

REFLECTIONS ON THE CASE OF *MAMZERUT*

by

Prof. Ze'ev Falk

The case of the Langer family has brought to the focus of public interest one of the problems of Jewish family law in modern society. The petitioners in this case were born after their mother had left her husband and while she was living with another man, their father. According to Jewish law, the petitioners are therefore *mamzerim* and, in accordance with Deut. 23:3, not eligible to marry into the community. After a prolonged discussion of the case by the Rabbinical Courts, and their final verdict against the petitioners, Chief Rabbi S. Goren summoned a Special Tribunal of nine rabbinical judges in order to reconsider the judgment, which was ultimately reversed. It was found that the husband of the petitioners' mother, a proselyte, had reverted to his former faith, and that the Jewish marriage could thus be declared invalid. The mother therefore was not to be regarded as having committed adultery and the petitioners could be admitted to marry within the faith. Both petitioners were married on the very day of this decision.

Rabbi Goren's judgment has caused considerable contention in rabbinic circles. Many of his colleagues consider it an arbitrary disregard of Jewish tradition, others justify its object rather than the procedure. The value of this decision, however, is limited, since it is based on rather exceptional circumstances. The question still remains whether the "vicarious liability" of children for their mother's offence can be maintained in a modern state. It is just one of the most striking examples of the difficulties arising from the confrontation of biblical law with the ethos of democratic society.

This writer ventures the opinion that here, as well as in similar cases, the casuistic method cannot provide an adequate solution. In former generations, a *mamzer* would take the law into his own hands by moving to a foreign community and marrying there without his disability being known. The technical progress made in Israel by the marriage departments of the rabbinate has, however, prevented this practical solution and once again brought the problem to public attention.

Instead of finding *ex post facto* some circumstances to liberate a particular person from the rule of *mamzerut*, a more generalising attitude appears advisable. While Reform, and perhaps Conservative, Judaism do not bother to re-interpret outdated Jewish law, but where necessary simply dis-

regard it, Jewish Orthodoxy unfortunately does not even attempt to seek an alternative solution.

However, the problem is by no means a creation of our time. The sages of the *Aggadah* already interpreted Ecclesiastes 4:1 with reference to the law of *mamzerut*:

“Again I saw all the oppressions that are practised under the sun” – Daniel the Tailor interpreted this verse with regard to *mamzerim* . . . “And behold, the tears of the oppressed” – because of their mothers’ offence these poor people are excluded. If one’s mother committed adultery, why is one to be blamed? “And they had no-one to comfort them. On the side of their oppressors there was power” – this is the Great Sanhedrin of Israel which, by virtue of the law, excludes them according to Deut. 23:3. “And there was no-one to comfort them” – the Holy One, blessed be He, said that He would comfort them. (*Lev. Rabba* XXXII 8).

Since no solution could be found within the law, one of the second century C. E. sages tried to restrict the rule by means of the law of evidence: “He who declares his son to be a bastard is not trustworthy. Even if both husband and wife declare the unborn embryo a bastard – they are not trustworthy. Rabbi Yehuda, however, held them to be trustworthy” (*Mishnah Kiddushin* IV 8). The former view corresponds with that of the Roman jurist Paul: *pater is est quem nuptiae demonstrant* (Dig. II 4, 5) (father is he whom the marriage shows – i. e. the husband of the mother is the father) and its object is the prevention of *mamzerut*. Unfortunately, it is the latter view which became the established rule.

As to the eventual solution of the problem, the sages of the second century C. E. were of different opinions. According to Rabbi Jose, *mamzerim* and temple slaves will in future become clean, for according to Ezekiel 36:25 “I will sprinkle clean water upon you and you shall be clean from all your uncleanness”. Rabbi Meir, on the other hand, held them to remain unclean even in the future (*Bab. Talmud, Kiddushin* 72 b).

However, this cleansing is a process conceived of as being beyond the framework of the law and flowing from divine revelation or inspiration. The problem is how to deal with the exclusion of the *mamzer* at present, and without any supernatural competence.

This writer is of the opinion that the law of *mamzerut* should be applied only if the community is homogenous and has preserved its genealogical records. According to rabbinical interpretation, only an undoubted *mamzer* is precluded from marrying into the community, but not a person whose status is doubtful; the *mamzer* may not marry into a community of established pedigree, but the injunction does not apply where the pedigree of the community is doubtful (*Bab. Talmud Kiddushin* 73 a).

In fact, since the destruction of the Temple the community of Israel has absorbed many elements of doubtful origin and cannot be equated with the community envisaged in the Deuteronomic provision.

According to Rabbi Joshua ben Levi (3rd century C. E.), "money purifies the *mamzerim*"; according to Mal. 3:3, "He will sit as a refiner and purifier of silver and he will purify the sons of Levi and refine them like gold and silver, till they present right offerings to the Lord". What is the meaning of this verse? Said Rabbi Isaac: "The Holy One, blessed be He, has acted charitably with Israel, allowing that any (unclean) family once; mixed with Israelites without traces shall not be traced any more (**משפחה שנטמעה נטמעה**: Bab. Talmud *Kiddushin* 71 a), i. e. a family which has absorbed impure elements remains pure and the impure elements shall not be traced any more. In other words, the tracing of illegitimacy is forbidden.

The following story is recorded concerning a scholar of *Eretz Israel* during the third century. "Ula once came to Pumbedita, Babylonia, into the home of Rav Yehuda, where he found his son Rav Isaac unmarried although over the age. When Ula asked Rav Yehuda why he had not chosen a wife for his son, the answer was that one could not know the pedigree of the women. Thereupon Ula told him that nobody knew his own or Rav Yehuda's pedigree, the possibility existing that both were descendants of 'the women ravished in Zion, virgins in the towns of Judah'" (Lam. 5:11 Bab. Talmud *Kiddushin* 71 b).

Rabbinical tradition thus recognises the mixed origin of the Jewish people and thereby provides the argument for disuse of the law of *mamzerut*. True, the price of the solution, questioning the legitimate pedigree of the community at large, seems to be high in proportion to the number of these exceptional cases. The need for a solution is, however, crucial for the viability of Jewish law in modern society and no effort should be spared to find it.

Professor Ze'ev Falk is Professor of Family Law at the Hebrew University of Jerusalem