מרכז צדק לנשים
CENTER FOR WOMEN'S JUSTICE

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Position Paper

The Position of the Center for Women's Justice Regarding those Banned from Marrying in the State of Israel

Marking Agunot Day 2017, the Knesset is holding a special conference on the subject of *mamzerut*. The position of the Center for Women's Justice is that a solution of the *mamzerut* problem would, to a great extent, eradicate the problem of *agunot*. Additionally, our position is that the policy of the State of Israel regarding those banned from marrying is not appropriate for a Jewish and democratic state at a number of junctures:

1. Gathering intimate details regarding people unfit to marry as part of the 'list of those banned from marrying' (hereinafter: 'the list') and the Rabbinic Courts Administration's possession of the list.

2. Initiation of investigations by the rabbinic courts and the Chief Rabbinate of Israel in order to locate *mamzerim.*

3. A nearly absolute prevention of carrying out paternity examinations for both minors and adults when there is concern that *mamzerut* may be involved.

We shall elaborate below:

1. The List of those Banned from Marrying

Since 1979, the Rabbinic Courts Administration has kept a computerized data base of those banned from marrying, termed 'the list of those banned from marrying.' Beginning with the establishment of the State, and up to that year, there were a number of lists in the country that were put together by the marriage registrars in a number of places. The centralized list includes the names of people determined by the rabbinic court to be of a *halakhic* status that impairs their fitness to marry, with the most serious and detrimental category being that of the '*mamzer*.' It bears noting that prior to the establishment of the State of Israel, the Jewish people never kept a central list of those *halakhically* unfit to marry. According to data that the Center for Women's Justice received pursuant to the Freedom of Information Act, as of August 2016, the list included the names of 6,356 persons in various categories who have been deemed unfit to marry.

The position of the Center for Women's Justice is that the State of Israel, as a democratic and Jewish state, imposes a fatal infringement of the rights of its citizens when it permits the existence of the list, to wit, the right to a good reputation, the right to privacy, the right to marry and the right to dignity.

2. The Pro-Active Policy of the Rabbinic Courts and the Chief Rabbinate

The policy of the Rabbinic Courts Administration, the Chief Rabbinate and the marriage registrars (hereinafter: the religious apparatus) to behave in a pro-active manner with respect to registering those banned from marrying, especially with respect to *mamzerim*, as well as the objective of trying to locate such people in an active manner, is without authorization and constitutes a severe infringement of human rights. This policy is entwined both in the internal procedures of officials of the religious apparatus as well as in its operations, as the activity of the Center for Women's Justice in representing those banned from marrying reveals. Below, we shall clarify the characteristics of the 'active policy' of the religious apparatus, through relating to the official procedures of the apparatus as well as by providing examples from actual cases. Afterwards, we shall explicate the legal, constitutional and moral difficulties this policy creates.

2.1. Opening Clarification of *Mamzerut* Files at the Initiative of the Rabbinic Courts

"**Guidelines for Procedures with Respect to Lineage Qualifications**" under the auspices of the Attorney General and the President of the High Rabbinic Court from April 4, 2004, instruct that when a rabbinic court is dealing with a particular matter and in the course of the hearing facts arise with respect to a person's lineage, 'the rabbinic court shall order the opening of a separate file to clarify the matter.' In this case the guidelines require the rabbinic court to convene a special panel to initiate the opening of a file for clarifying the matter of the person's lineage, even if such person is not one of the parties before the court and even if he is not interested in his lineage being adjudicated. The guidelines do not establish any limitations of scope and it would seem that in any event in which an allegation is made by a party to a case, even if it is an interested party, the rabbinic court must clarify the matter and raise the question of *mamzerut*. The guidelines also provide that this is the course of action to be taken even where the affairs of a minor are under consideration and it even transpires that the procedure will be implemented even where the minor's guardians are not interested in clarifying the matter.

2.2. Opening Files for Clarifying Genealogy at the Initiative of the Marriage Registrars

The Regulations and Provisions for Registering Marriages, 5773 (2013), that were drafted by the Israel Chief Rabbinate, consolidates the work procedures of the marriage registrars. Section 19 of the Regulations provides that every person who seeks to register for marriage and who does not have a father registered in his identity card cannot register without permission from the rabbinic court. The language of the regulation is as follows: "**A man or woman who wishes to marry, but the father's name does not appear in the identity card, is to be referred to the district rabbinic court to receive permission for marriage."**

The Actual Situation

The Center for Women's Justice is handling, and has handled in the past, a number of cases in which a person found himself 'accused' of *mamzerut*, in spite of the fact that he had never gone to the rabbinic court of his own initiative. Below a number of cases are described:

a. The rabbinic court put a minor on the list of those banned from marrying and opened a file for clarification of his lineage of its own initiative even though the minor and his parents did not request this. The file was opened on the background of the petition of the minor's father that was being adjudicated before the rabbinic court. In the course of the proceedings, the minor's mother was asked questions regarding his lineage, even though this was not the subject of the proceedings. At a later stage, the rabbinic court requested, of its own initiative, medical information pertaining to the minor in order to arrive at factual determinations regarding the circumstances of his birth. This initiative of the rabbinic court is contrary to the policy adopted by the State as part of the **Genetic Information Law, 5761-2000**, which forbids carrying out a paternity examination in cases where there is concern regarding *mamzerut*. In the wake of this incident, the Center for Women's Justice petitioned to the High Court of Justice (HCJ 3691/14 **Jane Doe v. the High Rabbinic Court** (published on the website of the Judicial Authority, September 9, 2015)). A short time after the petition was filed, and as a result of the petition, the High Rabbinic Court rendered a decision that the minor was a proper member of the community (i.e., not a *mamzer*) and therefore the petition was rendered moot.

b. The Center for Women's Justice represented a man who requested to register for marriage with his fiancée in the marriage registrar's office. Because no father appeared in his identity card, the man was referred to a process of 'clarifying lineage' before the rabbinic court and his registration for marriage was delayed. In the rabbinic court, the *dayanim* went through the divorce file of his parents from thirty years earlier, from which they concluded that the man was a *mamzer* and they put his name on the list of those banned from marrying.

c. In another case we handled, a woman sought to register for marriage and was sent to the rabbinic court to clarify her son's lineage, even though he himself had not approached the religious apparatus. The woman's registration for marriage was delayed until the date of the clarification and as of the present, the woman's son has been included in the list of those banned from marrying.

The Legal and Moral Problems Created by the Pro-Active Policy

A. Lack of Personal Jurisdiction –

The rabbinic court derives its jurisdiction from the **Rabbinic Court Jurisdiction (Marriages and Divorces) Law, 5713-1953.** In accordance with the law, the boundaries of the rabbinic court's jurisdiction extend as far as the litigants who come before it in order to marry or divorce (*see e.g.*, HCJ 2601/00 **Levi v. Levi,** IsrSC 54(3), 1 (2000)). From this, it transpires that the jurisdiction of the rabbinic court is limited to the persons before them, and therefore certainly has no jurisdiction with respect to minors. This issue was raised as part of the 'List of those Banned from Marrying' **The**

Attorney General's Guidelines 6.4501 (21.632) (5736 [1976]; updated 5763 [2003]) (hereinafter: **The Attorney General's Guidelines**), in which the Attorney General at that time, Aharon Barak, provided that the rabbinic court does not have jurisdiction to adjudicate the affairs of a person who did not apply to it of his initiative. This is the wording of Professor Barak in the guideline: "**The jurisdiction of the marriage registrar arises only with respect to a person who submitted a request to register for marriage before him. In the absence of such a filing, there is no jurisdiction.**" Hence, it transpires that a proceeding regarding minors who were not before the rabbinic court of their own initiative or that of their guardian, is not within the rabbinic court's jurisdiction.

B. Lack of Institutional Jurisdiction to Act as an Investigatory Authority

Basic Law: Jurisdiction delineates the substance and jurisdiction of the rabbinic courts with respect to jurisdiction only. The initiative of opening files by the rabbinic court and the conduct of investigations under its auspices are not characteristic of activities of the judicial authority, but rather of the enforcement authority such as the police or the State Attorney's Office. In this matter, Professor Barak expressed his opinion in the guise of the Attorney General's Guidelines and complained about the conduct of the religious apparatus (with emphasis on the marriage registrars) for initiating proceedings and conducting investigations:

> **"The status of the marriage registrar is not like the status of the police, which is always gathering information concerning potential criminals. The Police Ordinance provides that one of the duties of the police is "the prevention of and uncovering of crimes" (section 3 of the Police Ordinance [new version] 5731-1971). In order to carry out this duty it is appropriate for the police to keep lists of potential criminals. As opposed to this, the duty of the marriage registrar is to register those who apply to him for marriage and it is not his duty to gather information on people who do not apply to him.**

C. Infringement of Human Rights

The activities of the religious apparatus in initiating lineage examination files are not only lacking legal authority; they constitute an infringement of the most fundamental human rights: the right to privacy, the right to dignity and the right to a good reputation. All of these rights are infringed upon in cases in which the religious apparatus chooses to carry out investigations and examinations regarding people on its own initiative.

D. A Change in the Tradition not to Investigate with respect to *Mamzerim*

The declaration of lack of fitness to marry is particularly severe and it has serious repercussions on the disqualified person, because the stain applies forever, to all of the descendants of the *mamzer*. "***Mamzerim* … are ineligible [to marry] and their ineligibility is for all time, whether they be males or females**" (Babylonian Talmud, Yebamoth 78b [Soncino translation). In view of this, throughout the ages, the *halakha* sought to prevent, to the greatest extent possible, increasing the

number of *mamzerim*. An important *halakhic* principle which moderates the degree of injury to *mamzerim* is the *halakha* of 'a family that has been assimilated – has been assimilated' – the principle according to which it is forbidden to reveal the disqualification of a family in which a *mamzer* was absorbed in the past: '**Rabbi Yitzchak said: The Holy One Blessed Be He acted charitably with Israel, in that a family once mixed up [with impure elements] remains mixed up [and no attempt is made to excise it]'** (Babylonian Talmud Kiddushin 71a [Soncino translation). Additionally, a significant line of *poskim* adopted the position that in the case of rumors or a suspicion of *mamzerut* – the rabbinic court must not clarify or ask to examine testimony (Responsa *HaBach HaHadashot*, *siman* 56). Dr. Michael Wygoda from the Department of Jewish Law in the Ministry of Justice voiced this position in an expert opinion submitted to the rabbinic court:

> It transpires from what has been stated until now that according to the *halakha*, not only is the rabbinic court not required to raise suspicions and to delve into the matter of the propriety of the lineage of a person of its own initiative, and even if such suspicions are raised before it, the rabbinic court is not required to look for evidence that is likely to support such suspicions.

Dr. Michael Wygoda, *Clarification of Suspicions of Lineage Propriety in the Rabbinic Courts*, expert opinion submitted to the High Rabbinic Court in Appeal No. 621/5760, of Case 99009/01. Hence, it transpires that the policy objective of the religious apparatus to locate *mamzerim* is contrary to the tradition of *halakhic* decisions, or at least, is not required by it. In any event, it is appropriate that in a Jewish and democratic state, the religious apparatus respect the interpretation that limits the infringement of basic rights to the greatest degree possible.

3. Paternity Examinations

In accordance with the **Genetic Information Law**, 5761-2001, it is practically impossible to carry out genetic examinations for determining paternity where the results of the examination are likely to raise a suspicion of *mamzerut*. The significance of this restraint from carrying out such examinations is an injury to the right of a minor to know who his father is, as well as denying him his right to receive support from his father. In many cases, the child's mother is a secondary victim in that she is forced to raise the child without financial support from the biological father. The correct way to proceed, according to the position of the Center for Women's Justice, in order to balance between the minor's interest to know who his father is, while refraining from disclosing a *halakhic* defect in the child's lineage is the use of the legal doctrine that separates between the child's civil status and his *halakhic* status. For civil purposes (such as support and inheritance) the civil father will be registered, whereas, for *halakhic* purposes, such as lineage, the '*halakhic* father' will be recognized (see and compare, HCJ 10533/04 **Ayal Weiss v. The Minister of the Interior** IsrSCt 64(3) 807 (published on the Nevo site, June 28, 2011).

Conclusion

According to the position of the Center for Women's Justice, the State authorities must formulate procedures that will limit, to the greatest extent possible, the infringement of human rights as a result of the mixing of the personal status and the religious law, particularly where it involves casting a stigma on people who have done no wrong. Hence, according to the position of the Center for Women's Justice, the State authorities should act as follows:

- The 'blacklist' should be absolutely abolished, or at least the names of minors and of people who have not applied to marry or divorce of their own initiative should be expunged.
- The pro-active policy of the religious apparatus should not be allowed, including the repeal of the mentioned procedures.
- Minors should not be discriminated against in the determinations of civil forums regarding paternity merely in view of the religious concern with respect to the fitness of their lineage.

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