense in light of Maharik #72.

Maharik notes that Mishnah Yebamot 15:2 frames the decision to relax the standards of evidence as resulting from a specific case in which a beit din investigated a woman’s claim to be widowed and it proved true. Tosafot Yebamot 116b comments that “because they saw that there would be many agunot if they did not believe her”. Maharik explains that the specific case taught the Rabbis that even women who told the truth would often be unable to find sufficient formal evidence. The Rabbis knew that some women would falsely claim to be widows; it would be ridiculous to conclude from one case that all women always told the truth in such situations. But they created the legal presumption anyway, because the consequences of the higher standard were unbearable.

Rav Moshe does essentially the same thing. He presumably knows that the situation in the USSR made false claims more likely, but it also made more true claims impossible to prove. The balance of those changes meant that the rule should be left intact.

However, a compromise is available. Rav Moshe has the option of saying that the rabbi should at least make a good faith effort to verify the woman’s claim before permitting her to remarry. Pitchei Teshuvah 17:158 cited Radbaz as saying

that in some cases where an investigation can be easily done, it must be done.

Rav Moshe declines the compromise, on two grounds. First, he asserts that Radbaz required this only in cases where a woman was reputed to be licentious, and he sees no grounds for making this a general rule. (It seems likely that Rav Moshe did not see the original of Shu”t Radbaz 3:542, which strongly confirms his position. Radbaz seems to be dealing with a case in which a woman had made previous false claims of widowhood.) Second, Rav Moshe writes that since there is a man prepared to marry the widow in his case, and that man may not be willing to wait around while the rabbi investigates – the case is one of *iggun gamur*, just as if the woman were being prevented from marrying at all. (It’s not clear whether Rav Mosheh would have the same objection if the woman did not have a proposal in hand.)

I derive three principles from this teshuvah of Rav Moshe.

- 1) While *chazakot* are influenced by social changes, there is no straight line from a change in circumstances to a change in law. The legal presumptions that *Chazal* created via *chazakot* resulted from an interplay between their evaluation of reality and their sense of what halakhic outcomes were necessary or desirable.
- 2) Decisions in agunah cases are not properly classified as *chumrot* or *kullot*. Preventing a woman from remarrying is a wrong comparable to the stringency of allowing a woman to commit adultery. I don’t mean that 50/50 cases should be decided by a coin flip, or even necessarily that one can permit remarriage when the odds are less than 999,999,999 to 1. What I mean is that Chazal set up a very precise balance, and that any deviation from that balance, either way, is equally problematic.
- 3) For agunot, justice delayed can be equivalent to justice denied.

Shabbat shalom!

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