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## **Rabbinic-lay relations in Jewish law**

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ETHICAL IMPERATIVE AND HALAKHIC INNOVATION

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## ETHICAL IMPERATIVE AND HALAKHIC INNOVATION

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### I. HILLEL THE ELDER - A SOLUTION FOR ILLEGITIMACY

An epidemic of *mamzerut* swept over the Jewish community of Alexandria around the first year of the Common Era. It was the custom of Alexandrian Jewish men to betroth their wives a year before a marriage (a practice not dissimilar to that in the Biblical period and among Yemenite Jews of recent generations). In this hiatus between *qiddushin* (betrothal) and *nessuin* (marriage), other Jewish men would often take these betrothed women as their wives. The sages of Alexandria were about to pronounce the children fathered by these "second husbands" as *mamzerim* (illegitimate). They relied on the established *halakhah* that a woman betrothed by *qiddushin*, is considered a married woman, her relationship with another man is adulterous and their issue *mamzerim*.

These troubled people turned to Hillel the Elder in *Eretz Yisrael* for help. He instructed representatives of the younger generation: "Bring me your mothers' *ketubot* (marriage contracts)."<sup>1</sup> At that time the *ketubah* was composed by laypeople and varied in its text from place to place. Hillel scrutinized the document and found the following: *lekhesetikansi lahuppah, hevi li leintu* - "when you enter the *huppah* (marriage canopy), be thou my wife."

Hillel the Elder took this phrase out of context and interpreted it as though it were a condition: Only when you enter the *huppah* will you be wife, but if you don't enter the *huppah* with

me you are not betrothed. The result was that those women who did not reach the *huppah* with their fiances were proclaimed retroactively "unbetrothed." Therefore they were neither adulterous nor were their offspring blemished.<sup>2</sup>

By what means did Hillel succeed in making this radical transformation? The Talmud tells us that the great sage *haya doresh leshon heduyot* - he used to interpret common language, like that of the marriage contract written by a layperson, as if it were a rabbinic condition. Prof. Yitzhak Gilat of Bar Ilan University explains that Hillel gave *halakhic* approval to a lay custom; i.e., the text of the *ketubah*, and then used this custom as if it were a formula set by rabbinic sages.<sup>3</sup>

How could Hillel deal this way with a *mitzvah deoraita* - a Scriptural commandment regarding the forbidden status of a betrothed woman who, according to the *halakhah*, must be divorced before remarrying? The sages of Alexandria, who were determined to blemish the children, did indeed have the letter of the Law on their side.

It appears that Hillel, when confronted with the plight of these young people, felt compelled to use a legal fiction to save them from *mamzerut* (illegitimacy). The normative law stated that the children of a betrothed woman by another man are *mamzerim*, so his best course was to prove that she wasn't previously betrothed. We might well ask how Hillel the Elder, one of the framers of the *halakhah*, could have treated the law in such a fashion? Before trying to answer this question let us determine whether this was an isolated incident.

## II. RABBAN GAMLIEL - TESTIMONY REFORM

Hillel's grandson, Rabban Gamliel the Elder, was confronted with the consequences of the massacre of Jews at Tel Arza. The

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unidentified bodies of innumerable Jewish men forewarned the danger that almost as many widows would be left *agunot* (chained). Valid testimony of a husband's death was required for the widow to remarry. The Torah established: "Only on the evidence of two witnesses, or of three witnesses, shall a matter be sustained,"<sup>4</sup> which was codified as *halakhah*.<sup>5</sup>

Nevertheless, Rabban Gamliel permitted these women to remarry on the basis of the hitherto invalid testimony of one witness (instead of the required two), hearsay evidence (*eid mipi eid*) or the testimony of a woman of a maidservant.<sup>6</sup>

Once again a Biblical injunction was circumvented; this time *edut p'sulah* (invalid testimony) was accepted to free unfortunate women from the chains of widowhood. We may ask the same question of Rabban Gamliel that was asked of his grandfather: How could the President of the Sanhedrin make such a drastic departure from the accepted laws of testimony? Hillel and Rabban Gamliel were confronted with problematic ethical situations for which there was no apparent solution in the accepted *halakhah pesukah* (authoritative law) of their time. They were unable to turn their backs on unfortunates who were punished for no fault of their own. They could not consider a non-*halakhic* or extra-*halakhic* solution. Therefore by means of interpretation, at times quite forced, or through the use of a *taqanah* (rabbinic decree), they resolved an intolerable injustice. Could this laudable action justify taking the *halakhah* into their own hands? Whence did they derive the authority to make these far reaching changes, which were so controversial?

When the rabbis met victims of oppression, they did not theorize about the unethical character of the latter's predicament. Armed with prophetic insight and rabbinic *pesaq* (legal decision) they felt a moral responsibility to take *halakhic* action to relieve their suffering.

Rabbi Eliezer Berkovits, professor emeritus of the orthodox Hebrew Theological College in Skokie, proclaims that "The rabbis in the Talmud were guided by the following insight: God forbid that there should be anything in the application of the Torah to the actual life situation that is contrary to the principles of ethics."<sup>7</sup> If a ruling is *halakhic*, it must be ethical. If it is unethical, it cannot be *halakhic*.

The Talmudic sages and later decisors witnessed many tragedies that were the effect of slavishly literal interpretations of the existing *halakhah*. When a proportion of the people felt they were suffering from unethical rulings, the existing legal approach lost its exclusive *halakhic* validity. Therefore by offering a different approach, even if it be a legal fiction, the moral problem might be resolved. This new approach then became part of the *halakhah*. Here we have *halakhic* innovations initiated by an ethical imperative and eventually becoming part of the ongoing *halakhic* system.

Not only in the authoritative Talmudic period did scholars allow themselves to innovate but also, as we shall see, in a decision that was rendered many centuries later.

### III. RABBI MOSES ISSERLES - AN ORPHAN'S DIGNITY

Throughout the generations the sages initiated *halakhic* principles which enabled them to rule leniently and even permit the forbidden. One such principle established that in "a time of emergency,"<sup>8</sup> it is permissible to make a lenient decision and permit a rabbinic prohibition. The first generation Babylonian Amora, Rab, permitted carrying Hanukkah candles on Shabbat because this was an emergency situation. The candles must be hidden from the Parsees who ruled that it was forbidden for Jews to light them.<sup>9</sup>

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The second principle is explicitly stated in the Talmud: "Great is human dignity because it overrides a negative prohibition in the Torah,"<sup>10</sup> namely the Scriptural command: "You shall not turn aside from the verdict which they declare to You."<sup>11</sup>

This latter verse serves as the authoritative source of rabbinical precepts. Nevertheless, in order to protect human dignity so that no person would be publicly deprecated, it was permitted to disobey a rabbinic prohibition.<sup>12</sup>

More than a millennium later, Rabbi Moses Isserles (Rama) of Krakow, Poland (1525?-1572), employed these Talmudic principles to resolve a difficult and urgent problem. In one of his responsa he relates the controversy over a dowry, which delayed the wedding of an orphan bride that was to take place on a Friday:

"When the shadows of evening began to fall and the Sabbath was approaching, her relatives who were to give the dowry closed their fists and refused to give a sufficient amount....Then the groom absolutely refused to marry her. He paid no attention to the pleas of the leaders of the city that he refrain from putting a daughter of Israel to shame for the sake of mere money....Then they finally agreed and the groom consented to enter under the *huppah* and no longer to shame a worthy daughter of Israel. Thereupon I arose and conducted the marriage at that hour."<sup>13</sup>

The timing of this wedding, as described by Isserles, was "in the dark of night on Friday evening, an hour and a half after night had fallen."<sup>14</sup>

The Rama found it necessary to justify his action on the Sabbath, because some of the outstanding members of the Krakow community had lodged complaints. His vindication included the two above mentioned Talmudic principles.

a. It is possible to permit a wedding after the beginning of the Sabbath since it was a time of *emergency*, because "the maiden would have been put to shame if she had to wait for the wedding until the end of the Shabbat after she had already immersed herself." In this difficult situation Isserles relied on Rabbenu Tam who stated that the Rabbinic sages permitted one to betroth a woman on the Shabbat when it was a matter of great distress.<sup>15</sup> Isserles interpreted his ruling to mean:

"It is clear that, in a great emergency, we may permit such a marriage. There can be no greater emergency that this case in which a grown orphan girl was being put to shame. It would be a lifelong disgrace for her, enough to set her apart from all other girls."

b. His action was also justified by the principle of human dignity:

"Great indeed is the commandment to be considerate of the honor due human beings. It sets aside the negative commandment...in this case it is only a rabbinic prohibition...besides our concern that the match might be broken and there might be no marriage at all as a result of quarreling between the families. 'Great is the value of peace between man and wife!'<sup>16</sup>

Isserles shows that these two principles provide the moral infrastructure for a Talmudic *pesaq* (ruling) dealing with many *halakhic* questions. His concern for the unfortunate bride led him to officiate at her wedding in spite of *halakhic* prohibitions and the opposition of the elders of the Krakow Jewish community. His *halakhic* decision was a matter of conscience, as indicated by the conclusion of his responsum:

"The truth is that the need of the hour leads us to be lenient in such matters which are only an additional prohibition of the

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rabbis. The rabbinical prohibitory decrees were not meant to apply in times of emergency...what can be done if the hour has moved along until darkness, and there is ground for concern that the match may be broken or the maiden put to shame? Under such circumstances, he who relies on the above arguments to be lenient has not done harm. May he enjoy in peace the joy of the Sabbath thereafter. The good deed that he has done will atone for him, if his intention was for the sake of Heaven and peace."

### IV. RABBI MOSHE GALANTE - REDEMPTION OF A CHILDLESS WIDOW

In 1580 Rabbi Moshe Galante, a disciple of Rabbi Joseph Caro, succeeded his teacher as Rabbi of Safed. One of his most famous responsa deals with the case of a young childless widow who asked her brother-in-law (*yavam*) to give her *halitzah* (release from levirate marriage), but was refused. Apparently there was a great deal of property involved. For a period of two years since her husband's death, "a conflagration of fire was ignited between the two families. Every day a number of quarrels and arguments broke out between the family of the widow and the family of the brother-in-law who kept insisting on *yibbum* - (levirate marriage)."<sup>17</sup>

The questioner presents Rabbi Galante with the following narrative:

"Then one day the relatives of the widow were advised to instruct her to go to the synagogue in the community of her brother-in-law. At the time of the reading of the Torah she was to approach her brother-in-law and spit in his face. This is what happened. She came to the synagogue on a Monday at the time of the Torah reading, stood in front of her brother-in-law and spat in his face three times, and each time with spit that was apparently seen, in the presence of the entire congregation. Each time she said: 'This is the *yavam* that wants to take me in levirate marriage



- I don't want you!"

She spat thrice while three members of the congregation testified that she passed before them and they made a *beit din* judgement as is inscribed there.

The questioner then concluded with a number of *halakhic* queries:

What is the status of the widow? Is she forbidden to her levir? Must she therefore be given *halitzah*? Is there power in this spitting to forbid her to her brother-in-law, so that he must give her *halitzah*?

The main point to clarify was whether this staged act of spitting in the synagogue, in the presence of three men who sit as a rump *beit din* (court), may give the widow the status of a *halutzah* (one who has received levirate release), which would have prevented her brother-in-law from taking her in levirate marriage. Can this partial "*halitzah*," without removal of a sandal, with no declaration by the *yavam* and without his consent be considered sufficient to make his sister-in-law forbidden to him?

Rabbi Galante replies in a long, closely argued responsum that the deed perpetrated in the synagogue cannot be construed as valid *halitzah*. Nevertheless, it has the power to eliminate the possibility of *yibbum*: "In this case there is no one who will claim that she may be taken in levirate marriage. Rather she must receive *halitzah*." The decisor thereby gives his *post factum* approval of the desperate staged act of the young woman, that blocked her brother-in-law from chaining her to him. Now he must give her *halitzah*.

One question remains: "It is important to know whether a *beit din* has the power to force the *yavam* (to give *halitzah*) or

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not?" It is clear that he must release her, but is it possible to compel him to do so? To this the Safed rabbi responds:

"Since she may not be taken in levirate marriage, we force (the levir) to release her through *halitzah*."

This great rabbi gave his *halakhic* imprimatur to the desperate and blatantly extra-*halakhic* act of the unfortunate woman and thereby untied her bonds.

### V. RABBI JUDAH LEIB ZIRELSOHN - MARRIAGE OF A *KOHEN* AND A CONVERT

At the beginning of the twentieth century, Rabbi Yehudah Leib Zirelsohn of Kishinev wrote a remarkable responsum to a Bulgarian rabbi concerning a young woman who had converted to Judaism.<sup>18</sup> Two years after her conversion, she became engaged to a Jew in her city. After all the preparations for the wedding had been completed, it was discovered that the bridegroom was a *kohen* (of priestly descent) and therefore forbidden to marry a convert.

The bride's parents, who had willingly agreed to her conversion, belonged to one of the outstanding families of the city. Her family was now shocked at the refusal to allow her to marry her fiance. "The local Christian community was in an uproar over this flagrant insult to the family by treating their daughter like a prostitute." The bridegroom had threatened to convert to Christianity together with his fiance if they were not married by the rabbi. The Bulgarian rabbi asked for permission to marry them "in order to prevent a *hilul hashem* (desecration of God's Name) and especially at a time like this, when anti-Semitism is so rampant."

Rabbi Zirelsohn, the leader of Agudat Yisrael in Bessarabia, wrote a learned *halakhic* responsum to this query. He contrasted the prohibition of an individual couple, a *kohen* and a convert with

*mitzvah d'rabim* (the *mitzvah* of general welfare) of the Jewish community which must be saved from a possible pogrom. Zirelsohn further linked the prohibition of this marriage with the anticipated danger that these young people might become apostates and, therefore, proclaimed:

"Most surely we must dismiss the interdictions of the marriage of a *kohen* with a convert for this couple which is on the brink of an abyss...in order to save them from an incessant betrayal of the entire Torah by these two souls angrily leaving the religion of Israel."

In conclusion, Rabbi Zirelsohn gave the Bulgarian rabbi an *halakhic* judgement which allowed him to marry the couple, on condition that he widely publicize that this step does not constitute a precedent and that he notify the *hatan* (bridegroom) that he and his offspring are disqualified as *kohanim*.

We have studied five great decisors whose services to Israel stretch over a period of two millenia. With what qualifications were these scholars invested that enabled them to respond to the suffering of their people and to resolve their problems?

These rabbis and many others like them became great moral authorities because they acquired or were blessed with at least four traits:

- 1) A commanding knowledge of the tradition
- 2) Sensitivity to the suffering of individuals
- 3) The desire and determination to help
- 4) The courage to decide and to carry out their decision.

Therefore the plight of *mamzerim*, *agunot* or a couple prevented from marrying was perceived by the rabbis as an ethical imperative which they must resolve. In view of the religious and

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legal framework in which they lived they were able to resolve the moral problems that confronted them only by *halakhic* innovations.

Finally, what was the source of their authority to make such radical changes? We may consider the two following answers:

One is a reported discussion between two Talmudic scholars debating the question how rabbinic sages could make decisions which seemingly conflicted with the accepted *halakhah*. One scholar said that they were able to make these innovative decisions, because they were *g'dolei haTorah* (great rabbinic authorities). No, retorted the other, they were *g'dolei haTorah* because they *made* such decisions.

Rabbi Moses Isserles gave the following justification for this authority in a responsum that warrant one of his own radical *halakhic* innovations:

"When new circumstances develop that were unknown to ancient authorities and there is the fear of ruination or prohibition that was not suspected in ancient times, *it is certainly permitted to institute new enactments.*"<sup>19</sup>

Rabbis of every age were called upon to react with sensitivity to the ethical imperative of the suffering of their age. They instituted new enactments and *halakhic* innovations with the determination and courage to assuage the anguish of their distressed generation.<sup>20</sup>

## Notes

1. B. Baba Metziah 104a.
2. *Ibid.*, 104a.
3. Yitzchak Gilat, "The Relation of Halakhah to Reality," *Studies in Problems of Culture, Education and Society* (Hebrew), 4, Tel Aviv, 1972, p. 72.
4. Deuteronomy 19.15.
5. *Mishneh Torah*, Hilkhoh Edut 4.1.
6. M. Yevamot 16.7.
7. *Not in Heaven, The Nature and Function of Halakhah* (sub-section entitled: "Halakhah as the Priority of the Ethical"), New York: KTAV, 1983, p. 19. *Vide* my chapter "Authority and Criteria in Liberal Halakhah," in *Dynamic Jewish Law*, ed. Walter Jacob and Moshe Zemer, Tel Aviv and Pittsburgh, 1991, p. 14.
8. B. Shabbat 45a.
9. *Ibid.*, 45a. The Parsees, being fire worshippers, decreed that no one may light candles on their (the Parsees') festivals except in Parsee houses of worship. Fire was forbidden in the houses of Jews at such times. Since the Hanukkah *menorah* was lit near the street it would have to be hidden whenever a Parsee would approach.
10. B. Berakhot 19b. See Maimonides, *Sefer Hamitzvot*, Haim Heller edition, Jerusalem, 1980, Negative Precept, #312, p. 179.

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11. Deuteronomy 17.11.

12. See Yitzchak Gilat, *op. cit.*, p. 206, footnote 2.

13. Moses Isserles, *Responsa Harama*, ed. Asher Ziv, Jerusalem, 1971, Responsum no. 128, pp. 488-495; The translation is based in part on Solomon B. Freehof, *A Treasury of Responsa*, Philadelphia, 1962, pp. 113-117. All further references to Isserles are from this source. See Rama's gloss to *Shulhan Arukh* Orah Hayyim 339.9, which was apparently written in the wake of the incident discussed in the responsum.

14. Freehof, *op.cit.*, p.114.

15. Rabbenu Tam's statement is quoted in Moses Coucy, *Sefer Mitzvot HaGadol*, Jerusalem, 1961, Negative Precepts, #71-75.

16. B. Hullin 141a.

17. *Responsa R. Moshe Galante*, Livorna, 1608, responsum, #80, pp. 45a-46b.

18. Judah Lieb Zirelsohn, *Responsa Ma'arkhei Lev*, Kishinev, 1930, Even Haezer, Resp. 72.

19. *Responsa HaRama*, *op. cit.*, Responsum #19, footnote 8, (Emphasis added).

20. *Vide* my article, "Halakhah as a Developmental and Moral Phenomenon" (Hebrew), *Shalhevet*, Jerusalem: Israel Movement for Progressive Judaism, September, 1987, #34, pp. 4ff; or in its French version, "Il est certainement permis de modifier toutes les décisions rabbiniques," *Tenoua*, Paris: MJLF, Decembre 1987, 47, pp. 3ff; *Printemps*, 1991, 58, pp. 19ff.

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11. Deontology 17.11

12. See the text of the 1997 Code of Ethics

13. Most business schools have programs on ethics. For example, the University of Michigan Business School has a program on ethics. The program is based on the work of Aristotle and is designed to help students understand the ethical dimensions of business. The program is available to all students and is a required part of the business school curriculum. The program is designed to help students understand the ethical dimensions of business and to help them develop the skills and attitudes necessary to be successful in business.

14. Textbook, pp. 41-42

15. Richard Tani's account is found in *Business Ethics: A Practical Approach*, 2nd ed., pp. 101-102.

16. B. Holm 1994

17. Response R. Mark G. ... 1998 response, pp. 40-41.

18. Response R. Mark G. ... 1998 response, pp. 40-41.

19. Response R. Mark G. ... 1998 response, pp. 40-41.

20. Response R. Mark G. ... 1998 response, pp. 40-41.