

The Mamzer And The Shifcha

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Introduction

The decline in religious observance among many Jewish people is unfortunately one of the characteristic features of modern Jewish history. Recent times, it is true, have witnessed a limited movement of return to Torah Judaism; but in one area of Jewish law, the damage that has been done seems well-nigh irreversible. This is the area of *arayot*, forbidden sexual relationships whose offspring are *mamzerim*. Due to a variety of historical circumstances, many women have married in a halachically-valid ceremony and subsequently been divorced and remarried without the benefit of a *get*, a Jewish divorce. The result has been an unprecedented frequency of *mamzerim*. In this paper we will examine certain aspects of this problem, especially the possibility of a solution whereby the *mamzer's* offspring may be freed of this legal status.

The Problem And The Solution

לֹא יִשְׁתָּרֵם מִכֶּשֶׁל, *Something that is crooked which cannot be made straight* (Kohelet 1:15). That is how Chazal refer to the *mamzer*, the offspring of an incestuous or an adulterous union. Although the *mamzer* himself did not do anything

לֹא יִשְׁתָּרֵם מִכֶּשֶׁל, לֹא יִשְׁתָּרֵם מִכֶּשֶׁל, לֹא יִשְׁתָּרֵם מִכֶּשֶׁל

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wrong, his status as a *mamzer* is permanent and irreversible. To the end of his life he remains subject to the legal disabilities the Torah imposes upon him. These involve primarily restrictions upon whom the *mamzer* is permitted to marry: He may not marry any Jewish woman except a *mamzeret* (female *mamzer*) or a *giyoret* (convert). If he breaks the law and marries any other Jewess, the couple is required to divorce immediately.¹

There is another major irrevocable disability: the status of the *mamzer's* offspring. *Mamzerut* is hereditary. Regardless of whether the *mamzer* marries a *mamzeret* or a *giyoret*, or whether he marries another Jewess in violation of Torah law, the result is the same as far as his offspring are concerned: They are *mamzerim* because their father is a *mamzer*.² There is no way they can change their status. In turn, they pass this status to *their* children, who will likewise be *mamzerim*, and the process will continue down the generations, so that all descendants of the child of the incestuous or adulterous union will be *mamzerim*.³ The consequences of the forbidden sexual relationship are catastrophic!

However, what happens to those of his offspring who are *not* recognized in halacha as his children? If a Jew fathers a child by a non-Jewish woman, Torah law does not consider the child as his at all. The child is considered solely the offspring of the non-Jewish mother; in the eyes of halacha, the child has no father.⁴ Thus, the child is not Jewish due

1. *Devarim* 23:3. *Shulchan Aruch Even Haezer* 4:18, 22:24; 154:20.

2. *Ibid.*

3. See note 1.

4. *Rambam Issurei Biah* 15:4.

Interestingly, although the fact that the *mamzer* is the child's

to the fact that the child's sole parent is not Jewish. In fact, were that child subsequently to convert to Judaism, the Jew who fathered the child is technically permitted by Torah law, to marry that child since they are not at all related! (Although the Sages have forbidden it).⁵ Were he to father

biological father does not automatically make him its father in Jewish law, nevertheless, that biological connection is not completely void of halachic significance, at least according to the view of R. Avraham Yitzchak Hakohen Kook. In 1918 R. Kook was asked by R. Yaakov David Luria of Glasgow, Scotland, whether it was proper to convert the newborn child of a Jewish father and a non-Jewish mother. The mother was not interested in converting to Judaism but was agreeable that the child should be.

R. Kook ruled that the child may be converted (provided he receives an Orthodox Jewish upbringing). He based his ruling on the dictum of the Gemara in *Ketubot* 11a, which states that a non-Jewish father may convert himself and his entire family along with him, including his minor children, because even though the minors are not in a position to legally express their interest in conversion, there is nevertheless a presumption that they are agreeable to doing what their father wants. Since their father wants them to convert to Judaism, they agree to do so. R. Kook points out that if the father converts first, he is no longer their halachic father, because as a *ger*, he technically has no relations at all. In such a case, it would seem that it is impossible to say that the children wish to follow the desires of their father; after all, they have no father! The fact that the Gemara nevertheless asserts that in all cases the rule is that the conversion of the small children is valid based on the concept of *ניחא להו* proves, according to R. Kook, that whatever the exact halachic status of the relationship between father and child, the fact that the child is the biological offspring of the father makes that child desire to please the father. Thus, halacha recognizes the significance of the biological connection between father and child even when that child is not considered his in the eyes of halacha (*Da'at Kohen* 147-8; see, however, R. Zevin's critique in *Ishim veShitot* p. 259).

5. *Yoreh Deah* 269:1.

a child by a non-Jewish woman, the child would not be a *mamzer*, but rather a gentile. Were that child subsequently to convert to Judaism, the child would be a *ger*, a convert, subject to the restrictions of the convert (a *ger* may marry any Jewess; a *giyoret* may marry any Jew other than a *kohen*). Thus, although the child is biologically the *mamzer's* child, it is not his child in the eyes of Jewish law.

When rabbinic literature speaks about a *mamzer* "purifying" his offspring from the status of *mamzerut* (see below), it refers to his biological, not his halachic, offspring. Indeed, as we shall see, the very basis of the "purification" is the principle that the children he fathers by a non-Jewish woman or a "*shifcha*" (see below) are not legally his at all.

It therefore seems that there is a "way out," a way for a *mamzer* to father children who will not be *mamzerim*. However, this is not exactly true. A *mamzer* is not allowed to engage in sexual relations with any gentile, just as any other Jew is so forbidden. While the exact nature of this prohibition is controversial and the subject of much discussion in rabbinic literature,⁶ the bottom line is that no Jew, including a *mamzer*, is permitted to engage in such relations, whether they involve a "marriage-like" relationship or not. Thus, a *mamzer* is halachically denied the option of fathering a child by a gentile. However, were the *mamzer* to break the law and father such a child, that child would not halachically be his child, and that child could subsequently convert to Judaism and be a *ger*, not a *mamzer*. In other words, though he may not legally father such a child, nevertheless, were he to do so illegally, it would "work," i.e. his biological children would escape the taint of

6. See Rabbi J.D. Bleich's article, "The Prohibition Against Intermarriage" in the first volume of *The Journal of Halacha and Contemporary Society*.

mamzerut. However, no *mamzer*, and certainly no rabbi, could in good conscience entertain such an option, which involves violating Torah law.

There is, however, another possibility, which *does* enjoy legal sanction: fathering a child by a "slave girl," a *shifcha*. As is well known, Torah law recognizes two types of servitude, the *eved ivri* and the *eved kna'ani*. The *eved ivri* is a Jew who has become an indentured servant for a limited period of time (up to six years, or possibly until the Jubilee year). He is not really a slave, but rather a Jew subject to involuntarily servitude. On the other hand, the *eved kna'ani* is an actual slave, i.e. he is actually owned by his Jewish master. An *eved kna'ani* is a gentile who was acquired by a Jew in a halachically-recognized procedure; either he was purchased or else he sold himself. The Jew who purchases him owns him, although he does not have absolute power over the slave to do as he sees fit. The owner may not abuse him, and should he kill the slave, he could be liable to the death penalty (*Exodus* 21:20). Moreover, should he destroy one of the slave's limbs, the slave goes free (*ibid.* 21:23). These limitations notwithstanding, the master does own the slave.

When a Jew purchases an *eved kna'ani*, it is proper, though not required, to convert the slave.⁷ The conversion, however, is not the usual type, which results in the convert's becoming a full Jew. It is a unique, more limited type of conversion (יצאו מכלל הגוים ולכלל ישראל לא באו. רמב"ם איסורי) (ביאה פי"ב הלכה י"א) by which the slave becomes obligated to observe whatever positive commandments a Jewish woman is bound to observe, as well as all the negative commandments. Should the master free such a slave-

7. Ramo, *YorehDeah* 267:4.

convert, that slave would automatically attain the status of a *ger*, a free convert, who is a full Jew. The laws of a female slave, a *shifcha kna'anit*, are the same as for an *eved kna'ani*; of course, as a *giyoret* she could not marry a *kohen*.⁸

Because neither the *eved kna'ani* nor the *shifcha kna'anit* is a full Jew even when the master converts them, they are not legally marriageable (אין קדושין תופסין בהם).⁹ This does *not* mean that they are prohibited from all sexual relations with anyone. The *eved kna'ani* and the *shifcha kna'anit* may engage in such relations with each other, and the *shifcha* is permitted such relations with an *eved ivri*. In both cases, any child that results from such relations is halachically the child of the mother alone; in the eyes of the Torah the child has no father (עבד אין לו חיים). As the child of a *shifcha*, the children inherit her legal status; they are the slaves of her owner, who has the right to sell them to another Jew if he wishes.¹⁰

What about relations between the *shifcha kna'anit* and her owner, or between her and any other free Jew? According to Rambam, such relations are permitted (*mid'oraita*) by the Torah but prohibited rabbinically (*mid'rabanana*).¹¹ Other *rishonim* disagree with Rambam and maintain that relations between a *shifcha* and a free Jew are prohibited *mid'oraita*. These *rishonim* are of the opinion that a man's engaging in sexual relations with any woman who is not only forbidden to marry him, but whose marriage to him would not be legally recognized, renders him a *kadesh*, a sexually immoral person.¹²

8. *Chagiga* 4a and *Nazir* 61a.

9. *Kiddushin* 66b.

10. Rambam *Avadim* 3:3; *Even Haezer* 8:5.

11. Rambam *Issurei Biah* 12:11.

12. *Targum Onkelos* translates *Deuteronomy* 23:18 לא יהיה קדש

It would seem, then, that a *mamzer*, too, is prohibited from any relationship with a *shifcha*, for a *mamzer*, as a Jew, is subject to the same prohibitions to which any other Jew is subject. In fact, however, this is not the case. The Mishnah in *Kiddushin* 69a states:

רבי טרפון אומר יכולין ממזרין לטהר. כיצד? ממזר שנשא שפחה הולד עבד: שחררו, נמצא הבן בן חורין.

Mamzerim can be purified. How? [If] a *mamzer* married a slave, the offspring is a slave; [if] he [subsequently] freed him the son becomes a freeman.

In other words, R. Tarfon sanctions the union of a *mamzer* and a *shifcha*. The Gemara goes on to relate that R. Simlai told a friend of his who happened to be a *mamzer* and who had married either a *mamzeret* or a *giyoret*, that had he asked him in the first place, R. Simlai would have advised him not to marry any full Jewess, but rather to unite with a

לא יסב גברא מבני ישראל אתתא אמה as follows: *No Jewish male shall marry a female slave*. Rashi explains: שאף הוא נעשה קדש על ידה שכל בעילותיו בעילות זנות שאין קדושין תופסין לו בה, *for he [the Jew] will become a harlot through [his sexual relations with] her, since all sexual intercourse with her is [by its very nature] illicit, for she is not legally marriageable*. See, also, Rashi to *Kiddushin* 69a D"H *Lechatchila*. Ramban here and in *Sefer Hamitzvot*, Negative Commandment 355, likewise sees in this verse a Scriptural prohibition against any relations with a *shifcha kna'anit*. The *Chinuch*, interestingly, says that he is certain that such a Scriptural prohibition exists, although he does not agree that it is from *Deuteronomy* 23:18. As a result he actually makes a search to find such a source in the Pentateuch; see *Mitzvah* 209.

Rambam is consistent in his view that there is no Scriptural reference or prohibition of relations with a *shifcha*, for he understands *Deuteronomy* 23:18 as prohibiting sexual relations between two Jewish males; see *Sefer Hamitzvot* Negative Commandment 350. Accordingly, the verse makes no reference to any relationship between master and slave girl.

shifcha, father children by her, and subsequently arrange for their legal emancipation. In that way his biological offspring would end up as full Jews, that is, as free converts to Judaism. Neither they nor their progeny would be *mamzerim*.

The Gemara goes so far as to suggest that R. Simlai was prepared, were it necessary, to advise the *mamzer* to commit theft in order to be apprehended and sold by the court as an *eved ivri* (Exodus 22:2). As an *eved ivri* he would be permitted to engage in sexual relations with a *shifcha kna'anit* (*ibid.* 21:4).¹³

In the end the Gemara concludes that even a free *mamzer* is permitted to unite with a *shifcha*, and any children born of their union may be emancipated and will be free of the taint of *mamzerut*. Such, too, is the ruling of the *Shulchan Aruch* (*Even Haezer* 4:20 and 8:5).

The Ran asks, how is this permitted, isn't the *mamzer*

13. This passage in the Gemara raises a number of problems. First of all, The Torah prohibits voluntarily freeing any *eved kna'ani* (Leviticus 25:46), so how may an owner free the offspring? In fact, however, halacha does sanction exceptions to this rule. As the *Shulchan Aruch Yoreh Deah* 367:79 states, המסחר את עבדו עובר בעשה ד"לעולם בהם תעבדו". ומותר לשחררו לדבר מצוה אפילו הוא מדבריהם כגון שלא היו בבית הכנסת עשרה הרי זה משחרר עבדו ומשלים בו מנין עשרה וכן כל כיוצא בזה.

"Whoever emancipates his slave violates "You must make them serve you forever" (Leviticus 25:46). However, one may emancipate one's slave in order to perform a mitzvah, even a rabbinic mitzvah. For example, if there was a situation where the tenth person was lacking to make a *minyan*, one may free one's slave to supply the tenth person [i.e. the emancipated slave himself]. This rule applies for all similar situations." Thus, as long as there is a legitimate reason for freeing one's slave there is no halachic problem. Obviously, R. Simlai considered the purification of the *mamzer's* children to be a legitimate reason.

subject to the same restrictions as any other free Jew? If other Jews may not engage in relations with a *shifcha*, how is it that a *mamzer* may? To answer this question Ran quotes Rabbenu Tam:

לאו דשפחה שאני, דלא אמר רחמנא "לא יהיה שפחה". ומדאפקיה
רחמנא בלשון "לא יהיה קדש" משמע שאין הממזר בכלל, שכיון
שיצירתו בעבירה קדש ועומד הוא.

Rabbenu Tam is of the opinion that the prohibition involved here (*Deuteronomy* 23:18) is different from other prohibitions. The Torah does not explicitly prohibit any specific act, as it does elsewhere; for example the prohibition of incest, which clearly involves a specific act. Instead, the Torah here says that no Jew should become a *kadesh*, that is, every Jew must avoid anything that would make him a *kadesh*. As we have seen, relations with certain women would make the Jew a *kadesh*. *Kedeshut* is conceived to be a state resulting from certain acts. To Rabbenu Tam, *mamzerut* is at least equal to *kedeshut*. Therefore, Rabbenu Tam reasons, one who is already a *mamzer* is not going to "descend" to the level of a *kadesh*; he is already there. Nothing he can do can free him from this taint. On the other hand, nothing he can do will render him a *kadesh* – he already is one. Since he is already a *kadesh*, though not of his own volition, his situation is unique. He is not bound by the strictures of the Torah to avoid doing anything that would make him a *kadesh*. Since he cannot rid himself of this status, a status he did nothing to achieve, he need not avoid those acts that would make a non-*kadesh* into a *kadesh*. Accordingly, Torah law does not forbid a *mamzer* to engage in sexual relations with *shifcha*.

What about the view of the Rambam that even when relations between a *shifcha* and a free Jew are permitted *mid'oraita*, they are nevertheless prohibited *mid'rabanan*? Would such a rabbinic prohibition apply to relations between

a *mamzer* and a *shifcha*? The answer is no, for Rambam explicitly states that the rabbis expressly permitted such relations for the purpose of fathering children who would not be *mamzerim*.¹⁴

דבר זה התירו לממזר לישא שפחה כדי לטהר את בניו שהרי הוא משחרר אותם ונמצאו בני חורין. ולא גזרו על השפחה לממזר מפני תקנת הבנים.

As *Beit Shmuel* explains, since Rambam holds that it was the rabbis who promulgated the prohibition of relations between a *shifcha* and a free Jew, the rabbis had the prerogative to exempt certain cases from their decree (הם אמרו והם אמרו).

To conclude, it is "perfectly legal" for a *mamzer* to take advantage of the loophole in the law and father children by a *shifcha kna'anit* with the intention of seeing that they are subsequently emancipated. There is nothing devious or discreditable in his efforts to ensure that he will have biological descendants who are not *mamzerim*.

In fact, a review of the relevant responsa literature shows that *mamzerim* did just that with the sanction of leading *poskim*. Most of these responsa date from sixteenth and seventeenth century Turkey. In certain parts of the Ottoman Empire, Jews were at that time legally permitted to own and purchase slaves. R. Yaakov Castro (1525-1610), the leading *posek* in Egypt along with his *rebbe* the Radvaz, writes that in his time the marriage¹⁵ of a *mamzer* to a *shifcha* was an "everyday occurrence." ומעשים בכל יום שממזר נושא שפחה שטבלה לשם עבדות לטהר זרעו לבא בקהל (שו"ת אהלי יעקב ס"א).

14. Rambam, *Issurei Biah* 15:4.

15. The term "marriage" is of course used loosely throughout this article and throughout the literature, since in point of fact a *mamzer* cannot marry a *shifcha*; no Jew can, because, as previously stated, she is not legally marriageable (אין קדושין תופסין בה).

Similarly, R. Chaim Shabtai (1557-1647), who was *Av Beit Din* of Salonica and one of the leading Sephardic *poskim* of his era, relates (שו"ת מהרש"ש ח"ג ס"מ"ה) that his predecessor, the famous Maharashdam (1506-1590) sanctioned such a marriage for the nephew of a rabbi who was a *mamzer*: וכן עשה מעשה בממזר בן אחותו של החכם כה"ר חיים קרישינטי.

Maharashdam insisted, however, that the slave girl be acquired in a halachically recognized fashion:

לא היה מתיר השפחה הקנויה לנו לממזר, אלא שהממזר יקנה גויה שתמכור היא את עצמה ויטבילנה לשם עבדות.

We shall soon discuss the ramifications of the Maharashdam's ruling.

One final example can be found in *Knesset Hagedolah* (*Even Haezer* 4:34) where the author cites a manuscript responsum from R. Yitzchak Ashkenazi, who was present at a "wedding" in Constantinople between a Torah scholar who happened to be a *mamzer* and a *shifcha*. The eyewitness relates that the wedding was attended by the Torah elite of the city!

וכן מצאתי בתשובה כ"י למהר"ר יצחק אשכנזי ז"ל והעיר שראה מעשה בקושטא שממזר ת"ח נשא שפחה ונתקבצו שם חכמי קושטא באותן נישואין לכבוד הת"ח.

From these examples it is evident that *mamzerim* did in fact "marry" *shefachot*, father children, and subsequently emancipate those children, all with the sanction of contemporary *poskim*.

However, these examples occurred centuries ago, when slavery was a legally recognized institution. Today, there is no country in the world where slavery is legal; no human being has the legal ability to enslave another human being, and even were he to do so by physical force, no law would recognize the validity of the enslavement. In fact, even were

a person to voluntarily sell himself or herself to another person, no law would recognize the sale. It would therefore seem that the whole issue of a *mamzer's* marrying a *shifcha* belongs to the realm of history, not to that of "halacha and contemporary society."

And yet, this is not necessarily true. A number of modern *poskim* have addressed this issue *halacha lema'aseh*. Volume V of *Minchat Yitzchak* and Volume III of *Chelkat Yaakov* contain a lengthy exchange of correspondence concerning this very issue, that is, whether a *mamzer* in the twentieth century could actually purify his children through marriage to a *shifcha*. The question is not whether a *mamzer* may do so, for as we have seen, he may. The question is rather whether there is such a thing as a *shifcha* nowadays.

To give a scenario, suppose a man and woman meet and wish to marry. He is a *mamzer*, while she is a prospective convert to Judaism, that is, she sincerely wishes to convert to Judaism and intended to do so even before she met the man she now intends to marry. If they marry after she converts (a *mamzer* may marry a *giyoret*), their children will be *mamzerim*. She wishes to marry the man she loves, yet she does not want her children to be *mamzerim*. Anxious for a way out of her dilemma, she declares that she is willing to convert to Judaism as a *shifcha kna'anit*. That is, in accordance with *Yoreh Deah* 267:9;17, she is willing to sell herself to a Jew (in this case, the *mamzer*) and subsequently immerse in a mikvah as an act of conversion as a slave, thereby becoming a *shifcha kna'anit*. Of course, there is no question of the Jew's actually enslaving her in the sense of compelling her to do anything against her will, for he has no legal right or power to do so in the United States or anywhere else. The conversion is thus pro forma to a degree, the point being that in the eyes of Jewish law, she is a *shifcha kna'anit*. If she agrees to this, then if they subsequently marry their children will be *avanim kna'anim* and when they are

subsequently emancipated, they will be *gerim*, normal converts to Judaism, not *mamzerim*, as explained above.

While this scenario will seem far fetched and even bizarre to the modern reader, it is precisely the (*theoretical*) option the author of *Chelkat Yaakov*, R. Yaakov Breisch, recommended in a tragic case. The particulars of the case are given in *Minchat Yitzchak* V 47:

In the aftermath of the Holocaust, many displaced persons were unaware of the fate of their spouses and loved ones. Families had become separated, and in the period immediately following the end of World War II, there were cases where survivors believed that their families had perished when in reality they had survived. It thus happened a number of times that a woman, believing herself to be a widow, married another man after the war, had children by him, and subsequently discovered to her horror that her first husband had never died! The chaotic conditions prevailing in those years, especially in the DP camps and Eastern Europe, led many people to marry without consulting a *rav* or *Bet Din*, so many people were not even aware of the ramifications of their status.

R. Yitzchak Weiss, author of *Minchat Yitzchak*, was consulted about such a case. R. Tzvi Elimelech Kalish, Rabbi in Munkatch and subsequently in Bnei Brak, was faced with the situation of an entire group of young men who were the children of mothers who had remarried after the war, only to find out later that their first husbands were still alive. As the offspring of second "marriages" which in the eyes of Jewish law were adulterous, these young men were *mamzerim*. Two decades after the war, these young men, who had grown up in Hungary, wished to marry. R. Kalish therefore asked whether it was actually possible to convert gentile woman as *shefachot kna'aniyot* in the twentieth century. He phrased his question in general terms, without

stating the obvious, namely, that these women would have to convert of their own volition and with complete sincerity. Still, was it possible?

Dina Demalchuta Dina

The fundamental halachic question to be addressed was whether a person who sells herself as a slave in accordance with the rules laid down in the *Shulchan Aruch Yoreh Deah* 267 does in fact become a slave in the eyes of halacha – or does the refusal of the law of the land to recognize the validity of such an act render that act null and void even from the standpoint of halacha? If the latter is true, her "sale" of herself and her immersion in a mikvah are completely meaningless.

This brings us to the consideration of the scope of the halachic rule known as: the *law of the land is recognized by halacha as a valid law*, דינא דמלכותא דינא.

In spite of the voluminous literature dealing with this subject, the famous observation of the *Heishiv Moshe* (1769-1841) still applies:

יש מבוכה רבה בין הפוסקים בענין זה וסתירות רבות... ולא ראיתי שום אחד מן המחברים שיאמר בזה דבר ברור.

In this area of halacha there is great confusion and many contradictions among the *poskim*, and I know of no author who presents the matter clearly (*Heishiv Moshe* 90).

Without getting into an extended discussion of the various opinions concerning the nature and the scope of this unique halachic principle, the final ruling of the Ramo in *Choshen Mishpat* 369:8 is that halacha does recognize the validity of a just and equitable law passed by a legitimate governmental authority in all areas of civil law. But this ruling is challenged by the *Shach* (*Choshen Mishpat* 73:39), who maintains that a civil law passed by a gentile government is accepted as binding by halacha *only* when it does not

contradict an explicit Torah law; i.e., the secular law concerns a case that is not covered in halacha.¹⁶ According to the *Shach*, once the *Shulchan Aruch* rules that a gentile *can* sell himself or herself as a slave to a Jew, the validity of such a transaction is not affected by the fact that the secular law does not recognize such a sale. Thus, according to the *Shach* a gentile can "sell" herself to be a *shifcha*; but if we accept the *Ramo*, the sale is problematic.

The author of *Chelkat Yaakov* was willing to rely upon the view of the *Shach* to regard such a sale as valid in the eyes of Jewish law, and therefore permit a *mamzer* and this woman to have a child together, that child being not a *mamzer*, but an *eved*, as explained. To further buttress his ruling, *Chelkat Yaakov* pointed out that at least according to a few authorities,¹⁷ the acceptance of any secular law at all is only *mid'rabanan*; *mid'oraita*, there is no such rule as *dina demalchuta dina*. Thus no secular law can affect a sale recognized by the Torah. Although the *Chatam Sofer* (*Yoreh Deah* 314) and the *Avnei Miluim* (*ad loc.*) strongly disagree with this view, R. Breisch was willing to follow other more lenient rulings.

Forcefully arguing his view, R. Breisch pointed out that the *mamzer* has no decent alternative but to marry a *shifcha*, as can be deduced from *Tosafot*. In *Gittin* 41a the Mishnah rules (see also *Yoreh Deah* 267:62) that an *eved kna'ani* who

16. As is well known, the Chazon Ish strongly disagreed with this view of the *Shach*. The fact that there has been no published halachic discussion of a legal topic does not mean that halacha has nothing to say on the subject. As the Chazon Ish puts it: לשון הש"ך ז"ל קשה לכיוון. שאין חילוק בין דין מפורש לאינו מפורש. אין כלל דין שאינו מפורש, שהכל מפורש בתורה (חזון איש חשון משפט ליקוטים סימן ט"ז).

17. *Beit Shmuel* 28:3; *Binyan Tziyon Hachadashot* based on *Knesset Yechezkel* 14 and *Teshuvot Ramo* 87.

was originally owned by two Jews and was subsequently emancipated by one of his two owners, must be freed by the other owner. The reason is that the slave is in an impossible position. Having been freed by one of his owners, he is legally half-slave and half-free. As such, he is not permitted to marry a free Jewess (because he is half slave), nor may he be united with a *shifcha* (because he is half free, and a free Jew may not engage in relations with a *shifcha*, as explained above). To require him to be celibate, the Mishnah says, is unacceptable. Therefore, he must be freed by his remaining owner; as a free Jew he may marry any Jewess. *Tosafot* ask, why is it necessary to free him, could he not marry a *mamzeret*? After all, whether his status is that of a slave or of a freeman he is permitted to marry a *mamzeret* (see *Kiddushin* 69a). Why should we violate the Torah's injunction against freeing slaves (see above) if it is not necessary to do so? Rabbenu Tam answers that we do not consider this an acceptable option, since any children he has by the *mamzeret* will be *mamzerim*, following the mother. Any marriage that would not result in *mamzerim* is preferable to one resulting in more *mamzerim*, no matter how perfectly legal the marriage ואומר רבינו תם דאין זו תקנה להרבות ממזרים בישראל.

By the same token, argued R. Breisch, if it is at all possible to arrange matters so that the *mamzer* will be able to marry a *shifcha* and thus avoid his offspring's being *mamzerim*, one cannot simply maintain that since he does have other (less desirable) options, it is not necessary to do so. To leave him no option but to father *mamzerim* is unacceptable.

The view that *dina demalchuta dina* does not affect the sale of a slave is highly controversial. In fact, it was an intense halachic controversy in sixteenth century Turkey, as the author of *Atzmot Yosef*, R. Yosef ben Yitzchak ibn Ezra (1540-1602) states: ובאמת שנפל מחלוקת גדולה בזה כפי מה ששמעתי בימי בחורותי ושנעשו בזה פסקים ארוכים רבו מני ים. A number of the greatest halachic authorities took the position that if the law of the

land prohibits a Jew from purchasing a slave, then that slave is not considered the Jew's property even if the Jew goes ahead and purchases him anyway. The Mahari ben Lev (I 12) explicitly stated this in the case of a slave girl who followed her mistress to the mikvah and begged to be permitted to immerse herself and thereby become a *shifcha kna'anit*. In spite of the fact that the girl of her own free will yearned to be a *shifcha*, said Mahari ben Lev (1500-1580), she did not become one because the laws of Turkey did not allow it, and she may therefore not marry a *mamzer*.

A similar conclusion was reached by his colleague, the Maharashdam. In a number of cases (*Yoreh Deah* 194-6; 214) the Maharashdam ruled that purchasing and converting a slave girl did not make her a *shifcha kna'anit* and she could not marry a *mamzer*.

במלכות שלנו ראה ראינו שאינם מנחים ליהודים להיות אצלם עבדים
ושפחות אלא בכל מיני שכירות לקצת שנים... ושייך בהאי דינא
דמלכותא... שבענין העבדים אין לנו אלא דינא דמלכותא.

The Maharashdam states that this is because the laws of Turkey do not allow a Jew to purchase any slaves:

לפי דעתי כפי מה ששמעתי ונראה אמת שבמלכות הזה מלכות
תוגרמה יר"ה אין שום אדם חוץ מדתם יכול להשתעבד בשפחה ועבד
אם כן דין זה לא היה צריך להשיב עליו דשפחה אין כאן.

When the question concerning the slave girl who begged to be allowed to convert was sent to the Mahari ben Lev's contemporary in Eretz Yisrael, the Mabit (1500-1580), the latter ruled that the girl was considered a *shifcha* because according to his understanding of the situation, the laws of Turkey did indeed permit Jews to acquire and own slaves. Whether the Mahari ben Lev or whether the Mabit was correct as to the Turkish law is a question for historians. What is halachically salient is that all agreed that if Turkish law did prohibit Jewish ownership of slaves, that law would have

halachic consequences and would render it impossible for a Jew to acquire a *shifcha*, and would effectively preclude the possibility of a *mamzer's* taking advantage of the "loophole" to father children with her and subsequently arrange for their emancipation.

Interestingly, these rulings of the Mahari ben Lev and Maharashdam are quoted by the *Magen Avraham* and subsequently by the *Mishnah Berurah* in the context of contemporary halacha, namely, the laws of Shabbat. Chapter 304 of *Shulchan Aruch Orach Chaim* is devoted to the rules of what a slave or servant of a Jew may or may not do on the Sabbath. The law differentiates between three types of slave: (1) a full *eved kna'ani*, that is, one who was acquired by a Jew and subsequently converted as an *eved* in accordance with the rules laid down in *Yoreh Deah* 267; (2) a gentile who was legally acquired by a Jew, accepted upon himself the seven Noahide laws, but was not converted to Judaism as an *eved*; (3) a gentile who was legally acquired by a Jew, but who neither converted to Judaism as an *eved* nor accepted upon himself the Noahide laws. Note that all three were acquired by the Jew, that is, the Jew actually owns the slave (קנין גוף).

In paragraph 1, the *Shulchan Aruch* states that both type (1) and type (2) may not do any work for their master on the Sabbath, who is required by *Exodus* 23:12 to see to it that his slaves refrain from work on the Sabbath. In Paragraph 3, the *Shulchan Aruch* states that a Jew is *not* required to see to it that his gentile *employees* who are not his slaves refrain from work on the Sabbath. Commenting on this last rule, *Mishnah Berurah* states:

במקום שהמלך גזר שאין שום אדם חוץ מדתם יכולין לקנות עבד
ואמה העבדים והשפחות יכולין להעביר אש בשבת דהויין כשכיר
בעלמא. אבל יש חולקים וסבירא להו דאף עתה גופן קנוי לישראל.
ועכשיו שפורעים כרגא בעד עבדים והשפחות לכולי עלמא גופן קנוי

ואסורים במלאכה. וכן לקולא דהיינו שיכול ממזר לישא שפחה.

In a locality where the king decreed that anyone not of the official faith cannot acquire a manservant or a maidservant, one's servants may kindle a fire on the Sabbath [for their masters], for they are considered mere employees. However, other authorities disagree and maintain that even so their bodies belong to the Jew and they are considered slaves, not employees. Nowadays, when one pays a head tax for his male and female servants and is thereby entitled to own them, their bodies belong to their Jewish masters according to all opinions and they are forbidden to do work on the Sabbath. They are also regarded as servants where this would involve leniency, so that a *mamzer* may marry such a maidservant.

The first opinion cited by *Mishnah Berurah* is the opinion of the Mahari ben Lev and the Maharashdam. According to this view, a gentile acquired in a country which did not recognize Jewish purchases of slaves would indeed not be a slave but a free employee. The second opinion cited here is that of the *Knesset Hagedolah*, mentioned previously. The *Knesset Hagedolah* does not speak about the laws of Sabbath but about a *mamzer's* marrying a *shifcha*. The *Magen Avraham*, followed by the *Mishnah Berurah*, draws the conclusion that if a *mamzer* may marry a *shifcha* regardless of the law of the land, it means that *dina demalchuta dina* does not affect the acquisition of an *eved* or a *shifcha* carried out in accordance with the rules of the *Shulchan Aruch*.

In point of fact, however, a perusal of the source reveals that the *Knesset Hagedolah* did not at all maintain that the acquisition of a gentile slave was not affected by the law of the land. He merely stated that the law restricting Jewish acquisition of gentile slaves was not a *dina demalchuta* (a law of the kingdom) but a *dina demalka* (a law of the king). That is, one of the views restricting the scope of the rule of

dina demalchuta dina is that of the Ramban, cited in *Maharik* 66:

כי אמרינן דינא דמלכותא דינא הני מילי הדינים הקבועים בכל מלכותו
שהוא וכל המלכים שהיו לפניו הנהיגו הדברים וכן כתובים בדברי
הימים. אבל מה שהמלך עושה לפי שעה או חק חדש שהוא עושה
לפי שעה... אין אנו דנין אותו דין.

In other words, only old, long-established laws are recognized by halacha. New decrees of a king, especially those decrees which are not entered into the official law codes of the land, but rather remain royal decrees, are not recognized by halacha. The decree forbidding Jews to acquire slaves, says the *Knesset Hagedolah*, was such a new decree. For that reason, the validity of the purchase of the slaves was not affected by the royal decree.

It is evident, then, that contrary to the seeming interpretation of the *Magen Avraham*, the *Knesset Hagedolah* did *not* maintain that the purchase of gentile slaves was recognized by halacha regardless of the law of the land, but maintained only that in the present case there was no such law but merely a personal decree of the king. Had there been such a law of the land, the gentile could not have been acquired as a *shifcha* and the *mamzer* would not have been permitted by Jewish law to unite with her.

There is one more opinion cited here by the *Magen Avraham* and the *Mishnah Berurah*, the opinion of R. Yitzchak Aboab (1433-93):

וכתב בית יוסף שהמהרי"א נסתפק באותן עבדים ושפחות עובדי אלילים
שאם רצו להמיר דתם ולכנס לדת ישמעאל יוצאים לחירות. אפשר
שאף על פי שהם עתה קנויות קנין עולם, מחמת זה הם חשובים רק
כשכיר בעלמא. וצריך עיון. ודעת האחרונים להחמיר בזה מפני שיש
בזה חשש אסור תורה.

R. Yitzchak Aboab, who lived in fifteenth-century Spain, where Jews were permitted to acquire Moslem, but not

Christian, slaves, suggested that gentile slaves might be permitted to perform work on the Sabbath on the grounds that they were not really slaves at all, but simply employees. Even though they had been acquired in accordance with the rules of halacha and with the consent of the law of the land, nevertheless, the fact remained that if any slave announced to the Spanish authorities that he or she wished to convert to Christianity,¹⁸ their application would be accepted and they would immediately go free. In such circumstances, their halachic status as slaves was questionable, inasmuch as the essence of slavery is the inability to free oneself whenever one desires. Since these slaves could free themselves whenever they wished, they might not be regarded as slaves by Jewish law. If they were not slaves, then they were employees of a sort. As employees they could perform certain types of work for a Jew on the Sabbath. This lenient view was discounted by the *Knesset Hagedolah* and others, who held that as long as the slave was legally acquired in the eyes of halacha and with the consent of the law of the land, they were halachically slaves and as such could not perform work for their owners on the Sabbath.

The same dispute, it seems to this writer, would obtain in the case cited in the *Minchat Yitzchak* and *Chelkat Yaakov*. That is, even were a gentile woman to agree to convert as a *shifcha* today in the United States, she could "free" herself anytime she wished inasmuch as slavery is illegal. As stated above, her status as a slave would be strictly pro forma. The

18. The actual quote printed in the *Magen Avraham* and the *Mishnah Berurah* reads: לְהַמִּיר דָּתָם וּלְהִכְנֵס לְדַת יִשְׁמַעְאֵל, that is, to convert to Islam. However, in point of fact, the actual responsum, which is quoted in *Beit Yosef* at the end of chapter 304, makes it clear that R. Yitzchak Aboab was referring to Moslem slaves converting to Christianity.

fact that she could free herself whenever she wished would seem, following the thinking of R. Yitzchak Aboab, to preclude her being regarded halachically as a *shifcha*.

As we have seen, the Mahari ben Lev, the Maharashdam, the Mabit, the *Knesset Hagedolah*, all accepted that if the law of the land did not recognize Jewish acquisition of slaves, any "slave" purchased in violation of the law was not considered an *eved* or a *shifcha*, and a *mamzer* could not halachically unite with them. Further, it is evident from a review of opposing responsa that the cause of disagreement between the *poskim* was the unclarity of the Turkish laws, leaving some under the impression that the laws allowed Jews to purchase Christian slaves. But where the law was clear forbidding Jews' acquiring slaves, all agreed that *dina demalchuta dina* applied, and that in such a situation a *mamzer* would not be able to marry a *shifcha*.

Despite all this, *Chelkat Yaakov* still felt that a woman could become a *shifcha* nowadays, regardless of the law of the land. He advanced two arguments:

Becoming a *shifcha* involves two stages: a) The gentile sells herself to a Jew through a *kinyan*, a halachically recognized mode of acquisition. Like all sales, this is a matter of civil law (ממונא) and as such subject to the law of the land. b) Once she is purchased, she then converts to Judaism as a *shifcha* by immersing in a mikvah and formally accepting upon herself the laws of the Torah, including her obligation to perform those mitzvot which are now incumbent upon her. Conversion is strictly a matter of religious law, and as such is not subject to the law of the land. In our case, the woman wishes to convert; there is no problem as far as stage b) is concerned. The problem is that in order to get to stage b) she has to be able to sell herself, which is not allowed by the law of the land. In such a case as ours, argues *Chelkat Yaakov*, we are entitled to view stage a) as a religious matter

and as such not subject to the law of the land. After all, there is no intention of actually enslaving her in the conventional sense of denying her her freedom. Such is not his intention at all even were it legal. Rather, the *mamzer's* sole intention is to convert her for the purpose of "purifying" his offspring in accordance with the law. Such a "purchase" is not a purchase in the conventional sense of acquiring something because someone wishes to own that thing (or person). The purchase is for religious reasons alone and is therefore valid.

This subtle argument is *Chelkat Yaakov's* first basis for allowing purchase, conversion, and marriage to a *mamzer*.

The second argument is located in a broader framework, the actual scope of *dina demalchuta dina*. As we have seen, the *Shach* did not concede much scope to the law of the land vis-a-vis halacha.¹⁹

19. In truth, the question of whether a halachic *kinyan* is valid when it is not recognized by the law of the land is the subject of some controversy that extends beyond the question of slavery. The ruling adduced by *Chelkat Yaakov*, one of the best known examples of such a question, involves the sale of *chametz* before Passover. Traditionally, such sales of Jewish foodstuffs to a gentile were carried out in accordance with halachic norms, that is to say, the *chametz* was legally conveyed to the gentile through a *kinyan*. Such a *kinyan* was often not recognized by the law of the land. Did such non-recognition of the sale affect the sale's validity? If it did, it meant that the *chametz* had not really been sold and that the Jews had possessed *chametz* on Passover in violation of *בל יראה ובל ימצא*, and that *chametz* could not be used by them even after Passover. In other words, the consequences of the sale not being valid could be economically catastrophic for the Jews. The *Chatam Sofer* (*Orach Chaim* 113) reports:

When the Gaon R. Baruch Frankel, the Rabbi of Leipnik (the author of *Baruch Taam*) was still alive, it once happened that

slanderers put it into the ear of the government officials that the Jews were selling their *chametz* using bills of sale that did not bear the stamp of His Majesty the Emperor (as required by law). When the matter was brought before the Emperor, he declared that it was common knowledge that this was not a real commercial transaction but rather a religious one, and therefore did not require the official stamp. This gave rise to a certain amount of doubt (ועל זה נולד קצת ספק) in the mind of [R. Baruch Frankel], since it implied that in the eyes of the law of the land the document of sale had no legal validity.

But to my mind it does not seem that there is any problem, for the document is a valid one, both by Jewish law, since if the gentile purchaser goes to a Jewish court to claim the merchandise it will be awarded to him, as well as by the law of the land; except if the purchaser were to turn to the civil courts, he would first have to have the contract legally stamped. It is only that in his generosity and honesty the Emperor has declared that he does not wish to impose the yoke of the tax on this kind of transaction since the sole purpose of both buyer and seller is to avoid the prohibition of *chametz*.

The *Baruch Taam*, then, was concerned that the law of the land might not recognize the document *selling* the *chametz* and that in that case the sale might be invalid. The Chatam Sofer, too, did not take the attitude that the validity of a halachically valid bill of sale could not be affected by the law of the land. The Chatam Sofer rather argued that the bill of sale was indeed recognized by the law of the land and for that reason there was no question of its ultimate validity. It would seem, then, that according to these authorities any sale not recognized by the law of the land would be halachically problematical.

On the other hand, the *Baruch Taam*'s son-in-law, the Sanzer Rav, forcefully argued that the law of the land has no effect upon the validity of a halachically recognized *kinyan*. R. Chaim Sanzer, who was expert in the civil laws of Austria-Hungry, noted that, unlike the Chatam Sofer's contention, the deeds of sale of *chametz* were in fact not recognized by the law of the land:

We go according to our own law, whether this results in stringency or leniency (בין להחמיר בין להקל). This must be so, for no document

The *Divrei Chaim's* position was that once a *kinyan* is recognized by Jewish law, it cannot be invalidated by the law of the land. *Chelkat Yaakov* bases his permission that a gentile could sell herself as a *shifcha* on this ruling of the *Divrei Chaim*. *Chelkat Yaakov* concludes by pointing out the great lengths *poskim* down the ages were prepared to go to aid an *agunah* where possible. Aiding a *mamzer* in "purifying" his offspring was an endeavor that called for equal effort. Realizing, however, that such a ruling was radically innovative in modern times, *Chelkat Yaakov* would not issue an actual ruling unless other *poskim* agreed with him.

Such agreement was not forthcoming. The *Minchat Yitzchak*, who devoted no less than seven responsa to this matter, would not agree to the subtle argument of the *Chelkat Yaakov*, that the purchase of the *shifcha* in this case was different since the Jew did not intend to acquire her in order to enslave her. Jewish law knows of no such distinctions, says *Minchat Yitzchak*;¹ one either makes a full purchase or no purchase at all. As to the question concerning the scope of *dina demalchuta dina*, it is evident that in spite of what *Shach* and *Divrei Chaim* had stated, the Mahari ben Lev, the Maharashdam, and others cited above *did* hold that where the law of the land did not recognize it, a *mamzer* could not

of any kind written according to their law can be of any use in this matter [of selling *chametz* before Passover], for it is a clearly established law among them that a sale of this type, performed for the sake of satisfying a religious requirement, is no sale at all; therefore, no official stamp of theirs is needed [to make the transaction valid], and all the procedures of the civil court cannot strengthen this sale. This being the case, what is our sale if it has no validity by their law? Rather, we must certainly say that we have only the law determined for us by the Torah. Therefore it makes no difference whether we write [the bill of sale] in German or in the Holy Tongue (*Divrei Chaim* II37).

marry a gentile who had been acquired as a *shifcha* because she was not in fact halachically a *shifcha*.

Moved by compassion to seek some legal remedy for the *mamzerim*, *Minchat Yitzchak* proposed an ingenious solution of his own: let the gentile woman in question undergo *two* ceremonies, that is, let her first sell herself to the Jew and then convert as a *shifcha*, in accordance with *Yoreh Deah* 267. Next, let her undergo a formal conversion to Judaism as a *giyoret*, a full convert. Such a woman may marry a *mamzer*, whatever her actual status. She is either a *shifcha* or, if the law of the land prevented her from becoming one, a *giyoret*, either of whom may marry a *mamzer*. Any offspring of the union will be children whose status is doubtful, that is, they will be either *avadim* – if the mother was a *shifcha* – or *mamzerim* – if the mother was a *giyoret*. When these offspring grow up and wish to marry, a *Beit Din* will have to decide on their status. In such a case, *Minchat Yitzchak* argued, the *Beit Din* will rule that they are *avadim* who can be emancipated and thereafter be free to marry whomever they wish, since they will not be *mamzerim*.

Why will the *Beit Din* rule that they are *avadim* and not *mamzerim*? Because when a *Beit Din* is faced with an after-the-fact situation (בדיעבד) where it is necessary to rule on the status of a person who may or may not be a *mamzer*, the *Beit Din* is supposed to rely on those bona fide halachic opinions which would allow them to rule that the person is not a *mamzer*. In our case, since there are valid opinions that the woman is a *shifcha*, a future *Beit Din* will undoubtedly rule that the offspring are not *mamzerim* but rather *avadim*, who may be emancipated and then marry whomever they please.

This proposal was withdrawn, however, in the face of criticism by the *Chelkat Yaakov*, who pointed out that this proposal would actually make matters worse. For if the gentile

went ahead and became a *shifcha*, the only questions would be the efficacy of the acquisition and her status as a *shifcha*. If the *mamzer* relied upon those who say that she is a *shifcha* and fathered children by her, he committed no great sin, for there are valid halachic opinions to this effect, as we have seen. In any case, there is absolutely no question that his offspring will ultimately be legitimate Jews because they are either *avadim* or else gentiles, depending on the status of the mother. In either case, they are not *mamzerim* and may become full Jews. In other words, the proper procedure for the father would be to emancipate them on the assumption that they are *avadim*. They would then become legitimate Jews at the moment of emancipation. In addition, just to "make sure," the father should arrange for their formal conversion to Judaism as *gerim*. Thus, whatever they were, the offspring are finally and unquestionably full legitimate Jews. However, according to the proposal of *Minchat Yitzchak*, the status of the children will be in real doubt because if *dina demalchuta dina* applies, then the mother's conversion as a *giyoret* would be valid and the offspring would be *mamzerim*, since the offspring of a *mamzer* and a *giyoret* is a *mamzer*, as explained at the beginning of this article.

Ha'aramah

Another problem raised by *Minchat Yitzchak* is that "purchase" of a *shifcha* nowadays when there is no slavery is a legal fiction, known as *ha'aramah*. *Minchat Yitzchak* cites the famous opinion of *Tevuot Shor* (in *Bechor Shor* to *Pesachim* 21a) that a *ha'aramah* cannot effect circumvention of a biblical prohibition.

Our case, argues *Minchat Yitzchak*, involves an attempt to circumvent a biblical prohibition by resort to a *ha'aramah*. Despite the fact that the *Chatam Sofer* (OC 62) and *Chayei Adam* (*Nishmat Adam* to *Hilchot Pesach* 8) comprehensively

refuted the opinion of *Tevuot Shor*, by citing all the cases in the Talmud where *ha'aramah* was permitted and was regarded as effective in circumventing even biblical prohibitions, *Minchat Yitzchak* nevertheless felt that here we have to be conservative and not initiate a *ha'aramah* for which there exists no precedent. Even the *Chatam Sofer* and the *Chayei Adam* admitted that there were times when a *ha'aramah* could not affect a biblical prohibition (that is, we cannot conclude that because certain *ha'aramot* are effective, all are). On these grounds, *Minchat Yitzchak* felt that the "*shifcha* option" was not a valid one nowadays.

Chelkat Yaakov forcefully rebutted these arguments. First of all, the *Chatam Sofer* and the *Chayei Adam* were leading *poskim* who could be relied upon as precedents for sanctioning such a *ha'aramah*. But more importantly, *Chelkat Yaakov* took strong exception to the charge that there was any *ha'aramah* involved at all. What, after all, were the facts of the case? A *mamzer* wished that his offspring not be *mamzerim*, a halachically laudable goal, as we have seen. There is only one possible legal way to accomplish this, marriage to the *shifcha*, as provided for in *Shulchan Aruch*. The woman involved desires the same thing. Although she could convert as a full Jewess and then marry the man she desires, she, too, realizes that her children will be *mamzerim*, something she is as anxious to avoid as he. Realizing that this means that she must become a *shifcha*, she is prepared to take that step in good faith, fully conscious of the unusual status that will be hers, a status that is admittedly quite bizarre in the twentieth century. Nevertheless, for the best of reasons, she is prepared to swallow her pride for the sake of the man she wants to marry and for the sake of her children. Where is the *ha'aramah*? She knows what being a *shifcha* means in halacha, and she makes this choice with open eyes. There may be an element of tragedy here, but not of farce or trickery.

Furthermore, argues *Chelkat Yaakov*, the fact that we

cannot legally enslave anyone nowadays does not automatically mean that there can be no status of *shifcha*, for halacha does provide for a scenario where a woman is a *shifcha* even though she does not have to actually serve anybody, as in *Yoreh Deah* 267:77:

מי שצוה בשעת מיתתו "פלונית שפחתי אל ישתעבדו בה יורשים"
הרי זו שפחה כמו שהיתה ואסור ליורשים להשתעבד בה

If one who was dying commanded, "I do not want my heirs to compel my *shifcha* to do any work at all," then although she does remain a *shifcha*, the heirs may not compel her to work.

Thus, there is such a thing as a *shifcha* who, if her owner agrees or legally binds himself, is not halachically compelled to do anything. In spite of the fact that she need not actually serve anybody, she is a *shifcha*, and her children by a *mamzer* would not be *mamzerim*. Therefore, concludes *Chelkat Yaakov*, there is no problem of *ha'aramah*. At the same time, *Chelkat Yaakov* reject the fears of *Minchat Yitzchak* that the entire procedure might open a Pandora's box of insincere converts who might try to take advantage of certain leniencies in the *shifcha* process that do not apply to the normal process of conversion. It is up to the *Beit Din*, said *Chelkat Yaakov*, to formulate procedures and arrange matters in such a way as to prevent such mishaps.

In the end, however, in spite of these forceful refutations, *Chelkat Yaakov* was moved by the negative stand of *Minchat Yitzchak* to reiterate that he was not prepared to act upon his own suggestion without the approval of other *poskim*. This approval, we have pointed out, was not forthcoming.

The effect of this ultimate reluctance to actually rule, *Halacha lema'aseh*, that a woman could become a *shifcha* nowadays is reflected in a more recent responsum which deals with the same problem. In *Teshuvot Vehanhagot* I

764, R. Moshe Sternbuch describes how he was faced with a situation in South Africa of a woman who had had an Orthodox marriage, but had remarried without benefit of a *get*, a halachic divorce. Her husband had been reluctant to give her a *get*, so she remarried in a Reform ceremony. Obviously, the children from her "second marriage" were *mamzerim* because in the eyes of Jewish law she was still married to her first husband at the time she had children by another man. Some years later, the woman became a *ba'alat teshuvah* (repentant), sought and obtained a *get* from her first husband, and even sent her children to Orthodox day-schools. She was nevertheless faced with the consequences of her second marriage: her children were *mamzerim*.

In seeking a solution to this tragedy, R. Sternbuch likewise reasoned that it ought to be possible for a gentile woman to become a *shifcha* even in modern-day South Africa inasmuch as the entire process would be a legal fiction to which the state would not take exception. In the end, however, R. Sternbuch concluded that if such great authorities as the *Minchat Yitzchak* and *Chelkat Yaakov* were unable to sanction such a procedure, in the one case on account of halachic objections and in the other on account of a reluctance to rule absent support from other *poskim*, then such an option was not practicable nowadays. R. Sternbuch had no choice but to advise the *mamzerim* to marry converts, knowing, however, that their children would also be *mamzerim* down to the end of time. As he put it:

ועל כל פנים אין לנו לפרוץ גדרים בייחוס שלא שמענו מאבותינו כן
מעולם אף שהיה יכול להציל פסול זרעו לעולם

In any event, we ought not to "break fences" [i.e. make radical innovations] in matters involving family relations. We have never heard of our ancestors [resorting to such a procedure] even though [the *mamzer*] would be able to save his progeny [from the taint of *mamzerut*] forever.

Conclusion

There is no question that even nowadays the ruling of *Kiddushin* 69a, codified in *Even Haezer* 4:20, stands, and a *mamzer* could legally unite with a *shifcha*. Any children of their union would be *avadim kna'anim*, who could be emancipated, whereupon they would be legitimate Jews. The problem, however, is the technical one of the difficulty if not impossibility of anyone's becoming a *shifcha* in the modern world.²⁰ The fact that the law of the land does not recognize any form of slavery presents what seems to *Minchat Yitzchak* insuperable obstacles.²¹ Although *Chelkat Yaakov*

20. "It is probable that slavery no longer exists as a legal phenomenon recognized by a political authority or government any place in the world." *Encyclopedia Britannica* (1990) Volume 27, p. 290. See, also, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (Martinus Nijhoff 1992).

Actually, this is not a simple matter at all. While it is true that slavery is illegal around the world and hence no longer exists *de jure*, slavery does exist *de facto* in a number of Third World countries in a variety of economic guises, such as the system of "guest workers" in Saudi Arabia and the Gulf States, and debt-bondage in India, Pakistan, and parts of the Caribbean (*Newsweek* May 4, 1992, p. 30). In other words, legal chattel slavery no longer exists, but the the essence of slavery, namely, the exploitation of millions of human beings who are unable to escape forced labor, does exist. In the words of *Newsweek* magazine, "Instead of freeing slaves, governments simply pass laws they don't enforce."

In such a context, the question arises, which has greater halachic valence – the official laws of the country, which do generally prevail within its territory – or the *de facto* reality that does exist in certain of its regions? As we have seen, a similar state of confusion likewise characterized the law in the Ottoman Empire in the sixteenth century; see Assaf in *Zion*, no. 4, pp. 110-114.

21. Interestingly, no one seems to have considered the possibility of marrying a *shifcha* in modern-day Israel (although *Chelkat*

maintained that it *is* possible to become a *shifcha* nowadays and for a *mamzer* to purify his offspring through his union with her, in the end he was not willing to advise people to act upon his theoretical ruling.

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Yaakov makes a very brief, cryptic, reference to this possibility, but makes no attempt to pursue it; *Chelkat Yaakov* III no. 91). Do the secular laws of the State of Israel affect the validity of a halachically valid *kinyan*? As is well known, the Ran in *Nedarim* 28a quotes Tosafot to the effect that *dina demalchuta dina* does not apply to a Jewish king in the Land of Israel. Ran, of course, refers to a legitimate king whose authority is recognized by halacha. Other *Rishonim*, such as Meiri, *ad loc*, and Rashbam to *Bava Batra* 54b disagree.

This controversy concerns Davidic kings. Does anyone contend that the Meiri and Rashbam would recognize the secular state of Israel as possessing the same powers as a Davidic king based upon Torah law? Indeed there are; however, even they do not contend that the law of the State could outweigh or nullify a law of the *Shulchan Aruch*. See, for example, R. Shilo Raphael (*Torah She B'al Peh* no. 16, p. 127), who, although he argues that the laws of the Knesset have halachic recognition, nevertheless, clearly stipulates that such laws must not come into conflict with halacha: אלא שהגבלה חמורה יש בדבר כל האמור אינו אלא בשהחיקה איננה בניגוד לדין תורה. אם מדובר בחוק או תקנה המתנגדת לדיני תורה או אפילו למצות חכמים היא בטלה ומבוטלת.

This is the opinion of someone who views the State of Israel in a positive light, halachically speaking. The views of such *poskim* as R. Yaakov Breisch, author of *Chelkat Yaakov*, a leading *charedi*, and of Rav Yitchak Yaakov Weiss, author of *Minchat Yitzchak*, who was *Av Beit Din* of the *Eida Hacharedis* in Jerusalem, obviously grant less recognition or none at all to the laws of the Knesset! Accordingly, it would seem that the scenario discussed above would be much less problematic if carried out in the State of Israel today.