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"Taking Responsibility for Torah"

HALAKHIC POWER AND HALAKHIC POLICY: MAMZERUT AND IGGUN PART 3

By Rabbi Aryeh Klapper

A child birthed by a married Jewish woman as the result of her adultery is a mamzer and halakhically forbidden to marry a non-mamzer. No such stigma attaches to a child born out of wedlock. Therefore, retroactively annulling the woman's marriage also retroactively removes her child's mamzer status.

Chazal had the authority to retroactively annul marriages, as evidenced by at least five Talmudic cases. Consensus post-Talmudic halakhah holds that cases parallel to those in which Chazal annulled marriages automatically generate annulments in subsequent generations. Annulment is therefore in principle now a predictable halakhic outcome in some circumstances. (However, for annulment to become the predictable outcome in practice, there has to be agreement that Chazal used annulment in the relevant paradigm case, and on the factors necessary for a contemporary case to be considered parallel to that paradigm case.)

This opens the possibility of deliberately engineering circumstances to generate an annulment. At the 5739 Conference of Israeli Rabbinical Court Judges, Ashkenazic Chief Rabbi Shlomo Goren gave a shiur proposing the use of such engineering to remove the status of mamzer from some children of adultery. The journal record of the conference reports responses from Sefardic Chief Rabbi Rav Ovadyah Yosef, Rav Shmuel Barukh Werner, Rav Avraham Shapira (who would be Rav Goren's successor), Rav Mosheh Malkah, Rav Shlomo Karelitz, and Rav Simchah Kuk.

Rav Goren cited the 19th century Responsa [should this be "Responsum", the singular?] Maharsham 1:9 as precedent for his proposal. He conceded that Maharsham made the suggestion only counterfactually, as what he would have done had circumstances been different. (See parts 1 and 2 of this series. The initial post of part 2 has now been revised for clarity.) Rav Goren also argued that Maharsham's specific suggestion was flawed, and advocated engineering a different set of circumstances to generate the annulments.

Rav Goren made a dramatic leap beyond Maharsham's precedent by considering annulment as a systemic approach rather than in reaction to a specific extreme case.

Maharsham's proposal related to a woman who had remarried with the permission of a beit din on the basis of compelling evidence that her husband was dead. In other words, it involved mamzerut resulting from a highly understandable error rather than from careless or deliberate sin. Rav Goren did not mention restricting the use of annulment to cases such as Maharsham's.

However, Rav Goren also never spelled out how broadly he would be willing to use such annulments. Regardless, engineered annulments cannot resolve all cases of mamzerut. Both Rav Goren's mechanism and Maharsham's require the active and willing participation of the mother's husband. Therefore, they cannot be used to resolve cases where the husband is dead, unavailable, or unwilling. Furthermore, both mechanisms are triggered by a legitimate divorce process. Therefore, they cannot be used where the couple has already divorced.

Rav Simchah Kuk nevertheless responded to Rav Goren that such mechanisms should never be used to resolve mamzerut.

"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 reported that his father Rav Rafael Kuk (brother of Rabbi A.Y. Kuk) actually implemented Maharsham's proposal to enable a Holocaust survivor to continue living with her second husband after her pre-Holocaust husband turned up living. But he insisted that his father would never have used Maharsham's mechanism in a case involving mamzerut.

I find it very hard to believe that Rav Rafael Kuk would have been less willing to free the woman had a child also been involved. But that case certainly involved an understandable error parallel to that in Maharsham's case.

Rav Werner reported a Holocaust-survivor story very similar to Rav Kuk's, with the added detail of two brilliant

scholar sons born of the second marriage. The case came before Rav Isser Yehudah Unterman, then Rabbi of Tel Aviv and eventually Ashkenazic Chief Rabbi, in 5714. Rav Unterman sent Rav Werner to Rav Yitzchak Halevi, who was in charge of gittin in Tel Aviv, to ask whether the Maharsham could be used in such an exceptionally rare case. Rabbi Halevi “pushed him away with both hands, said that this was not a valid practical halakhic suggestion, and did not wish to debate the issue”. Therefore, Rabbi Werner concludes,

“I think that ‘a sage has already ruled’, and (besides), it is already known that just about all the great poskim opposed the Maharsham’s suggestion, and therefore we have very little to discuss intellectually. I once wrote for a (previous) Sefardic Chief Rabbi a full pamphlet about this with regard to a case in Tel Aviv. I don’t mean to say that everything is settled there, of course there is much more to add, but according to my impoverished intellect, there is no space to permit this, and what I’ve said is sufficient”.

It’s not clear to me whether the written order of presentation in the journal reflects the actual order of speakers at the conference. Rav Kuk’s response ends the report. If he spoke last, there’s no way to know whether Rav Werner modified his position after hearing that Rav Rafael Kuk had implemented Maharsham’s proposal. Note also that Rav Simcha Kuk believed that his father never acted without consulting Rav Zvi Pesach Frank. Bottom line, Rav Werner’s opposition should have to depend on more than “a sage has already ruled” to be compelling.

Rav Shapira said that the topic should not have been on the conference agenda, without explaining why. However, now that it had perforce been raised, he felt that Maharsham had not been given his due as a posek many times greater than those in the generations following him, and without whom contemporary dayyanim would flounder. It seems possible that he was hinting that Maharsham’s proposal could be utilized in specific cases but should not be discussed at a conference setting broad halakhic policy.

Rabbi Werner responded to Rav Shapira that he was second to none in his respect and admiration for Maharsham. He contended that owing to the gravity of the issue, Maharsham would be grateful to anyone who ruled against him. That’s a very hard contention to evaluate!

Rav Mosheh Malkah implicitly but sharply critiqued Rav Werner and I think also Rav Shapira:

“The wisest of all men (= King Solomon) said ‘Behold the tears of the oppressed, and they have no comforter’, and Chazal say that this refers to mamzerim, for in what way have they sinned? The son is tripped up by the command of the

Holy Torah A mamzer must not enter the congregation of HASHEM. The Torah ruled and established thus, and we are all obligated to bow our heads. But if there is a possibility, if there is an opening even as the point of a needle to help these suffering ones – we must do so. Our masters established a precedent with regard to women in situations of iggun to be as lenient as possible, accepting hearsay testimony, women as witnesses, relatives as witnesses, nonJews speaking while innocent of the halakhic implications of their testimony, even though we are speaking of the grave issue of adultery with a married woman, and despite this Chazal say that anyone who strives to permit an agunah is as if he rebuilt one of the ruins of Jerusalem, **The Noda b’Yehudah, brought by Pitchei Teshuvah, says that the issue of ‘entering the congregation of Hashem’ is considered a matter of iggun.** Therefore, the obligation is incumbent on every rav and dayyan in Israel to strive and to find supports to help these suffering ones. If a great and mighty rav in Israel said something about the matter – we do not dismiss him, and we must judge the matter seriously.”

It’s not clear to me whether “great and mighty rav in Israel” refers to the Maharsham or rather to Rav Goren, but I tend to the latter.

Rav Shlomo Karelitz sided with Rav Werner:

“Rabbi Yisroel Salanter brings that his teacher, the genius Rabbi Zundel of Salant, would learn all four sections of Shulchan Arukh ‘halakhah lemaaseh’. I was once astonished – what praise is this?! But the intent is that he would learn with that sort of responsibility, AS IF it were halakhah lemaaseh. Because there is a divide between halakhah and halakhah lemaaseh. The Maharsham did not rule halakhah lemaaseh - the case happened after the get was given, and the Maharsham wrote that had he come earlier, he would have advised doing this, but in practice he did not advise this, and as stated this was merely lehalakhah and not lemaaseh.

So, of the respondents we’ve discussed, only Rav Malkah seems willing to consider the broad use of Maharsham-type mechanisms. Rav Werner and Rav Karelitz seem completely opposed to any use, while Rav Shapira may allow narrow use, and Rav Kuk may allow use to resolve cases of iggun but not cases of mamzerut.

It’s interesting to me that none of the other respondents refer in any way to the response of Rav Ovadyah Yosef, which in the print version immediately follows Rav Goren’s presentation. Possibly Rav Ovadyah actually spoke last. We’ll discuss Rav Ovadyah’s response in Part 4 and move toward addressing the actual halakhic fate of Rav Goren’s proposal.

Shabbat Shalom!