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Despite their preoccupation with political and military problems, Israelis have lately been focusing much attention on religious issues, such as autopsies, questionable conversions and marriages. Although Rabbi Rabinowitz's essay was submitted before the outbreak of the currently raging controversy over prohibited marriages, recent developments have endowed it with special relevance. Dr. Rabinowitz, formerly Chief Rabbi of South Africa, is a noted scholar and author who serves as Associate Editor for the Encyclopaedia Judaica.

THE NEW TREND IN HALAKHAH

There are to my mind few passages in Rabbinical literature more pathetic, and more heartrending, and so infused with deep humanity than the famous interpretation by Daniel Chayyata (the Tailor) of Ecclesiastes: 4:1.

> But I returned and considered all the oppressions that are done under the sun; and behold the tears of the oppressed, and they had no comforter; and on the side of the oppressor there was power, but they had no comforter.

Daniel Chayyata applies this verse to *mamzerim,* the children born out of incest and adultery (not the illegitimate children born out of wedlock). "Behold the tears of the oppressed"—truly their parents transgressed, but wherein did these unfortunate ones sin? His father had relations with a married woman, but wherein has he sinned? "And on the side of the oppressors there was power"—on the side of the Great Sanhedrin of Israel which comes upon them by the power of the Torah, and rejects them on the strength of the law "the *mamzer* shall not come into the congregation of the Lord."[1] He concludes this daring interpretation with the assurance that in the world to come they will be comforted by God.[2]

In the usual case of a child born out of a wilful and deliberate transgression on the part of the parents, one attempts to justify the unfortunate fate of the offspring to a certain degree. This is but one of the sad but undisputable facts where the sins of the parents are heaped upon the children. But there is another *mamzer* about whom no such rationalization can be put forward. It is the classic case involving the *agunah* whose husband is missing. She obtains circumstantial, but almost, conclusive evidence of his presumed death, and she produces it before the *Bet Din*. It should be pointed out in parenthesis that the whole essence of the *Heter Agunah* depends upon the fact that there is no 100 percent certainty that the husband is dead. There is, so to speak, one chance in a million that he may be alive, but the *Bet Din* is given the power, after carefully and exhaustively sifting the evidence, in accordance with rules laid down in the Talmud and Codes, in coming to the conclusion that they are justified in presuming his death, and issuing a certificate that the *agunah* is to be regarded as a widow and free to remarry. On this certificate, issued "by the power of the Great Sanhedrin of Israel" she remarries legally "according to the law of Moses and of Israel," and a child is born of that union. And then the lost husband, presumed dead, turns up. The result is surely the harshest law in the whole Jewish code. The unfortunate woman must be divorced from both husbands, and that child is a *mamzer*. The *Bet Din* acted in accordance with the power granted them by the Torah: the woman married in accordance with the laws of the Torah. The second husband is certainly entirely blameless (see the *Etz Yosef* on the Midrash who makes the statement of Daniel Chayyata apply to both these categories of *mamzerim* and weakly suggests that the "sin" consists of a lack of adequate investigation by the *Bet Din*, an argument which surely cannot be sustained).

It is a well-known and established fact that throughout the ages the unfortunate plight of the *agunah* has exercised the compassionate attention of the Rabbinic authorities. The verse of Ecclesiastes quoted by Daniel Chayyata with regard to the *mamzer* is the common refrain of many authorities with regard to her, and every possible device of the halakhah was pressed into

service in order to find a *heter* to release her from her chains (*agunah* actually means "chained"). To give but two outstanding later examples: the Responsa *Ein Yitzchak* of Rabbi Isaac Elchanan Spektor of Kovno abounds with such cases; it is said that of 200 cases that came before him from all parts of the world he failed to find a *heter* in only one (I have not found it in the volume); while the *heterim* worked out by the authorities of the European holocaust, when thousands of husbands disappeared without even the minimum trace laid down by the existing halakhah, is one of the glorious features of the essential compassion of the rabbis.

It will therefore occasion no surprise that in the particularly unfortunate case quoted, if the law that she was to be divorced from both husbands could not be ameliorated, at least an attempt should be made to remove the stigma of *mamzerut* from the child. One of the most interesting and far-reaching attempts was proposed about three quarters of a century ago by R. Shalom Moses Schwadron of Brezen, the author of *Teshuvot Ha-Marsham*.[3] Although he is careful to point out that it is a "suggestion according to the halakhah (only) but not (necessarily) for application in practice" (*Le-Halakhah Ve-Lo Le-Maaseh*—a common precaution in all far-reaching innovations, but see later), it represents what may be termed a halakhic breakthrough. Briefly stated, it relies upon the Tosafot in *Gittin* 33a on the much discussed passage in the Talmud *in loc.* that "when a man betroths a woman, he does so under the conditions laid down by the Rabbis, and in this case the Rabbis annul his betrothal." It is a discussion on the Mishnah[4] that in "former times" a man could send a bill of divorce to his wife through a messenger and, desirous of cancelling it, he could assemble an *ad hoc* Bet Din anywhere and annul the *get*, without informing the messenger. But Rabban ben Gamliel the Elder issued a decree that this was no longer to be done because of *"tikkun Ha-Olam"* (the better ordering of society). The Talmud discusses whether said annulment was valid, should the husband infringe the *takkanah* of Rabban Gamliel and annul a *get* sent to his wife prior to its reaching her, before a *Bet Din* and without her knowledge. Rabbi Judah Ha-Nasi expressed

the opinion that it was valid, while Rabban Simeon ben Gamliel expressed the view that it was of no effect. In answer to the objection that a rabbinical enactment (that of Rabban Gamliel) could not override a Biblical law, since the annulment was valid according to such law, the answer is given that "when a man betroths a woman he does so under the conditions laid down by the Rabbis, and they therefore have the right to annul the *Kiddushin.*"

Despite the fact that the Halakhah is in accordance with the view of R. Judah Ha-Nasi, the Maharsham, basing himself upon a statement of Rabbenu Tam in Tosafot *in loc.*, suggested that in order to give relief to the child in this particularly tragic case, advantage could be taken of the view of Rabban Simeon b. Gamliel. It could be arranged that the first husband should execute a *get* and send it to his wife, and before it reached her he would annul it before a *Bet Din* in defiance of the *takkanah.* And as a result the original *kiddushin* would be annulled *ab initio,* and the stigma of *mamzer* would be removed from the child.

This solution is frankly taking advantage of a "legal fiction." The case of the Talmud deals with a husband who acts deliberately in an unworthy manner, which does not apply in this case. But in view of the circumstances that everyone concerned was blameless and that its purpose was to save the innocent child from the results of these unfortunate complications it is a striking example of the unwearying attempts of the rabbis to give relief wherever possible.

In the light of the main point with which this article aims at discussing, it is a sheer and positive delight to read the two volumes of *Heichal Yitzak,* the Responsa on *Even Ha-Ezer* by the late Chief Rabbi Isaac Halevi Herzog, Chief Rabbi of Israel.[5] In it one sees the essential humanity and profound compassion which always inspired the rabbis throughout the generations to find relief for "the cries of the oppressed who have no comforter." As the editor, Rabbi Jacob Goldman, rightly says in the English forward to the second volume, the works reveal "the scope of his encyclopaedic knowledge, the breadth of his understanding, the nobility and piety which were of the essence

of his personality." All these noble qualities are pressed into the service of searching for and exploring some form of relief particularly in such and related cases which are the subject of discussion. They are eloquent evidence of the truth of the adage "He who says I have sought and not found, believe him not."

Two of these Responsa deserve to be quoted. One was in answer to a query sent by the late Rabbi Reuben Katz of Petach Tikvah.[6] A Jew of Yemen had betrothed his minor daughter (who was not present), to a man in Asmara. As to whether he subsequently informed her grandmother with whom she was staying there was contradictory evidence. The fact was that she was unaware of it and later married another man to whom she bore a son. All those concerned, grandmother, father, daughter and both "husbands" came to Israel with the Aliyah from Yemen and presented the case before the *Bet Din* of Petach Tikvah. Rabbi Katz wrote to Rabbi Herzog who wrote a special Responsum[7] on the status of the child, at the end of which he explicitly mentions this striking solution of the Maharsham. He points out that the solution he gives is practically identical with it, and with judicial impartiality and objectivity he adds:

> It is true that he wrote it *Le-halakhah ve-Lo Le-Maaseh,* but perhaps his intention was that it should not be acted upon except with the approval of another great authority, or perhaps two. But on the other hand, one may well ask, if that was what he meant, why did he not say so explicitly? Nevertheless the case with which we are dealing is a better one than his, because of the other doubts with regard to (the evidence of) the relations.

The second case has an extrinsic if not intrinsic connection with my theme. The person appointed by the Haifa *Bet Din* as the *shaliach* for delivery of *gittin* executed abroad for delivery in Israel, died, and after his death a considerable number of *Gittin* arrived with *Harshaot* appointing him as the messenger. In some cases it would have been virtually impossible to have another *get* drawn up, and the wife would have remained an *agunah.* The Haifa *Bet Din* applied to Rabbi Herzog as to whether, in view of the special circumstances, they could, on

the strength of the *harshaot,* appoint another *shaliach.*[8] It was a unique problem which had presumably never come up before. As was to be expected, Rabbi Herzog found a way out, but made the practical application of his *heter* conditional upon his arguments being sent to Rabbi Pesach Zevi Frank, the Chief Rabbi of Jerusalem, and "to another outstanding rabbinic authority in *Eretz Israel* of your choice, and if they will agree to it, I join them in releasing these unfortunate women by the appointment of a new messenger."[9] This condition was apparently widely interpreted. There is no responsum from Rabbi Frank (who died shortly after; the responsum is dated—7th Shevat 5716) but there are replies from Rabbi J. Weiss (then of Manchester, now of the Edah Haredit of Jerusalem), and from Rabbi Joseph Shalom Eliashiv, of the Jerusalem Supreme *Bet Din,* as well as from Rabbi Solomon Zalman Auerbach, the distinguished head of the Kol Torah Yeshivah in Jerusalem. There is, however, no indication whether it was the Haifa *Bet Din,* or as is highly possible, Rabbi Herzog himself, who sent his suggested *heter* to one or both of the last two.

It is with Rabbi Auerbach's replies that I am concerned. In the first responsum he rejects some of the arguments of Rabbi Herzog, but, on the other hand, he puts forward what he himself calls a "novel approach" (*milta chadta*) whereby the *gittin* can de delivered,[10] which was, after all, what was to be expected. One of the outstanding halakhic authorities of the day, he is the *rosh yeshivah* of the Kol Torah Yeshivah in Jerusalem, and is held in universal esteem not only on account of his vast learning, and for his deep piety, but he is in general acutely alive to the problems of the time. Of his integrity and high moral purpose there can be no shadow of question. He was proposed as a candidate both for the chief rabbinate of Jerusalem and of Israel, but refused to allow his name to go forward because of his desire to devote himself entirely to pure learning, though his candidacy would have had wide support. We are living in an age where a definite transformation has taken place with regard to *Pesak Halakhah.* In the past, almost without exception (the only exception I can think of is Netziv, R. Naphtali Zevi Judah Berlin, and perhaps partly on account of that he

was called *Rabban shel Kol Israel*) *roshei yeshivah* did not regard it as their function to decide on practical halakhah. To give a parallel from the world of science, they regarded themselves as exponents of "pure Torah." *Halakhah Le-Maaseh* belongs to "applied Torah" and the great Poskim were all practicing rabbis of communities who came up against practical problems which they had to decide, taking the human aspect into consideration. To mention only a few of the last two centuries, R. Ezekiel Landau, the *Nodah Biyehudah,* the Hatam Sofer, Saul Nathanson, R. Isaac Elkhanan and Rabbi Herzog. A fundamental change has taken place in this direction; one has only to think of such outstanding Poskim as R. Moshe Feinstein in the United States, and, among those in Israel, Rabbi Solomon Zalman Auerbach holds an honored place. He is a great Posek, and some of his decisions, dealing with the problems raised by modern technology, have made a solid contribution to modern Halakhah. What came therefore, as almost a painful surprise was the talmudic essay which is the main purpose of this article.

Among the most recent new publications in the field of halakhah ("and Jewish thought, and problems of Judaism") is the bi-monthly *Moriah*[11] where there is a profound study by Rabbi Auerbach of this *heter* given by the Maharsham,[12] whose purpose was, as stated, to free the unfortunate child of an invalid marriage, innocently and legally entered into, from the status of a *mamzer.* He freely acknowledges that this *heter* is an example of the manner in which "because of the great anguish of the woman, . . . the great Torah authorities toiled to find a justification for having compassion on the woman and legitimizing ('purifying') the child." He then properly points out that the Maharsham explicitly stated that the *heter* was *Le-halakhah Ve-lo Le-Maaseh,* but he is not quite accurate in the concluding paragraph of the introduction, "I heard on various occasions from those sitting as *dayyanim* in our Holy Land that they were desirous of relying upon this suggestion of that 'gaon of Hora'ah,' the Maharsham, and decide accordingly on practice, but since the Maharsham stated explicitly that his words are not *Le-Ma'aseh,* I have decided to examine it and express my

humble opinion." As we have seen, Rabbi Herzog did rely on this *Le-Ma'aseh,* 20 years ago.

After an exhaustive examination, Rabbi Auerbach sums up his conclusions and enumerates no less than six reasons why he has "reservations" or "doubts" (*pikpukim*) as to why the suggestion of the Maharsham cannot be accepted in practice. As a result, he virtually closes the door to this legal device being used in affording relief to the hapless child.

Before dealing with what I consider to be the main implications of this approach, something must be said of the factual basis of the *heter* of Rabbi Schwadron. Both Rabbis Herzog and Rabbi Auerbach make the valid point that he explicitly stated that the *heter* was *Le-Halakhah Ve-Lo Le-Ma'aseh.* This gives the impression that, like Rabbi Auerbach's rejection of it, it was purely an academic talmudic disquisition with no immediate practical bearing. Reference to the source, however, shows that it was not so, and the facts are important for two reasons. The Responsum in question was a reply to a query by Rabbi Abraham Joel Aaronson of Odessa. The case was one heavy with tragedy. A man had gone to America, leaving his childless wife behind. After 12 years of separation his brother came with the news that he had died, and as supporting evidence the wife actually obtained a legal certificate of death from the authorities in America. Acting upon this seemingly incontrovertible evidence the wife applied to the *Bet Din* to be declared a widow, with permission to remarry. It was granted; her brother-in-law gave her *Chalitzah,* and subsequently she remarried and became pregnant from her second husband. And then, before the child was born, the shattering news came that the husband was alive. He had given his passport to another man who died and the dead man was identified, on the strength of that passport, as her husband. The husband was alive, and, to add tragedy to tragedy, was an inmate of a mental home, although sufficiently of *compos mentis* to execute a *get.* Rabbi Aaronson, in accordance with the *din* that she must get a divorce from both, succeeded in getting one from the first husband, and from the second. Deeply concerned with the status of the yet unborn child, Rabbi Aaronson addressed himself to Rabbi

Schwadron as to whether some relief could be found for it.

The first point is that with all the good will in the world, and despite the fact that the first husband was of unsound mind and there was reason to believe that he had been so even at the time of his marriage, and despite the fact that Rabbi Aaronson expressed the fear that the woman would put an end both to her life and that of the child, Rabbi Schwadron could not find a *heter*. That the first husband was regarded as sufficiently of *compos mentis* to execute a *get,* had barred the way to relief on the grounds that the first marriage may have been invalid.

The second point is with regard to the theoretical *heter*. Rabbi Schwadron delicately suggested, in his reply, that his inquirer had made a mistake in obtaining the *get* from the first husband. In this connection he wrote:

> I will not dissemble the fact that had you consulted me before the *get* was executed from the first husband I would have suggested a possible way out *Le-halakhah Ve-Lo-Le Maaseh,* according to the Tosafot in *Gittin,* etc.

Rabbi Schwadron makes the point which has been suggested above, that when the woman acted according to the decision of the *Bet Din,* there is no fear of the undesirable advantage which might be taken of it in other cases and "the rabbis would be entitled to annul the marriage *ab initio.*" Surely in this context, the words *Le-halakhah Ve-Lo-Le-Ma'aseh* can be taken merely as an expression of regret that, alas, it was by then a purely theoretical point, which could not be implemented in practice. I am convinced that it is so, but be that as it may, it hardly affects the issue as I see it.

If the suggestion of Rabbi Schwadron was not a purely theoretical one, everything seems to point to the fact that the profound analysis of it, with its negative conclusion, by Rabbi Auerbach, was. It is not a responsum on an actual problem; it is a halakhic essay belonging to the same category. For instance, as some of those which follow it, on a stolen *Shofar* or *Lulav,* on whether a witness can become a judge in a capital case, or "Matters appertaining to the Beginning of Tractate Makkot." And to my mind it is to be regretted that this distinguished

scholar selected a theme, which, with its negative conclusions, would slam the door against the possibility of relief in a case heavy with poignant tragedy.

But that is not all. To my mind, the difference between the former Responsum of Rabbi Auerbach in which, though he disagrees with the conclusions of Rabbi Herzog, he nevertheless does suggest an alternative manner of solving the problem and this purely negative one is a symptom of a tendency which is becoming more and more dominant in halakhic circles in Israel, and is in the highest degree disturbing. It is the tendency to be a *machmir,* to adopt the stringent view, instead of seeking out the possibility of a lenient decision, a tendency which is so pronounced that innumerable examples could be given.

It is interesting in this connection to note that in a footnote at the end of his article, Rabbi Auerbach writes, "after this essay was given for publication, my attention was drawn to an article . . . by R. Ovadiah Joseph (now Sephardi Chief Rabbi of Tel-Aviv/Jaffa) which appeared in Vol. 48 of *Sinai.* But after studying it I see no reason to retract or alter my conclusions."

The article in question[13] naturally deals with a similar possibility of granting relief by annulling the *kiddushin* in exceptional cases, and I quote from it one salient passage:

> Whatever the case may be, we learn from this that the great halakhic authorities of Austria did adopt the procedure of annulling the *kiddushin* even at the present time, when there was a compelling reason to do so. In addition, I found that the rabbis of Jerusalem in the year 5369 (1709) in their *takkanot* and rulings, (published at the end of the book *Sefer Chayyim Va-chesed* (par. 92) expressed their view that it is possible, even after the completion of the Talmud, to permit the annulment of *kiddushin.*

NOTES

1. Deut. 23:2.
2. *Vayikra Rabba* 32—end; *Koh. R.* on the verse.
3. Warsaw 1902, Vol. 1. Responsum 24.
4. *Gittin,* B. Talmud 32a.
5. Vol. 1, Jerusalem 1966; Vol. II, *ibid.* 1967.
6. Vol. II, pp. 74-82.
7. *Ibid.* Responsum 19, pp. 80-81 dated Iyyar 5711 (1951).
8. *Ibid.* Nos. 51-56, pp. 197-216.
9. Responsum 51, end.
10. *Ibid.* No. 53, pp. 203-206.
11. Numbers 9-10 (Ellul 5730-Tishri 5731). Published by *Tenuah Le-Hafatzat Torah,* Jerusalem.
12. *Ibid.,* pp. 6-24.
13. *Sinai,* 48 (1961), pp. 186-193.