Solemnizing the Marriage Between a כור and Divorcee

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May a member of the RA officiate at the marriage between a כור and a divorcee?

In 1952 the CJLS adopted a responsum authored by Rabbi Ben Zion Bokser permitting RA members to solemnize such a marriage. This has been widely accepted by the overwhelming majority of the RA although his recommendation, that “where such marriage is to take place, the rabbi seek to persuade the couple to refrain from a large public wedding,” has not been widely observed.

Rabbi Aaron Blumenthal, in a concurring opinion, differed with Rabbi Bokser, and argued that such marriages be treated no differently than any other.

I return to this responsum not because I disagree with Rabbi Bokser, but because his paper fails to offer a satisfactory rationale for overturning a clear Biblical prohibition.

In his responsum, Rabbi Bokser reviewed the sources clearly forbidding such marriages but concluded, “A rabbi who officiates at such a marriage has not acted in a manner inconsistent with his Judaism.”

His paper was written during a period in which the role of the כור was, if not dismissed, then certainly significantly reduced. Rabbi Bokser reflected this sentiment in his contention in 1951, “…the very few prerogatives left to the כור stand as a vital reminder of the immense progress made in the democratization of Judaism.”

While the role of the כור continues to be marginal in most of our Congregations, there has been a revival of interest in the institution of the כור and its place within our Movement. Not surprisingly issues focusing on the status of the כור have come before the CJLS.

In 1990, Rabbi Mayer Rabinowitz concluded, “Where a Rabbi feels that a Congregation or service would be better served calling people up to the Torah as כור, it is entirely permissible to do so. This system allows any congregant who may normally be granted an כור at that service to be honored with any of the כורים during the service.”

In response to this paper which was overwhelmingly approved by the Committee, Rabbi Herbert Mandl wrote what was a limited dissent. Distinguishing between כור and Shabbat/Yom Tov, he permitted flexibility during the former services but argued for maintaining the practice of giving the first כור to the כור at the latter services. Yet even on Shabbat and Yom Tov, the כור might be by-passed “provided it does not become a habitual practice Sabbath after Sabbath without reserving at least some special occasions and circumstances when a כור will be honored.” Rabbi Mandl is clear that his reading of the sources does permit the כור to waive his right to the first כור, and that this be made clear when a non-כור is called up first. His paper was also overwhelmingly approved.

The central issue in the above papers and in the CJLS debates was whether a כור had special status by virtue of the historic and traditional interpretation of כור. The flexibility shown by Rabbi Rabinowitz in
permitting Congregations to do away with giving the first כהן to a עליה was based on the assumption that the practice was מדרבנן. Had his research concluded that it was מדרבנן, his conclusion may have been otherwise.

The prohibitions of a כהן marrying a divorcee is clearly מדרבנן. The text in Leviticus clearly forbids a marriage with a divorcee. Rabbi Bokser begins his paper by recognizing that "there is no question that Jewish law objects to such marriage. It is Biblically forbidden. The Talmud reaffirms this prohibition...”7 He develops his argument by showing that where such a marriage does take place, the Talmud ruled מדרבנן. To be sure, the children of such marriage are מדרבנן and disqualified from priestly functions, but in the event that they do perform a function it is מדרבנן.

The rest of the וקג is a discussion of the rationale behind the prohibition, the less jaundiced view we have today of a divorcee, the diminished role of the כהן in our times and the fact that “great numbers of מדרבנן today are not conscious of any special status.”9 He observes that “finding of a suitable mate is difficult,” and “we must accept the fact that an unequivocal condemnation of such a marriage and an unwillingness to officiate may present Judaism as arbitrary and indifferent to personal happiness and as placing legal formalisms above human values, with the result that such people would feel driven to leave the Synagogue and Jewish observances generally.”10

It is always dangerous to impute a rationale to a Biblical commandment, but the very term מדרבנן (from the root, מדרבנן, to chase away) underscores the tendency to lay the cause of divorce at the feet of the woman. Was the מדרבנן regarded as a “discard” and hence not fit for a כהן who was to embody perfection? This point can certainly be argued.

Divorce is viewed differently today. It is often an opportunity for a second chance, and our continued embrace of the Biblical prohibition of the marriage between a כהן and a מדרבנן could reinforce the ancient prejudice against a divorced woman.

Even if we are willing, however, to extend a welcoming hand to a כהן, the Biblical prohibition is clear, and the CJLS, reflecting our Movement’s commitment to halakhah, must root its decision in appropriate halakhic principles.

The authority to overturn a Biblical prohibition is debated by Rabbi Hisda and Rabbah in a famous sugya in Yevamot.11 The issue is "האמ ביט דינ מתין לעך דבר מי ותורה?" (Isaiah 55: 1-2). The Talmud in Nazir 43a permits a כהן, in clear violation of Biblical law, to involve himself in the burial of his minor wife whose father was dead. In a famous Tosfot, Rabbi Yitzhak explains that by Biblical law, she is not a מדרבנן because she has other family. Yet since her relatives and family may have abandoned her, the Rabbis regarded her as a מדרבנן, and even though a כהן does not have the authority to uproot a Biblical prohibition, “in an instance where there is מדרבנן, it is universally accepted that there is authority to uproot.”12

On Uprooting a Biblical Prohibition

R. Hisda’s carefully marshaled arguments are challenged by Rabbah, but there is no question that R. Hisda has articulated a principle that resonates within the Talmud, The Rabbis, in fact, granted a כהן “to uproot” in three instances.

1. B'shev va' al ta'aseh. There are instances where the Rabbis ruled that a mitzvah not be performed. Specific examples of this principle are not blowing shofar on Shabbat or blessing lulav and etrog on Shabbat out of concern that the Shabbat ban on carrying in public be violated.

2. B'kum va' seh. When there is הרצת tiempo, the demands of the moment, it is permitted to violate a specific prohibition, in order to prevent erosions from commitment to the Tradition. The example cited is Elijah offering a sacrifice on Mt. Carmel in order to turn the people back from idolatry.

3. B'davar she'b'mammon. The principle of הפקר הפקר - gives a כהן the right to declare money or articles ownerless.

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Later authorities were reluctant to assume such unilateral authority. Yitzhak Gilat’s review of the later literature demonstrates the dual concern that later-day authorities did not have the requisite knowledge, piety, etc., of their Talmudic forbearers and the fear that invoking this principle would create the proverbial slippery slope, thereby weakening the entire halakhic structure. Later authorities thus imposed severe limitations on the conditions and situations where it would be appropriate and necessary “to uproot.”

Thus the statement in the Yerushalmi, “when we can fulfill both their [the sage’s] word and the Torah’s, you fulfill them. Where you cannot fulfill the words of both, you negate their words and fulfill the words of the Torah.” Or in the words of the Bavli “The Torah comes and negates the Rabbis.”

Yet the right “to uproot” was never completely prohibited. There was often the need for an escape hatch, and the right of Rabbinic authorities to do so was articulated by the Rashba as follows: “It was not a matter of the sages deciding on their own to uproot a matter of the Torah, but it is one of the mitzvot in the Torah to obey the ‘judges in your day’ and anything they see necessary to permit is permissible from the Torah.”

The high intermarriage rate is of deep concern. In an instance when two Jews express their desire to marry one another, are we not beholden to remove barriers to their relationship? The high divorce rate is a reality. All too often second marriages of a divorcee are to a non-Jew, and these women are often single mothers with minor children. Exposing them to a home with a non-Jewish stepfather who introduces into their lives a host of non-Jewish relatives is not in the best interests of the Jewish people.

When a כור is prepared to marry a Jew, albeit a זא, is it appropriate for us, in this day and age, to refuse to solemnize the marriage? Even a strategy of seeking to counsel the couple against marriage because of their respective statuses and agreeing to officiate מโรงแรม casts aspersions upon their relationship. A ringing endorsement of their intended union will affirm the importance our Movement attaches to endogamous marriages.

We also regard divorce differently than did our Biblical and Rabbinic forbearers. We no longer perceive the divorced woman as being guilty of ערז ורד (an unsavory act). To exclude a Jewish woman who is divorced from marrying the man with whom she is in love, affirms the negative status of the divorcee. This is inconsistent with our view of divorce or of our assessment of the character of a woman who happens to be a זא.

One could defend the decision permitting such marriages by arguing that every זא is a זא, but such an approach creates its own problems. Would we then be honest in our attempts to reintroduce דעהנות into our Services and to repopularize the קראות פורים הבן ceremony? To be sure, we can argue that the קראות פורים הבן should lead to restrictions and regard marriage with a זא (or a טמא) as being the price paid for special status. Those to whom the קראות פורים is a privilege may well accept this and other limitations. The vast majority of our Congregations do not perceive themselves as enjoying a unique status nor will they accept any limitations on their behavior because of their זא. Hence most זא do not רכזים, they will visit cemeteries as a matter of course. Are we prepared to say that even if the Temple were to be rebuilt זא as an inappropriate bride for a זא? While but a rhetorical question at this juncture of history, it touches upon our willingness to reinterpret the status of the זא.

The hard fact confronting us is that the Torah is clear that a זא is not to marry a divorcee. Nothing in that verse speaks of the level of the קראות פורים הבן זא. Even after Temple times, זא was interpreted to vest the זא with certain prerogatives in terms of the Synagogue Service and the קראות פורים הבן זא. The contention in this paper is that despite the קראות of the זא, he may marry a divorcee for the two reasons cited above. The large number of divorcees make it highly probable that a זא will find his intended among the divorced women in our community. This high divorce rate together with the high intermarriage rate mandate that we do not place a
barrier to such a marriage. This is a justifying uprooting the Biblical prohibition of Leviticus 21:7. Our willingness to do this is further supported by our view that a divorcee is not of a lesser status than her non-divorced sister.

Our steadfast refusal to solemnize their marriage, or even to agree to do this only after seeking to dissuade them, may well lead the couple to be married either in a civil ceremony or in a ceremony without full ḥupah and ḥalakah. The couple, knowing of our disapproval of their relationship, will find little comfort within our Movement and its Synagogues.

Arguing for Ḥakkerah of Leviticus 21:7 in effect removes it as a prohibition. While the Talmud, accepting the reality of such marriages in its day, ruled that children were ḥalishim and denied all privileges of ḥalakah, while their father sacrificed his special status only as long as he continued in the marriage. Our decision to negate the prohibitions reaffirms the status of both father and child. Congregations which reserve the first ḥalakah for a divorcee, which have duhaning and which encourage a divorcee’s re-marriage, are to regard such fathers and sons as acceptable ḥalakhoth.

New times bring new issues and concerns, and affirming the argument of the Rashba, it is the Biblically ordained right and duty of the judges or leaders to rule in the best interests of the people and the Torah. For the Conservative Movement, the CJLS is the body vested with the judicial and legislative authority to adapt halakhah in light of contemporary reality and modern concerns.

The decision to uproot Biblical prohibitions and Rabbinic tradition can never be treated lightly. Rashba reminds us that halakhic authorities have been granted the power, either through outright legislation or through midrashic interpretation, to abandon even a Biblical prohibition. The caveat before us is well stated by our colleague, Rabbi Joel Roth who reminds us that “...what motivates halakhic authorities in their commitment to the integrity of the system they govern? This is a sine qua non of halakhic authorities. It is the characteristic that guarantees, to the extent anything can, that what motivates halakhic authorities on the part of the systemic authorities assures that their actions are taken in the best interests of the people and the Torah.”

Rashba’s principle of granting authority to “the judges in your day” is the rationale permitting uprooting,” albeit only after a careful analysis of contemporary needs. We are challenged not to be timid in advocating changes which we, in good conscience, believe are demanded by the shifting circumstances in which we now find ourselves.

**CONCLUSIONS**

1. The prohibitions of a divorcee marrying a divorcee is clearly Biblical. The reality is that very few who turn to us for marriage are concerned about their status as divorcees. Our refusal to solemnize their marriage would only lead them to be married either in a civil ceremony or in a ceremony without full ḥupah and ḥalakah. The couple will therefore seek to marry in a civil ceremony or in a ceremony without full ḥupah and ḥalakah.

2. While we regret the dissolution of a marriage, divorce in our day offers men and women an opportunity for a second chance to develop a successful marital relationship. We also no longer perceive a divorcee as a woman who has been discarded by her former husband and hence not suitable as a spouse for a divorcee.

3. The principle that is applied only when faced with extreme situations, and we regard intermarriage crises as such a situation. We also note the high rate of intermarriage of divorced women who are often single mothers with minor children.

4. We, therefore, support the decision of two Jews to marry even when he is a divorcee and she is a divorcee, and a member of the Rabbinical Assembly may solemnize such marriage.

5. With the negating of the prohibition in Leviticus 21:7, children born of marriages between a divorcee and
are not disqualified, and the כִּנְרָה is no longer disqualified to serve as a כִּנְרָה in our Services or rituals.

6. Such marriages may be properly celebrated in a public manner. *Our goal continues to be to assure that such celebrations be כִּנְרָה.*

NOTES

2. Ibid., p. 61.
3. Ibid., p. 58.
4. Ibid., p. 56.
5. Rabbi Mayer Rabinowitz, “Rishon or כִּנְרָה,” p. 10.
10. Ibid., p. 57.