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The Adoption of Non-Jewish Children

Infertility, delayed childbirth, and other factors have made adoption an increasingly desirable option for childless couples. Yet, because of the scarcity of Jewish children available for adoption, childless Jewish couples have little other choice than to adopt non-Jewish children. Halakhically, there are two main questions in connection with this practice. The first regards the propriety of converting an adopted child to Judaism without the child's explicit consent. The second regards the applicability of the law prohibiting sequestering of a male and a female (aside from close blood relatives) to an adoptive parent and an adopted child of the opposite sex.

The Halakhah, as formulated in the classical sources, does not discuss adoption as an institution. In fact, as Rabbi Louis Ginzberg points out (*Students, Scholars, and Saints*, Philadelphia, 1928, p. 123), the modern Hebrew term for adoption (*imutz*) does not appear in Rabbinic literature. Nevertheless, it is clear that the sages had a positive view of the practice of one person raising someone else's child. (See, for example, *Megillah* 13a; *Sanhedrin* 19b; *Genesis Rabbah* 71:7, Theodor-Albeck edition, p. 831.) Interestingly, a teacher of someone else's child is considered like the child's father (*Sanhedrin* 19b and 99b). The paradigm of this principle is none other than Moses who was the teacher of his nephews, the sons of Aaron (see RaShI on Numbers 3:1). Moreover, Moses himself was an adopted child and his adoptive mother, Bithia, is praised by the sages (*Leviticus Rabbah* 1:3, Margaliot edition, p. 10). Further, Moses was adopted a second time, as it were, by his father-in-law Jethro, a kindness Moses gratefully acknowledged (*Exodus Rabbah* 4:2). The important thing to note from the two examples in the life of Moses is that they both involved an adoption of a member of one people by someone from another people.

Even though these *midrashim* offer no direct normative principles for the specific questions at hand, they do indicate that a generally positive attitude towards

adoption ought to inform any halakhic inquiry on the subject (See Jerusalem Talmud, *Peah* 2:4, 17a and Jerusalem Talmud, *Horayot* chapter 3, end, 48c. See also Rabbi Tzvi Hirsch Chajes, *Darkhei haHora'ah*, Sec.2, in *Kol Kitvei MaHaRaTz Chajes*, Jerusalem, 1958, 1:251 and Prof. A.J. Heschel, *God In Search of Man*, New York, 1955, p. 333, no. 13 for a brief discussion on how *aggadah* impacts on Halakhah).

The most important halakhic source concerning the conversion of a non-Jewish child is cited in the Talmud (*Ketubot* 11a with reference to Mishnah *Eruvin* 7:11).

> Rav Huna said that a convert who is a minor may be immersed under the direction of a rabbinical court. What does this come to teach us? That it is a merit for him, and one may act to benefit someone in his absence....With what are we specifically dealing here? With a convert whose children converted with him so that they are satisfied with what their father does. Rav Joseph said that, nevertheless, when they become adults they may cancel the conversion...once she (or he) has reached the age of majority for even one hour and did not cancel it, she (or he) may not ever cancel it again.

At first glance it would seem that according to the Talmud a child may only be converted to Judaism when his or her biological parents are bringing him or her along in their own conversion. This might be regarded as the "merit" inasmuch as conversion supposedly breaks previous biological relationships including parenthood (See *Yevamot* 22a, 62a; Maimonides, *Laws of Matrimony* 15:6; Rabbenu Asher on *Yevamot*, Chapter 4, paragraph 37; Rabbi Moses Schreiber, *Responsa Hatam Sofer*, *Yoreh De'ah* 253.) In other words, only a biological parent can confer such a benefit on his child. Although some authorities maintain that this is an automatic right of the father, while a mother's request requires a formal legal ruling (See *Ketubot* 44a, Tosafot, s.v. *hagiyoret*; *Bet Yosef* on Tur, *Yoreh De'ah* 268), the consensus is that Gentile parents do have the right to transfer full control of their children to Jews irrespective of whether or not their own status changes (*Sifra*, Behar, Weiss edition, 109d; *Yevamot* 46a and *Kiddushin* 22a). Thus Maimonides, basing himself on this legal principle, writes (*Laws of Slaves* 8:20):

> A Jew who took a Gentile child or found a Gentile infant and had him immersed: if for the sake of conversion, then he is a convert; if for the sake of slavery, then he is a slave; if for the sake of emancipation, then he is emancipated. (See also *Laws of Forbidden Intercourse* 13:7; *Laws of Kings* 10:3. Regarding Maimonides choice of the term "*taqaf*" for "took", see *Kiddushin* 22b and 25b, Tosafot, s.v. *behema* in the name of Rabbenu Tam. Refer also to Rabbi David Tzvi Hoffmann, *Responsa Melamed leHo'il*, vol. 2, no. 87 in the name of MaHaRaM Schick.)

This view is shared by other medieval authorities (Rabbi Isaiah di Trani, Tosafot *RID* on *Ketubot* 11a; Rabbi Nissim Gerundi's gloss on Rabbi Isaac Alfasi, *Yevamot* 16b). In support of this position, Rabbi David Halivni suggests that the text from *Ketubot* 11a quoted above may be describing what commonly happens rather than setting a normative requirement (*diberu hakhamim behoveh*; see Mishnah *Shabbat* 6.6 and parallels).

However, there are formidable medieval authorities who require at least some consent on the part of the Gentile parents even if they themselves remain Gentiles (RaShI, *Ketubot* 11a, s.v. *ger qatan*; Rabbi Yom Tov ben Ashbili, *Hiddushei haRITBA ad locum*) Following this view, it would be prohibited to convert children whose biological parents put them up for adoption not knowing that Jews would adopt the child, let alone specifically approving a conversion to Judaism.

Still other authorities emphasize that even if the biological parents do not initiate the conversion, the child must be capable of intelligently requesting the court to fulfill his or her own choice and to act *in loco parentis* (in place of parents) to convert him or her (Rabbi Menahem haMeiri on *Ketubot*, Sofer edition, p. 51; Rabbi Jacob ben Asher, Tur, *Yoreh De'ah* 268). Following this view, we would be prohibited from converting infants to Judaism. We would have to be assured that this procedure was what the child explicitly wanted for himself or herself. The age of conversion, then, would no doubt vary from child to child according to his or her intellectual capacity and maturity. (The age of consent for Gentiles need not be 12 or 13 as is the prescribed age for Jews. See Rabbi Sofer's note on *Ketubot*, p. 51, no. 6; *Berakhot* 48a, *Nedarim* 32a, and *Baba Metzia* 12b include similar cases.)

We follow the view that an adopted child may be converted to Judaism without the consent of the Gentile parent(s) and irrespective of whether or not the parent's status changes. (See Rabbi Gedalia Felder, *Nahalat Tzvi*, New York, 1959, pp. 18–19, who summarizes the views of all the medieval authorities and states that the very fact of putting a child up for adoption is the proof that the biological parents are giving the child over to do what is best for the child, and this is tacit enough permission to convert the child.) However, the timing of the conversion remains a problem. To accommodate the view that the child must understand and request the conversion, the best halakhic approach would be to arrange for the child's conversion just prior to Bar or Bat Mitzvah.

In addition to accommodating the aforementioned view, this procedure would also solve two other problems. First, several medieval authorities argue that the right of the child to retroactively cancel his or her conversion (RaShI, *Ketubot* 11a, s.v. *yekholin limhot*) upon reaching the age of consent is contingent on the fact that the child received a Jewish education and is living a religious life (Rabbi Nissim Gerondi's gloss on Rabbi Isaac Alfasi, *Ketubot* 4a; Rabbenu Asher,

Ketubot, Chapter 1, paragraph 23; Rabbi Jacob ben Asher, Tur, *Yoreh De'ah* 268:7).

Second, Rabbi Solomon Luria (*Yam Shel Shlomo* on *Ketubot* 11a) rules that even if the converted child had lived a Jewish life into adulthood but had not been informed of his or her Gentile origin and his or her conversion, he or she cannot be said to have had the opportunity to retroactively cancel the conversion, which is his or her privilege. Arguing along these same lines, Rabbi Moshe Feinstein states that if the child was neither informed nor given the opportunity to cancel, the possibility that he or she might be informed at a later date and then exercise the right to cancel the conversion retroactively leaves his or her ultimate status as a Jew in doubt. This would preclude marriage to a Jew, among other things (*Iggerot Moshe*, *Yoreh De'ah*, vol. 1, no. 161).

A conversion just prior to Bar or Bat Mitzvah, however, would overcome all of these problems. The child would have to receive a Jewish education, the child would have to lead a religious life, and the child would have to be aware of his or her birth to Gentile parents (see Rabbi Azariah Berzon, "In the Matter of a Minor Proselyte," *Barkai*, vol. 4, pp. 197–208 for a contrary view) and the subsequent conversion done by the adoptive parents. This latter point, which precludes misleading the child to believe that he or she is the biological child of the adoptive parents, is certainly psychologically sound and recommended by all competent professionals. Most importantly, it avoids the clear legal fiction of making a conversion, which by definition is an act of personal volition (see especially *Yevamot* 47a), an act performed for someone else without volition—an act that can, therefore, be canceled retroactively. If the suggestion of conversion prior to Bar or Bat Mitzvah is followed, however, no cancellation is possible (*Yevamot* 47b).

The other halakhic question regarding the adoption of non-Jewish children is that of *yihud*, namely, the sequestering of a non-blood-related male or female. According to Halakhah, a Jewish male and female may not remain alone with each other, even if only for a short period of time (Shulhan Arukh, *Even ha'Ezer* 22:1; *Otzar haPosekim*, vol. 9, 22:1, subparagraph 1; Rabbi Eliezer Waldenberg, *Responsa Tzitz Eliezer*, vol. 6, Section 40, Chapter 1 and Chapter 22). In an as yet unpublished responsum graciously shared with us by Rabbi Moses Tendler, Rabbi Moshe Feinstein first insists that the question of *yihud* be taken seriously. In fact, it is a more serious matter than public displays of affection (see Rabbi Shabbetai haKohen to *Yoreh De'ah* 157:1, subparagraph 10). However, Rabbi Feinstein indicates that even if, for example, the male adoptive parent is alone with his female adopted child, this is not a cause for concern because it is understood that his wife will not be away from him except for short periods of time. If, on the other hand, the wife dies, then the husband is forbidden to be sequestered with his adopted daughter. The same is the case, he says, for the adopted son if the adoptive father

dies and he is left alone with the mother.

With all due respect to an authority of the stature of Rabbi Feinstein, a close examination of the whole concept of *yihud* will yield a different understanding. (See Rabbi David Novak, *Law and Theology in Judaism*, First Series, New York, 1974, pp. 36–38; Second Series, 1976, pp. 61–63).

The actual status of *yihud* is the subject of some controversy. The Talmud quotes Deuteronomy 13:7 which deals with close family members seducing each other to idolatry. Because this verse is not dealing with the sexual meaning of *yihud* at all, the Talmud refers to this as "an allusion from the Torah" (*Kiddushin* 80b and *Avodah Zarah* 36b; See also Rabbi Joseph Karo, *Bet Yosef*, on Tur *Even Ha'Ezer* 22, beginning). Maimonides identifies the rationale for the prohibition of sequestering as "setting the condition for sexual immorality" (*Laws of Matrimony* 22:1–2. That *remez* (allusion) indicates an essentially rabbinic law, see *Baba Batra* 147a, Tosafot s.v. *minayyin*). As such, for Maimonides it is not specifically a scriptural prohibition but rather a matter of "tradition". On the other hand, other medieval authorities consider it to be a direct Torah prohibition (Rabbi Moses ben Jacob of Coucy, *Sefer Mitzvot Gadol*, Negative Commandments, 126; Rabbenu Asher, *Kiddushin*, Chapter 4, paragraph 21; Rabbi Jacob ben Asher, Tur, *Even Ha'Ezer* 22 and Rabbi Joel Sirkes thereon). Thus the prohibition is: "A son may be sequestered with his mother but no one else may be sequestered with any other sexual liaison forbidden by the Torah" (*Kiddushin*, *loc. cit.; Avodah Zarah*, *loc. cit.*).

Nevertheless, even if there is an explicit scriptural prohibition against *yihud*, it is one with a reason attached and that reason can be invoked when determining the precise extent of the prohibition. The probability of actual sexual immorality taking place largely determines how literally the prohibition against *yihud* is applied. Thus the sixteenth century Polish authority Rabbi Joshua Falk (*Perishah* on Tur, *Even Ha'Ezer* 22, beginning) writes that the reason for the exception of a mother with her son and a father with his daughter is "because he is constantly with his mother and, also, a daughter with her father, and it is not usual that they would become accustomed to sin" (see Mishnah *Sotah* 1:2 and Jerusalem Talmud, *Sotah* 1:1, 16b and 1:2, 16c; *Yoma* 69b and RaShI *ad locum*, s.v. *lefalga*). It would seem that Rabbi Falk is presenting a criterion of predictive probability for determining the meaning and application of the prohibition of *yihud*. Following his view, then, surely an adopted child is "constantly with" his or her adoptive parent since this is precisely why he or she was adopted. Therefore, the law prohibiting *yihud* would not apply.

Such an interpretation is not without precedent. For instance, although there is a general prohibition against a man physically ministering to a sick woman (*Semahot* 13; *Kiddushin* 70a; Maimonides, *Laws of Matrimony* 21:5) which in-

volves the question of *yihud* (Rabbi Vidal of Tolosa, *Maggid Mishneh* on Maimonides, *ad locum*, citing Jerusalem Talmud, *Ketubot* 5:5, 30a), the discussion of the Talmud on this question concludes with the statement of Samuel that "it is all for the sake of God" (*Kiddushin* 81b–82a) and thus permitted. The Tosafists rely on this conclusion (*ibid.*, s.v. *hakol*) to permit physically ministering to women. This conclusion is quoted with approval by Rabbi Moses Isserles (Shulhan Arukh, *Even ha'Ezer* 21:5).

Moreover, Rabbi Yom Tov ibn Ashbili (*Hiddushey haRITBA*, *Kiddushin*, end) ruled concerning a number of cases of *yihud* that the prohibition is contingent on the judgment of one's own conscience about his or her own likelihood of becoming sexually aroused. In other words, a psychological factor is accepted as determinant. Thus, anyone afflicted by pedophilia should certainly not be permitted to adopt a child.

Another example that demonstrates that sociological factors determine the extent of the prohibition is the law of *yihud* as it pertains to homosexuality. Whereas Rabbi Judah prohibits any close physical encounter between unmarried men (because it might lead to homosexual intercourse; Mishnah *Kiddushin* 4:14 and RaShI, *Kiddushin* 82a, s.v. *velo'*), his colleagues rejected his opinion stating "Jews are not suspected of homosexual intercourse" (*Kiddushin*, *loc. cit.*). Here the judgment is based on sociological probability as is clear from the ruling of Rabbi Joseph Karo (*Even ha'Ezer* 24:1) that "In these times when promiscuous people have multiplied, one should avoid being sequestered with males". This undoubtedly reflected the mores of sixteenth century Muslim society in which he lived where homosexuality was rampant. On the other hand, basing himself on the social reality of seventeenth century Poland, Rabbi Joel Sirkes ruled that the original Talmudic leniency applied there (BaH on Tur, *Even ha'Ezer* 24, end). In other words, sociology can at times determine how a law is to be applied.

Yet another example of where the reason for even a scriptural law determines its application can be gleaned from the scriptural law prohibiting the wearing of clothes of the opposite sex (Deuteronomy 22:5). The reason for this law, according to the Talmud (*Nazir* 59a), is "so that a man will not wear women's clothes and sit among women, and a woman will not wear men's clothes and sit among men." According to RaShI (*loc. cit.*) this is because of *yihud*. Yet the late thirteenth century Spanish authority, Rabbi Solomon ibn Adret (*Responsa RaShBA*, vol.5 no. 121; also see Maimonides, *Laws of Idolatry* 12:9), indicates that the prohibition depends on what is considered uniquely male and uniquely female clothing in a particular time and place. Even though transvestism *per se* is prohibited (*Nazir*, *loc. cit.*, RaShI, s.v. *'im* and Tosafot, s.v. *hu'*), it seems to be largely determined by what is considered distinctive between male and female clothing. Here again, a judgment of sociological mores determines the extent of the application of a law.

From all the above, it is clear that there is sufficient grounding in the sources for Jews adopting non-Jewish children and converting them to Judaism at infancy. However it is halakhically preferable to wait until the child reaches the age of consent and can request conversion, thus making the decision irrevocable. As for the question of *yihud* between an adult and a child not his or her own biological offspring, either of two opinions may be followed. One can follow the view of Rabbi Moshe Feinstein that there is no *yihud* when a child has been adopted by a married couple. One can alternatively follow the view that the very prohibition of *yihud* does not in principle apply here at all because there is little likelihood of improper sexual contact between an adoptive parent and his or her adopted child. (See Rabbi Aaron Felder, *Oholei Yeshurun*, vol. 1, p. 8 and, p. 19, no. 99 who unequivocally writes, "A parent and a child or two children that converted may remain alone". Interestingly, this book bears the endorsement of Rabbi Feinstein. As for the question of *yihud* between older children with adopted siblings, see *Sotah* 43b).

Since the institution of conversion of a minor is the result of a highly abstract process of legal reasoning, whatever approach is taken will not solve all of the halakhic problems which may result. Although one can make the stronger halakhic case for waiting until a child reaches his or her religious majority before facilitating his or her conversion, this approach raises a number of halakhic issues regarding the manner in which these children should be educated and integrated into the Jewish community. For until the actual conversion, the child has the status of a non-Jew. This causes the adoptive parents, who are already quite anxious about the missing biological tie with their new child, to be even more anxious. Postponing the conversion, then, might become an impediment to the proper integration of the adopted child into his or her new Jewish family and community. Thus the overwhelming number of members of our panel, and of rabbis in general, favor converting the child in infancy.

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