

CENTER FOR MODERN TORAH LEADERSHIP



HALAKHIC POWER AND HALAKHIC POLICY: MAMZERUT AND IGGUN PART 1

By Rabbi Aryeh Klapper

At the 5739 annual Conference for Rabbinic Court Judges of the Israeli Rabbinate, Rav Simchah Kuk z"l told the following story:

A woman who had been married in Europe before the Holocaust remarried a *dati* man in Israel. She believed that her first husband had died in the camps, but he turned up alive a few years later. Her second husband correctly believed that they were now forbidden to each other as negligent adulterers, and intended to divorce her unless the rabbis permitted them to be intimate. She said that she had lost all her previous family and would commit suicide if she lost this husband as well.

The question came before his father Rav Rafael Kuk (brother of Rav A. Y. Kuk), who consulted with Rav Tzvi Pesach Frank. They agreed to arrange a retroactive annulment (*hafka'ah*) of the original marriage, thereby validating the second marriage.

Does this case, if accepted as valid precedent, prove that rabbis can and ought to use retroactive annulment to resolve all *agunah* cases and all cases of *mamzerut* resulting from adultery? Rav Simchah Kuk told the story while arguing that it does not prove they can, and that they ought not. This series is intended to explain and evaluate his position and the position(s) he was responding to, and to address the current implications of that discussion.

Let's start with some definitions. *Hafka'ah*, which I'm translating as "retroactive annulment", is distinct from *bittul*, even though both yield the result that the couple was never married. *Bittul* is a discovery that something was halakhically inadequate about the original marriage ceremony, either a technical flaw in the ritual or else because one of the parties was under a radical misimpression about the other and therefore did not validly will to marry. *Hafka'ah* is a decision to retroactively

invalidate the original marriage even though it was not in any way legally inadequate. (Note: Cases in which an implicit or explicit condition set by one or both parties has/has not been met is a third category that bridges the two I've discussed, but will not be addressed here.)

The signature Talmudic phrases for *hafka'ah* are *kol demikadesb - adaata derabanan mekadesb* = "all those who marry – do so on the condition of rabbinic approval", and *afk'ihu rabbanan lekiddushin minay* = "the rabbis removed marriage from him". The Talmud cites this power in five cases, which I will take some liberties in reducing to two – where the marriage was an interpersonal wrong, and where divorce law otherwise allows a husband to create a situation in which a woman cannot know whether she is divorced.

The narrowest reading of this power sees it as superseding ordinary law rather than working within the legal system. Rabbis and prophets do have the power to suspend law = to issue a *bora'at sha'ah*, and that power itself can be construed narrowly or broadly. Here the narrow reading argues that the power of annulment needs to be authorized explicitly, and requires rabbinic authority greater than any granted to contemporary rabbis. Therefore its use is limited to the specific cases in which the Talmud used it.

However, medieval and modern halakhists cite the principle as the implicit basis of a variety of other rules and rulings. A broad reading uses these citations as evidence that the power of annulment gives halakhic authorities the near-total capacity to regulate marriage. Narrow readers might grant the existence of multiple positions, and deliberately choose the narrowest position, or else adopt the fallback that *hafka'ah* can be used only in the specific cases where later commentators have understood Talmudic rulings to be based on it.

Conservative Judaism utilizes the logic of *kol demekadesb* to allow its central *beit din* to annul all marriages that end in *iggun*. A clause to this effect is included in many

Conservative ketubahs, but to the best of my understanding, the power is not formally limited to cases in which such a ketubah was used, or where the officiant at the wedding was Conservative. This approach depends on a very broad, perhaps unlimited, reading of the power to do *hafka'ah*.

Orthodox Halakhah mostly adopts the approach that *hafka'ah* can happen only in cases for which there is direct precedent (granting that proposals for other halakhic solutions to *agunah* issues often mention annulment as the last of a series of grounds on which the proposal can be defended. It may also be possible to develop narrower-reading arguments for using *hafka'ah* in some cases of *iggun*).

Nonetheless, even the narrowest reading leaves open a way to resolve some *mamzerut* cases whenever both the mother and her husband are willing to cooperate. Tosafot Gittin 33a point out that one of the *hafka'ah* cases in the Talmud can be engineered at will. (According to at least some opinions,) *hafka'ah* results when the husband sends a *get* to the wife via agent and then cancels the agency outside the presence of the agent but in the presence of two consecutive but not simultaneous witnesses. It therefore seems that so long as the husband is alive and has not send a valid *get* to the wife, any children she has with subsequent partners can be retroactively made non-*mamzerim* by having the husband send her a *get* via agent and then etc.

Tosafot record several responses. One is yes, that works. A second is that the engineered case does not result in *hafka'ah* because the husband never intended to divorce the wife, and therefore the *get* and agency were not valid in the first place and cannot be cancelled.

Maharsham (1835-1911; Responsa Volume 1 #9) was approached in the following case:

A woman remarried on the basis of adequate evidence that her husband was dead. (Her brother in-law testified to his death, and the government issued a death certificate.) She has a child with her second husband. The first husband then turns up alive, and divorces her. The mother is threatening murder-suicide, and the child will regardless likely be sent to a non-Jewish orphanage if declared a *mamzer*.

Maharsham's response includes the following:

I will not hide from Your Honor that had you consulted with me before the divorce from the first husband was completed, I would have produced advice lehalakhah velo lemaaseh on the basis of Tosafot Gittin 33a . . .

In other words, Maharsham says that he would have suggested having the husband appoint an agent to deliver the *get* and then cancel the agent as described above. This would have resolved any issue of *mamzerut*, and enabled resolving the issue of *iggun*. However, in practice this advice was no longer relevant. Maharsham also says that his suggestion would have been *lehalakhah velo lemaaseh*, as law but not as the basis for practice. He uses that language in other responsa to mean that he would not permit acting on his advice unless one or more other major halakhists signed on as well.

In Rav Simchah Kuk's narrative, his father and Rav Frank implemented Maharsham's suggestion (with the proviso that the husband was not told in advance that the agency would be cancelled, to account for Tosafot's second response), but did so only because *mamzerut* was not involved. His father never would have resolved a *mamzerut* case on the sole basis of Maharsham's suggestion.

Rav Kuk probably believed that Maharsham's suggestion has narrow implications in the context of *iggun*. It requires the willing cooperation of a mentally competent first husband, whereas most cases of *iggun* involve a recalcitrant, incompetent, or missing first husband. By contrast, in the context of *mamzerut*, the first husband will usually be available (although he may not always be willing to cooperate – we'll discuss that later.)

But Rav Kuk also stated a broader ground for opposition:

In our era, to permit a *mamzer* means to permit public adultery. *Mamzerut* is the last thread of prohibition. There is no need to think about untying this delicate thread, which is the (sole) restriction for (sustaining) the sanctity of Israel in this generation.

Rav Kuk was responding to a shiur given at that conference by then-Chief Rabbi Rav Shlomo Goren. In coming installments we'll discuss Rav Goren's shiur and other reactions to it at the conference, and the historical and contemporary halakhic implications of that discussion.

Shabbat Shalom!

The mission of the Center for Modern Torah Leadership is to foster a vision of fully committed halakhic Judaism that embraces the intellectual and moral challenges of modernity as spiritual opportunities to create authentic leaders. The Center carries out its mission through the Summer Beit Midrash program, the Rabbis and Educators Professional Development Institute, the Campus and Community Education Institutes, weekly Divrei Torah and our website, www.torahleadership.org, which houses hundreds of articles and audio lectures.