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Survey of Recent Halakhic Periodical Literature

MARRIAGE OF A KOHEN AND THE DAUGHTER OF A NON-JEW

In a decision issued on 19 Iyar 5766, the Rabbinical District Court of Rehovot confirmed its earlier ruling declaring an applicant for a marriage license to be eligible to contract a marriage as a Jewess but denied her permission to marry a *kohen* on the grounds that she was the issue of a union between a Jewish woman and a non-Jewish man.[1]

The decision, on the surface, was routine and unexceptionable. Denial of the application for a marriage license was based upon an explicit provision of Halakhah recorded twice in *Shulhan Arukh*, *Even ha-Ezer* 4:5 and 4:19 and implicit in the ruling of *Shulhan Arukh*, *Even ha-Ezer* 7:17. The Rehovot *Bet Din* composed a detailed analysis of the basis of that ruling only because the case was remanded to them on appeal for further consideration by the Supreme Rabbinical Court of Appeals .

The Gemara, *Yevamot* 45a, posits a controversy among the *Amora'im* regarding the status of the progeny of a union of a non-Jewish man and a Jewish woman. One opinion is that the child born of such a liaison is a *mamzer* while a second opinion maintains that the child is legitimate but, if a female, is forbidden to marry a priest. The Gemara, *Yevamot* 45b, concludes, "The law is that if a non-Jew or a slave consorts with a daughter of Israel the child is legitimate." Ostensibly, that definitive ruling represents an adjudication of the earlier controversy and the term "*kosher*" or "legitimate" is used as the antonym of "*mamzer*" or "bastard" with the implication that the child is legitimate but nevertheless forbidden to a *kohen* as had earlier been stated. Rosh understands the Gemara in that manner and rules that the daughter is certainly forbidden to a *kohen*.

Rif, however, states that some authorities rule that the daughter is not only legitimate but permitted to a *kohen* as well. Presumably, the rationale underlying that position is that, since there is no halakhically recognized paternal-filial relationship between the biological father and

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the child, there is no basis for disqualifying her from marrying a *kohen*. The term *kosher* is understood by the authorities cited by Rif as "legitimate" in the fullest sense of the term and the dictum is understood by him, not as adjudication between two conflicting views, but as the expression of a third, previously unexpressed position, which is pronounced to be normative.

Ramban, *Yevamot* 45a, similarly asserts that the Gemara records three distinct views with regard to the status of such progeny and, although the Gemara clearly rules that the child is not a *mamzer*, there is no definitive ruling with regard to whether a daughter of such a liaison may marry a *kohen*. Since the issue remains a matter of doubt, Ramban rules that such a girl may not enter into marriage with a *kohen* but, *post factum*, if such a marriage has been celebrated, they cannot be compelled to divorce.[2] Ramban ascribes that view to Rif as well. The view that Rif regards the matter as remaining in doubt is supported by the published text of Rif.[3]

As previously noted, the prohibition against marriage of such a woman to a *kohen* is explicitly codified by *Shulhan Arukh* in two places, *Even ha-Ezer* 4:5 and *Even ha-Ezer* 4:19. Both *Helkat Mehokek*, *Even ha-Ezer* 4:3 and 7:26, and *Bet Shmu'el*, *Even ha-Ezer* 4:2 and 7:39, confirm Ramban's view in ruling that the daughter of such a liaison is forbidden to marry a *kohen* but, if already married, the couple need not be compelled to divorce.[4] That ruling is explicitly accepted by R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 6. R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, VII, *Even ha-Ezer*, no. 60, is in fundamental agreement with that position but rules that, since Ramban regards the status of such a woman to be doubtful, in the presence of a second "doubt," e.g., the status of the prospective groom as a *kohen* is itself doubtful, the marriage may be permitted on the basis of *sefek sefeika* or "double doubt."

The case heard by the *Bet Din* of Rehovot involved one additional consideration. Before applying for a marriage license the couple had been living together for a period of approximately one and a half years and had announced that, if a license was denied, they would continue to do so without benefit of marriage. The issue of a *kohen* already living with the daughter of a Jewish mother and a non-Jewish father pursuant to civil marriage has been analyzed by R. Moshe Feinstein in his earlier-cited responsum and by the late Sephardic Chief Rabbi of Jerusalem, R. Shalom Mashash, *Shemesh u-Magen*, III, *Even ha-Ezer*, nos. 55 and 58.

Ramban's position that the status of such a woman is unresolved led him to rule that she may not marry a *kohen* but, if married, the couple cannot be compelled to divorce. That ruling seems somewhat contradictory. The couple is forbidden to marry because of the possibility of transgression. The selfsame possibility of transgression persists within an already contracted marital union. If so, would not logical consistency lead to the conclusion that, if married, they must divorce? A number of latter-day authorities have endeavored to resolve that perplexity.

One possible solution is that the prohibition is rabbinic in nature and the edict was not designed to apply *post factum*. However, the most cogent resolution is that advanced by *Sha'ar ha-Melekh*, *Hilkhot Issurei Bi'ah* 15:3. A divorce executed under duress by a *Bet Din* is valid only if there are halakhic grounds for coercion. However, asserts *Sha'ar ha-Melekh*, if the transgression is doubtful, it follows that the grounds for coercion are also doubtful. If so, argues *Sha'ar ha-Melekh*, a *get* cannot be compelled in cases of doubt born of halakhic controversy because its validity would perforce be a matter of doubt with the result that the woman could not be permitted to remarry on the strength of such a *get*. Nevertheless, as a matter of religious law, the parties themselves are forbidden to continue to live together as man and wife. *Iggerot Mosheh* accepts *Sha'ar ha-Melekh*'s explanation in ruling that a religious ceremony may not be performed for such a couple despite the fact that they have been living together in an ongoing relationship pursuant to civil marriage.[5] *Sha'ar ha-Melekh*'s resolution of the problem is particularly compelling if it is accepted that the prohibition is biblical in nature.

Rabbi Mashash, on the other hand, in his previously cited responsum, was quite willing to permit marriage of such couples not only in situations in which a civil marriage had already taken place but also in situations in which the parties had already been sharing an abode. He bases his conclusion upon two considerations:

1) A Jew suspected of consorting with a non-Jewish woman may not marry her subsequent to her conversion. However, if they have already married he is not obligated to execute a *get*. There is significant controversy with regard to whether, in such a situation, civil marriage constitutes a *post factum* condition. Those opinions have been analyzed in detail by this writer in *Contemporary Halakhic Problems*, I (New York, 1977), 286-290. Rabbi Mashash chooses to cite only the permissive opinions and entirely ignores the opposing position. He then summarily equates the case of a union between a *kohen* and the daughter of

a non-Jew with that of a Jew suspected of having has a sexual relationship with a non-Jewish woman.

Apart from the controversy with regard to the effect of civil marriage in the latter situation, according to *Sha'ar ha-Melekh*'s explanation of the rationale underlying that provision in the case of a *kohen*, the two situations are obviously entirely dissimilar.

Rashi, *Yevamot* 24b, explains that the prohibition against a Jew marrying a convert with whom he is suspected of having had a liaison was promulgated in order to safeguard the honor and reputation of the husband since marriage under such circumstances is likely to lend credence to rumors of previous immorality. Accordingly, some authorities conclude that the prohibition does not extend to situations in which the couple have been living together publicly since in such cases previous immoral conduct is an established verity.[6] *Teshuvot ha-Rashba*, I, no. 1,205, explains that, if the couple are suspected of having lived together previously, their marriage subsequent to conversion will lead to suspicion that the conversion itself was insincerely contrived for purposes of marriage. Accordingly, a number of authorities assert that, according to Rashba, if the couple have already established a permanent conjugal relationship, there can be no grounds for the suspicion that the conversion was insincerely entered into merely for the sake of marriage.[7] Quite obviously, according to these lines of reasoning, in the case of a converted paramour, civil marriage or a long-standing conjugal relationship is not equated with a valid marriage as creating a *post factum* situation but is regarded as rendering the prohibition entirely nugatory.

2) Rabbi Mashash asserts, again quite unequivocally, that in both instances the prohibition is rabbinic in nature and hence lenience is in order in matters of doubt. It is certainly the case that the prohibition against marrying a proselyte in the situation described is rabbinic in nature but it is far from clear that such is the case with regard to a *kohen* and the daughter of a non-Jewish father. Indeed, if the prohibition is merely rabbinic and if, as Ramban maintains, the permissibility of such a marriage is a matter of doubt, it is difficult to understand why the marriage is not permitted even *ab initio*. R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 5, depicts the prohibition as based upon doubt with regard to a biblical transgression. Nevertheless, *Teshuvot Rema mi-Panu*, no. 124, *Helkat Mehokek*, *Even ha-Ezer* 7:26, *Teshuvot R. Akiva Eger*, no. 91 and *Bet Me'ir*, *Even ha-Ezer* 4:5, regard the prohibition as rabbinic in nature.[8]

R. Shlomoh Amar, *Shema Shlomoh*, V, *Even ha-Ezer*, no. 8, endorses Rabbi Mashash's ruling and adds that, in a sexually promiscuous age such as ours, it is quite possible that the groom's mother may have engaged in sexual conduct that would serve to deprive any future progeny of the priesthood.

The *Bet Din* of Rehovot took note of the opinions of Rabbis Mashash and Amar but declined to accept them as authoritative. The matter was appealed to the Supreme Rabbinical Court of Appeals and, in a brief decision, the Court of Appeals simply cited the responsa of Rabbis Mashash and Amar, reversed the ruling of the rabbinical district court and "requested" the rabbinate of Rehovot to perform the marriage.[9] One of the members of the panel hearing this case was R. Shlomoh Amar.

The halakhic authority of the Israeli Supreme Rabbinical Court of Appeals to reverse decisions of district courts is not at all clear. That issue has been discussed by this writer in *Contemporary Halakhic Problems*, IV (New York, 1995), 17-45. The theories offered in support of such authority are much more persuasive in matters of jurisprudence than in matters of religious law. The general rule "If a scholar has prohibited another scholar dare not permit" (*Berakhot* 63b, *Avodah Zarah* 77b, *Hullin* 44b and *Niddah* 20b) admits of exceptions in instances of clear error. It does, however, bar exercise of purely subjective discretion in choosing one set of precedents over another.

It is difficult to believe that any objective scholar would find Rabbi Mashash's reasoning absolutely compelling. It is impossible to fault the *Bet Din* of Rehovot for assaying greater weight to the responsa of Rabbis Feinstein and Yosef than to those of Rabbis Mashash and Amar. It is quite easy to conclude that the lower court's decision was overruled simply because Rabbi Amar chose to follow his own previously announced opinion.

Such a course of action might well be legitimate were Rabbi Amar able to allege a lack of cogency in the opposing view or to show that the weight of precedent contradicted the decision of the lower court. This he made no attempt to do. Mere preference for one set of precedents over another without a clear elucidation of doctrinal support is not the manner in which appellate review is carried out in the common law judicial system from which the Israeli system of rabbinic appellate review was adopted. Such a procedure strikes this writer as a misuse of appellate power.

Furthermore, there is some question with regard to whether the appellate jurisdiction of the Supreme Rabbinical Court extends to "non-adversarial" matters. In an unpublished decision issued in 5702, Index no. 1/46/701, the Supreme Rabbinical Court held that it had appellate authority in all matters. However, in a subsequent unpublished decision issued in 5716 the Supreme Rabbinical Court ruled that it had no authority to hear appeals in "non-adversarial" matters, i.e., in determining issues of Jewish religious law since such matters are not within the ambit of authority granted to the *Bet Din* by virtue of the applicable Israeli civil law. The issue before the court involved the conversion of a minor child by its Jewish father in face of the announced opposition of its non-Jewish mother. The district court declared that it was not acting by virtue of the powers vested in a *Bet Din* to adjudicate disputes but was simply announcing a matter of religious law. The Supreme Rabbinical Court ruled that such matters are not subject to appeal.[10] The question of whether a marriage between a daughter of a non-Jewish father is permitted to marry a *kohen* is similarly a non-adversarial issue of religious law.[11]

Moreover, as cogently demonstrated by *Iggerot Mosheh*, even in circumstances in which the couple will continue to cohabit even without benefit of marriage, celebration of a wedding ceremony is tantamount to rabbinic license to commit an even graver transgression. According to many early-day authorities, cohabitation outside of marriage consitutues a rabbinic infraction. Rambam, *Hilkhot Issurei Bi'ah* 17:12, maintains that priestly conjugal prohibitions are biblically binding only within a marital relationship. Thus, according to Rambam, performance of a wedding ceremony transforms what would otherwise be a rabbinic infraction into a more serious biblical transgression.

It is, however, not inconceivable that the same result might have been achieved on the basis of other considerations. As pointed out by Rabbi Feinstein in his earlier-cited responsum, in Jewish law, cohabitation for purposes of marriage creates a marital relationship when such is the intention of the parties. Whether or not such intention is presumed in a relationship tantamount to common law marriage depends upon whether the presumption that couples do not engage in fornication when the option of a marital union is available is applicable in situations of the nature described. An analysis of that very complex issue is beyond the scope of the present discussion. Suffice it to say that a *Bet Din*, in appropriate circumstances, might reasonably have concluded that the existence of a valid halakhic marriage necessitating a *get* for its

dissolution was at least a matter of doubt. Since, in the case of a *kohen* married to the daughter of a non-Jew, a *get* cannot be compelled, it should follow that the recalcitrant parties may not be prevented from regularizing their relationship by means of a formal marriage.

NOTES

1. Index no. 321328494-15-1.
2. Rambam's position is a matter of some dispute. Rambam, *Hilkhot Issurei Bi'ah* 15:3, rules that the child is legitimate but makes no reference to the status of a daughter *vis-à-vis* a *kohen*. Accordingly, *Maggid Mishneh*, *ad locum*, presumes that Rambam regards the daughter to be permitted to a *kohen*. However, *Mishneh le-Melekh*, *ad locum*, advances evidence indicating that Rambam maintains that she is forbidden to a *kohen*.
3. Cf., however, *Nemukei Yosef*, *ad locum*, and R. Yechiel Ya'akov Weinberg, *Teshuvot Seridei Esh* (Jerusalem, 5726), III, no. 54, reprinted in *Teshuvot Seridei Esh* (Jerusalem, 5763), I, no. 72. For a comprehensive survey of the positions of early-day authorities regarding this issue see *idem*, *Teshuvot Seridei Esh* (Jerusalem, 5763), I, no. 71.
4. *Shulhan Arukh* rules simply that such a marriage is forbidden but does not expressly address the *post factum* status of such a couple. R. Chaim Joseph David Azulai, *Birkei Yosef*, *Even ha-Ezer* 4:19, regards that omission as indicating that *Shulhan Arukh* maintains that even after the fact they are forbidden to live together as man and wife. Cf., however, R. Shalom Mashash, *Shemesh u-Magen*, III, *Even ha-Ezer*, no. 58.
5. Cf., however, R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, VII, no. 9, sec. 6, who cites an oral report regarding Sephardic authorities who permitted performance of a marriage pursuant to a civil marriage in France. They considered the matter to be *post factum* because France, at the time, did not allow civil divorce and remarriage. Sanction of a marriage under such circumstances is certainly not consistent with the position of *Sha'ar ha-Melekh*.
6. See this writer's *Contemporary Halakhic Problems*, I (New York, 1977), 286, note 42.
7. See *ibid*, p. 289.
8. The question is contingent upon whether the *kal va-homer* formulated by the Gemara, *Yevamot* 45a, in establishing the prohibition is a compelling *a fortiori* argument or a mnemonic device associated with a rabbinic edict.
9. Index no. 321328494-12-1.
10. See Eliav Shochetman, *Seder ha-Din* (*Civil Practice in Jewish Law*) (Jerusalem, 5748), p. 450.
11. For a comprehensive discussion of the issues involved in determining the ambit of the appellate authority of the Supreme Rabbinical Court see this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), 17-45.