

Solemnizing the Marriage Between a כהן and Divorcee

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This paper was adopted on March 12, 1996 by a vote of twelve in favor, four opposed, and two abstentions. Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Stephanie Dickstein, Elliot Dorff, Jerome Epstein, Shoshana Gelfand, Myron Geller, Arnold Goodman, Mayer Rabinowitz, Elie Spitz, Gordon Tucker, and Gerald Zelizer. Voting against: Rabbis Judah Kogen, Vernon Kurtz, Paul Plotkin, Avram Reisner. Abstaining: Rabbis Baruch Frydman-Kohl, Lionel Moses.

שאלה

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

תשובה

In 1952 the CJLS adopted a responsum authored by Rabbi Ben Zion Bokser¹ permitting RA members to solemnize such a marriage. This הורח 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,”² 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.”³

His paper was written during a period in which the role of the כהן 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 כהן stand as a vital reminder of the immense progress made in the democratization of Judaism.”⁴

While the role of the כהן continues to be marginal in most of our Congregations, there has been a revival of interest in the institution of the כהונה and its place within our Movement. Not surprisingly issues focusing on the status of the כהן 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 שני, ראשון, שלישי, it is entirely permissible to do so. This system allows any congregant who may normally be granted an עליה at that service to be honored with any of the עליות during the service.”⁵

In response to this paper which was overwhelmingly approved by the Committee, Rabbi Herbert Mandl wrote what was a limited dissent. Distinguishing between חול and Shabbat/Yom Tov, he permitted flexibility during the former services but argued for maintaining the practice of giving the first עליה to the כהן at the latter services. Yet even on Shabbat and Yom Tov, the כהן 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 כהן will be honored.”⁶ Rabbi Mandl is clear that his reading of the sources does permit the כהן to waive his right to the first עליה, and that this be made clear when a non-כהן 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 כהן had special status by virtue of the historic and traditional interpretation of “וקדשתו.” The flexibility shown by Rabbi Rabinowitz in

permitting Congregations to do away with giving the first עליה to a כהן was based on the assumption that the practice was מדרבנן. Had his research concluded that it was מדאורייתא, his conclusion may have been otherwise.

The prohibitions of a כהן marrying a divorcee is clearly מדאורייתא. 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 קדושין תופסין.⁸ To be sure, the children of such marriage are חללים and disqualified from priestly functions, but in the event that they do perform a function it is valid בדיעבד.

The rest of the תשובה 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 כוהנים 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 גרושה (from the root, גרש, to chase away) underscores the tendency to lay the cause of divorce at the feet of the woman.

Was the גרושה 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 גרושה could reinforce the ancient prejudice against a divorced woman.

Even if we are willing, however, to extend a welcoming hand to a גרושה, 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 “האם בית דין מתנין לעקור דבר מן התורה?”

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 בית דין authority “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 הוראת שעה, 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 בית דין הפקר - gives a בית דין the right to declare money or articles ownerless.

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 מת מצוה because she has other family. Yet since her relatives and family may have abandoned her, the Rabbis regarded her as a מת מצוה, and even though a בית דין does not have the authority to uproot a Biblical prohibition, “in an instance where there is פנים וטעם לדבר, it is universally accepted that there is authority to uproot.”¹²

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."¹³

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."¹⁴ Or in the words of the Bavli "The Torah comes and negates the Rabbis."¹⁵

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."¹⁶

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 גרושה is prepared to marry a Jew, albeit a כהן, 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 בדיעבד 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 "ערוות דבר" (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 גרושה.

One could defend the decision permitting such marriages by arguing that every כהן is a ספק, but such an approach creates its own problems. Would we then be honest in our attempts to reintroduce *duhaning* into our Services and to repopularize the פדיון הבן ceremony? To be sure, we can argue that the קדושה of the כהן should lead to restrictions and regard marriage with a גרושה (or a גיורת) as being the price paid for special status. Those to whom the כהונה is a privilege may well accept this and other limitations. The vast majority of כוהנים in our Congregations do not perceive themselves as enjoying a unique status nor will they accept any limitations on their behavior because of their כהונה. Hence most כוהנים do not דורח, they will visit cemeteries and have probably never affiliated at a פדיון הבן.

There are those who contend that a כהן in our day has lesser holiness because there is no longer a בית המקדש where כוהנים offered קרבנות. Are we prepared to say that even if the Temple were to be rebuilt and sacrifices restored that we would still wish to regard a גרושה as an inappropriate bride for a כהן? While but a rhetorical question at this juncture of history, it touches upon our willingness to reinterpret the status of the גרושה.

The hard fact confronting us is that the Torah is clear that a כהן is not to marry a divorcee. Nothing in that verse speaks of the level of the קדושה of the כהן. Even after Temple times, וקדשתו was interpreted to vest the כהן with certain prerogatives in terms of the Synagogue Service and the פדיון הבן. The contention in this paper is that despite the קדושה of the כהן, he may marry a divorcee for the two reasons cited above. The large number of divorcees make it highly probable that a כהן 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 הוראת שעה 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.

השעה speaks of crisis. Should the current rate of intermarriage be reversed, a future Law Committee may well decide to review this issue. At this time, however, we face a crisis of such proportion that we dare not, in good conscience, stand between the marriage of two Jews whose union as forbidden by virtue of his being a כהן and she a divorcee.

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 קדושין and חופה. The couple, knowing of our disapproval of their relationship, will find little comfort within our Movement and its Synagogues.

Arguing for עקירה of Leviticus 21:7 in effect removes it as a prohibition. While the Talmud, accepting the reality of such marriages in its day, ruled קדושין תופסין, the children were חללים and denied all privileges of כהונה, 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 כוהנים עליה, which have *duhaning* and which encourage פדיין הבן, are to regard such fathers and sons as acceptable כוהנים.

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 “...יראת שמים is a *sine qua non* of halakhic authorities. It is the characteristic that guarantees, to the extent anything can, that what motivates halakhic authorities in their commitment to the integrity of the system they govern. יראת שמים on the part of the systemic authorities assures that their actions are taken לשם שמים.”¹⁷

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 כהן marrying a divorcee is clearly Biblical. The reality is that very few כוהנים who turn to us for marriage are concerned about their status as כוהנים. Our refusal to solemnize their marriage would only lead them to be married either in a civil ceremony or in a ceremony without full חופה and קדושין.

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 כהן.

3. The principle that בית דין מתנין לעקור דבר מין התורה 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 כהן and she is a גרושה, 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 כהן and

a גרושה are not חללים, and the כהן is no longer disqualified to serve as a כהן in our Services or rituals.

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

NOTES

1. *Proceedings of the Rabbinical Assembly*, 1954, p. 55-61.
2. *Ibid.*, p. 61.
3. *Ibid.*, p. 58.
4. *Ibid.* p. 56.
5. Rabbi Mayer Rabinowitz, "Rishon or כהן," p. 10.
6. Rabbi Herbert Mandl, "May a Non-כהן Be Called Up First to the Torah?" p. 9-10.
7. Bokser, *op cit.* p. 56.
8. Talmud Bavli, *Kiddushin* 67a.
9. Bokser, *op cit.*, p. 56.
10. *Ibid.*, p. 57.
11. Talmud Bavli, *Yevamot* 89a-90b.
12. Talmud Bavli, *Nazir* 43b, Tosfot, והאי מת מצוה
13. Yitzhak Gilat, *P'rakim B'Hishtal'shut HaHalacha*, p. 191-204.
14. Yerushshalmi *Ketubot* 10:2.
15. Talmud Bavli, *Shabbat* 128b.
16. *Chidushai Rashba, Nedarim*, p. 90a.
17. Rabbi Joel Roth, *The Halachic Process*, p. 203.