

Zvi Zohar

Intermarriage, Giyyur and Repentance – Analysis of a Responsum by Rabbi Mas'oud HaCohen

Introduction

The month of Ellul is associated with repentance, and the well-known *notrikon* reads the letters of the month's name as initials of the words from the Song of Songs *Ani le-Dodi ve-Dodi li* – with the 'beloved' being none other than God Himself. In the wake of developments such as emancipation and secularization, there were (and are) many Jews who have a similar feeling of closeness, love and commitment towards ... their non-Jewish spouse. Quite a few of them may hope – whether openly or only in their hearts – that somehow their partner will decide to become a Jew(ess). But in most cases, the Jewish partner him/herself is far from observance of the ritual mitzvot – and what, then, can really be expected of the non-Jewish spouse, even if s/he converts? Is there any point, from a halakhic perspective, to conduct a *giyyur* ceremony for someone who will subsequently not be religious? And if one was to conduct such a ceremony – would it be efficacious, i.e., would not the 'convert' remain as much a 'goy' as they were before? And even if such a *giyyur* could be successfully performed, is it not better for a person to remain a non-Jew, rather than become a non-observant Jew?

In the following pages I discuss the response(s) to these questions by Rabbi Mas'oud HaCohen, as they appear in a responsum he composed in the interwar period. As we shall see, his understanding is that when an intermarried person seeks for his/her partner to become a Jew(ess), this is a manifestation of *teshuva*, repentance: the Jewish partner is thus expressing his feeling that it would be better for him to be in a relationship in which both partners are Jews. When a Jew seeks repentance, it is the obligation of rabbis to encourage and enable the fulfillment of that inclination. The *giyyur* of the spouse will be halakhically valid even if s/he does not intend to lead a *frum* life, and it is halakhically preferable for the original Jewish partner to live with a non-observant Jew(ess) rather than a non-Jew. Therefore, it is a mitzvah for rabbis to encourage such conversions, and to perform them with no qualms at all.

Before proceeding, it is useful to bear in mind that at the time this responsum was written, Algeria was legally part-and-parcel of France (although separated from the rest of the Republic by the Mediterranean sea – think Hawaii!). Algerian Jews were full citizens of France, batei din had no legal status and only civil marriage was recognized by the French legal system as valid.

It is also important to remember that Rabbi Mas'oud HaCohen was Sephardic; like other pre-SHAS Sephardic rabbis, he was neither Reform, Conservative or Orthodox, but simply halakhic.

This analysis of Rabbi Mas'oud's responsum is a segment of a chapter on the halakhic positions of Algerian rabbis on *giyyur*, especially with regard to cases of intermarriage. This chapter is part of a book that I have been writing for some time now, on the positions of Sephardic rabbis in the 19th and 20th centuries on matters of *giyyur*. I am submitting it to the Torat Chayim Elul Torah collection, after Dani Satlow encouraged me to participate. Any comments and questions from Torat Chayim readers are welcome; please feel free to write to me at zvi.zohar@biu.ac.il

Rabbi Mas'oud HaCohen

Rabbi Mas'oud HaCohen was born in southern Morocco, in the area of Tafilalt, where Jews had lived for many centuries.¹ He later moved to Oran, the major city of western Algeria, where he studied under Rabbi David HaCohen Scali. Sometime before January 1920 – i.e., shortly after Rabbi Ḥayyim Bliḥ passed away in Tlemcen -- he was appointed rabbi of the relatively new town of Aïn Témouchent in north-western Algeria, where he served for several decades until his decease in 1950.² His halakhic work includes several responsa dealing with matters of intermarriage and *giyyur*; seven were published in his book *Pirḥei Kehuna*,³ and another was published by Rabbi Ḥaim Amsallem from manuscript, in 2017.⁴ Of these, two tackle head-on the policy of *giyyur* as response to intermarriage. One of these was composed in 1920⁵ and the second – an expanded and detailed version of the first – in 1930.⁶

Rabbi Mas'oud HaCohen reports that as a newcomer from Tafilalt to Algeria, he was initially struck – and troubled -- by the widespread policy of accepting all those who wanted to convert, especially in situations of intermarriage. This seemed to him doubly puzzling, because during the time he spent studying under Rabbi Scali in Oran, he had seen Rabbi Scali rejecting applications for *giyyur* under such circumstances, just as Shammai had rejected many applicants as unworthy.⁷ Indeed, Rabbi Scali had explained to his students that in such cases, the Gentile woman was seeking *giyyur* because she was "attached to him [her Jewish spouse] like a dog, and her heart was not directed towards Heaven, and God does not want such people".⁸

In 1920, Rabbi Mas'oud composed a halakhic epistle to Rabbi Scali,⁹ relating that when he recently began serving as rabbi of Aïn Témouchent, he had resolved not to get involved in any cases of *giyyur*. However, the heads of the community responded that whatever he may have heard from Rabbi Scali, this was unacceptable, as the policy of enabling *giyyur* in cases of intermarriage was a venerable and widespread praxis in all countries and towns, as could be observed in nearby Tlemcen and Sa'ida as well as throughout the Maghreb. Rabbi Mas'oud did not dispute the factual claim

¹ For a relatively recent collection of articles on Jewish Tafilalt see: [Brit; revue des juifs du Maroc, 31, 2013.](#)

² On Rabbi Mas'oud ben Eliyahu Hacohen see: See *Malkhei Yeshurun*, p. 140.

³ *Pirḥei Kehuna*, Casablanca, 1948.

⁴ Rabbi Ḥaim Amsallem (ed.), *Shesh Teshuvot b'Inyenei Giyyur*, Jerusalem, 2017, pp. 104-107.

⁵ Published by Rabbi Amsallem in *Shesh Teshuvot*.

⁶ *Pirḥei Kehuna* (above note 3), *Even Ha'ezer*, #10.

⁷ Rabbi Mas'oud (in *Shesh Teshuvot*, above note 4) describes Rabbi Scali's rejections of applicants for *giyyur* as דהאם בידו באמת הבנין אשר – a clear reference to Shammai's repulse of a person seeking *giyyur* (BT Shabbat 31a).

⁸ *Shesh Teshuvot*, above note 4, p. 104. Towards the end of this chapter we shall see that Rabbi Scali's position on *giyyur* in the context of intermarriage was indeed quite negative.

⁹ Above note 4.

advanced by the communal leaders, nor did he consider their rejection of his initial reticence re *giyyur* to be out of bounds. Rather, he decided to deepen his reading of the halakhic sources with the goal of discovering what could possibly be the halakhic grounds of the permissive and *prima facie* impossible approach; in his dramatic words: "How could the rabbis of this orphaned generation declare a raven kosher for us"?¹⁰ Two major issues seemed halakhically problematic:¹¹

- (1) They accept female proselytes who came [for giyyur] because they 'set their eyes on the young men of Israel'.
- (2) And as if that is not enough, they allow them [after she converts] to marry, even though it is certain that he already had relations with her, as all were aware. And they [contemporary rabbis] rule that he may marry her *a priori*.

How did they arrive at this permission, and on what basis?¹²

Focusing on the first issue, of rejecting a person who seeks *giyyur* for utilitarian reasons (e.g., 'for the sake of a man'), Rabbi Mas'oud studied the halakhic sources and arrived at what he declares is a novel insight: the requirement to investigate the motivation of a prospective convert and reject her if her motive is not 'for the sake of Heaven' is binding upon the court only when such a procedure will lead to a conclusively preferable alternate reality. Specifically, in our case: if, having discovered that a woman seeks *giyyur* for the sake of a man, her rejection by the court will result in her separation from the Jew upon whom she had set her eyes. However, there is no point in investigating her motivation

If, should we decide to reject [her], we will achieve nothing - since already before they applied for her to convert she was attached to him like a dog, as they were already married by the municipality (=civil marriage), so that it is impossible to separate them. And even were we to refuse to convert her, we would be saving him from the frying pan but returning him to the fire; for they would continuously transgress the Torah prohibition of 'You shall not marry them'.¹³

¹⁰ A raven is an archetypical non-kosher fowl (Leviticus 11:14). The Talmud (Sanhedrin100a) characterizes uneducated laymen as saying, that the rabbis have no real discretion in their decision making, as the forbidden and the permitted are already completely determined by Torah: "Of what use are the Rabbis to us? They have never permitted us a raven, nor forbidden us a dove!" Rabbi Mas'oud thus conveys his sense of surprise at the common policy in North Africa of permitting *giyyur* (followed by *huppa* and *kiddushin*) in a case of intermarriage, which *prima facie* seemed to him a radical deviation from the norm, as if declaring a raven kosher.

¹¹ In his 1920 epistle Rabbi Mas'oud conflated these two issues, and was criticized by Rabbi Scali for doing so, See: *Shesh Teshuvot*, p. 105

¹² In the following discussion, I integrate the arguments of Rabbi Ma'oud's shorter (1920) and lengthier responsa (1930) on the same issue.

¹³ *Pirḥei Kehuna, Even Ha'ezer*, 10, p. 80c.

In other words, when the relationship is already a *fait accompli* and the couple are already married in a civil marriage, rejecting the Gentile partner because her motives are not 'for the sake of heaven' will be to no halakhic avail, as this will not lead to any positive change in reality. To the contrary: Such a decision will push the Jewish partner from the frying pan into the fire. The couple will not separate because a Rabbinic Court rejected the Gentile's application for *giyyur*, and the Jewish partner will continue living conjugally with a Gentile, thereby continually transgressing a serious prohibition. Under such circumstances, the court should simply disregard the requirement to investigate her motivation, and accept the gentile spouse for *giyyur*:

In order to save the couple from transgression, the court should apply the maxim '*vehit'alamta*' – 'ignore! [the issue of motivation], and regard the situation as if *ex post facto*... And since the *giyyur* will be considered valid, it is better that we ignore the instruction of our rabbis of blessed memory 'to investigate' [the Gentile's motivation], than that we let them commit a transgression forbidden by the Torah itself,¹⁴ entailing punishments that are explicated by Maimonides and the *Shulḥan 'Arukh*.¹⁵

The idiomatic phrase that Rabbi HaCohen employs – '*vehit'alamta*' – alludes to the halakhic obligation of a person who come across another's lost property. The general rule as set forth in Torah is, that one is obligated **not** to disregard the lost article but to take it and return it to its owner. However, in some cases one **should** disregard the lost article and should act as if it just isn't there:

Our rabbis taught: "**shalt thou disregard**":¹⁶ -- Sometimes thou mayest disregard, and sometimes not. E.g., if one was a priest, whilst it [the lost animal] was in a cemetery; or was an old man, and it was inconsistent with his dignity [to catch the animal and lead it home]; or if his own [time] was more valuable than his neighbor's — therefore it is said, **shalt thou disregard**.¹⁷

In other words, the rabbis read the word *vehit'alamta* as ambiguous, teaching that Torah itself holds that it is sometimes appropriate to completely ignore the clear commandment of returning a lost article in order to uphold another Torah value. For example: for a *Kohen* to avoid impurity, for an elder to avoid being publically demeaned, or to prevent significant financial loss. Rabbi Mas'oud holds that in the case before us, this principle can be useful in explaining and justifying the policy

¹⁴ I.e., intermarriage.

¹⁵ *Pirḥei Kehuna*, ibid.

¹⁶ Deuteronomy 22, 1 -- *vehit'alamta*.

¹⁷ *Sifrei Devarim*, 225; *Baba Metzi'a* 30a.

followed by North African rabbis in the area of *giyyur*: They were of the opinion that the halakhic requirement to investigate the convert's motives should be disregarded in order to forestall ongoing transgression of a Torah-based prohibition, i.e., intermarriage.¹⁸

Rabbi Mas'oud explains that a similar line of reasoning can enable us to understand the North African rabbis' policy to disregard the second prohibition noted above, i.e., the halakha stating that even if the Gentile partner already converted, rabbis should refrain from allowing the couple to marry, so as to prevent gossip (*'lazut sefataim'*).¹⁹ Given current circumstances (as described above), if we refuse to perform Jewish marriages for such couples, this will not only be useless but rather will also lead to highly negative consequences:

The liberties of the time, enshrined in the government's laws, have overcome us, and have destroyed the foundations of our holy religion. We lack the power even in our mouths to demand that our people refrain from transgression. [...] [Should we attempt to do so] we will be put to scorn and derision for our rebukes, and to our face he [the Jewish husband] will respond

"Back with you to your own place! I shall not see your face again! Whoever heard the like? Whoever witnessed such things?²⁰ To leave the woman of his youth who loved him like herself and she is his entertainment and the delight of his youth?!"

Such are the difficult and bitter words that he will hurl at us; and he will in perfidy raise his hand against the words of our rabbis.²¹

Currently, rabbis are powerless to enforce halakhic norms, since the government granted each person the freedom to act in whatever way they wish regarding religion. The option of convincing intermarried Jews to sever ties with their Gentile partner by verbally rebuking them is similarly unrealistic. Were a rabbi to attempt this, he would become the object of public scorn and derision, the husband would respond with outright antagonism and the couple would continue living together in total disregard of the rabbi's preaching. In light of the fact that separating the couple is out of the

¹⁸ It is furthermore possible (writes Rabbi Mas'oud in *Pirḥei Kehuna, Even Ha'ezzer*, 10, p. 82c), that the Maghrebi rabbis agree with Rabbi Eliashar's analysis (see ch. XXX at note YYY), holding that if the non-Jewish spouse already 'possessed' the Jewish man via civil marriage, her choice to convert was not for the sake of a man but for religious reasons. If so, there is no problem that needs to be overcome by disregarding a halakhic rule.

¹⁹ The halakhic sources on this matter were outlined in chap. 1 (above), text to notes 58 – 63. In chap. 2 we saw Rabbis Palache and Matalon each addressing this matter in some detail.

²⁰ This stream of antagonism that Rabbi Mas'oud puts in the mouth of the intermarried Jews is a string of biblical quotations. "Back with you to your own place!" (Numbers 24:11) "I shall not see your face again!" (Exodus 10:29) "Whoever heard the like? Whoever witnessed such things?" (Isaiah 66:8).

²¹ *Pirḥei Kehuna, Even Ha'ezzer*, #10, p. 81b.

question, their relationship has a status of 'as-if they married' (*ke-ilu kanas*). When a couple is in a relationship characterized as *kanas*, the Mishna states that the court need not intervene to separate them.²² Nothing, then, prevents us from permitting the non-Jewish spouse to undergo *giyyur* and then enabling the couple to marry in a halakhic ceremony.

Given this portrayal of the antagonistic anti-rabbinic attitude of the intermarried husband, it would be unsurprising to find Rabbi Mas'oud HaCohen responding with a mirror-image antagonistic attitude towards such wayward sinful men. But he takes another tack entirely. Under current realities, he explains, the ties binding a Jewish man to his non-Jewish spouse are so strong, that he indeed cannot leave her; the only possible way for him to escape from his state of sin is, therefore, for her to become a Jewess. When considered in this light, it can be seen that if such a person convinces his wife to apply for *giyyur*, he is thereby "knocking at the gates of repentance".²³ Rabbinic sources teach us, writes Rabbi Mas'oud, that a person contemplating repentance should be actively encouraged to do so, and that rabbis are called upon to remove any obstacles that might deter such a person from actually repenting. A classic case is that of *taqqanat ha-shavim*, in which the rabbis of Mishnaic times ruled to set aside an explicit Torah law, in order to enable a thief to repent.²⁴ This *taqqana* illustrates a general principle of rabbinic *noblesse oblige*: rabbis have a responsibility to rescue common Jews from sin. If this can be achieved only by setting aside or even violating a halakhic norm (of lesser importance) – rabbis are religiously obligated to do so.²⁵ In the case at hand, even if officiating at their marriage contravenes specific halakhic directives,²⁶ rabbis should do so nevertheless; indeed, writes Rabbi Mas'oud, "we should accept this woman convert – and others like her – with open arms".²⁷

²² In chap. 1 (text to notes 57-62) we have already seen the Mishnaic and Talmudic background of this matter. In chap. 2 we saw that this matter was discussed by rabbis Carciente, Palache and Matalon.

²³ *Shesh Teshuvot*, p. 106.

²⁴ If a thief wants to repent, he must first return the stolen object to its rightful owner (Va-Yiqra 5:23). The rabbis noted that in certain cases, the requirement to physically return the article itself might be too difficult for the thief, and thus an obstacle to his repentance. They therefore legislated an enactment stating that he could instead return the value of the object (Mishna Gittin 5:5).

²⁵ As advocated by Rabbi Judah the Prince (BT Eruvin 32b). This principle is cited by Rabbi Mas'oud (in *Shesh Teshuvot*, p. 106) employing a later formulation: "A scholar should prefer to perform a minor transgression, so that a simple person be spared from performing a major transgression"

²⁶ Such as preventing gossip by refusing to marry the couple after her *giyyur*.

²⁷ *Shesh Teshuvot*, p. 106. In this responsum and in *Pirhei Kehuna, Even Ha'ezer*, #10, Rabbi Mas'oud cites additional instances from within halakhic literature that exemplify the principle, that significant but lesser prohibitions should be set aside in order to save potential sinners from more serious transgressions. These include *inter alia*: (1) the permission for a soldier to take a beautiful woman for a wife rather than simply ravish her in the heat of battle (BT *Kiddushin* 21); (2) the permission to transgress the prohibition against handling *muktzeh* on Shabbat and to carry a dead body in order to save it from a fire, rather than directly extinguishing the fire itself, which would entail a more severe sin (BT *Shabbat* 43); (3) the permission granted by the great Rabbi Rafael Berdugo (Meknes, 1747-1822) that a Jew forced to live as a

After reaching similar decisions, several rabbis we have discussed concluded their halakhic discussion. Not so Rabbi Mas'oud HaCohen, who at this point raises an issue that other rabbis may have preferred to ignore: How do we imagine that this woman – married to a non-observant Jew -- will conduct herself (Jewishly) after having undergone *giyyur* and marrying her husband in a ceremony of *huppah* and *qiddushin*? In the 1920 epistle he poses the problem thus:

We are concerned lest she sin and return to her previous deviance, especially because "a companion of the foolish will be depraved" (Proverbs 13:20), and this *giyyoret* will be in the company of sinners, "he in big gourds and his wife in small gourds" (BT Sotah 10a), and it is almost certain that she will revert to her previous deviance.²⁸

And in the 1930 expanded responsum he explains:

Our concern is that she might return to her previous deviance. For freedom has increased in our era. She accepted the Jewish religion upon herself in that specific time and place, while in the presence of a rabbi. But later, she does not remember what that rabbi told her is prohibited. The cause of this is that she sees her husband who feels no need or cause to distance himself from prohibitions; "he in big gourds and his wife in small gourds". If so, all is dashed, and we have accomplished nothing.²⁹

A direct consequence of religious freedom is, that observance of mitzvot is entirely up to the individual. While each individual bears personal responsibility for his/her choices, an individual's lifestyle is heavily influenced by the company s/he keeps. This is especially true with regard to a convert, whose attitude towards religious observance will be less affected by what a rabbi told her at the time of her *giyyur* than by the day-to-day behavior of the Jews she associates with – in this case, her husband. The folk-wisdom cited by the Talmud -- "he in big gourds and his wife in small gourds" – means, in our context: "like husband like wife". In other words: Since this convert's husband follows a non-observant lifestyle, it stands to reason that after the *giyyur* ceremony the woman will 'forget' her acceptance of the commandments, and will revert to her previous secular (and, effectively, non-Jewish) conduct. If she does so, asks Rabbi Mas'oud HaCohen, what is the point of the whole *giyyur*? Maybe 'we have accomplished nothing'?

Rabbi Mas'oud HaCohen presents a phased response. In the first phase he asks: what indeed is the

Muslim could cohabit with his divorced former wife under the *pilegish* (concubine) framework (see: *Mishpatim Yesharim* Responsa, Part 2, #170).

²⁸ *Shesh Teshuvot*, p. 106.

²⁹ *Pirḥei Kehuna, Even Ha'ezzer*, #10, p. 82c.

halakhic status of a person who after undergoing a *giyyur* ceremony reverts to his previous way of life? Citing BT Yevamot 47b, Maimonides and 15th century *Nimuqei Yosef*,³⁰ he demonstrates clearly that the Jewishness of such a convert is not annulled. S/he is an apostate -- but a Jewish apostate (*Yehudi mumar*). Therefore, s/he is eligible to be party to a Jewish marriage. In the second phase he reminds his readers, that what motivated us to accept this woman for *giyyur* was, our responsibility towards the Jewish husband, who was seeking to repent from intermarriage by having his wife convert and then marry her in a Jewish ceremony. Even were she subsequently to abandon Jewish observance and 'revert' to her previous lifestyle, the benefits derived from her conversion would remain:

The benefits are two. First: Before she accepted Judaism, he would sin whenever he had sex with her; ... whereas now, after she accepted Judaism, even if she reverts, his position is that of a Jew who has sex with an apostate Jewess – with regard to which we find no prohibition at all, if he had married her previously. And so too in our case: since she had already accepted Judaism upon herself, their marriage was fully permitted. And second: the children that she bore previously are not considered his progeny in any way, but rather hers. Which is not the case now [regarding children born to the couple after her *giyyur*]: although his mother is an apostate, that child is a kosher Jew, similar to the children of a Jewess by birth who apostatizes.³¹

The upshot is that if we ask point blank: it is better for a Jewish man to be married to a Gentile woman, or to a former Gentile who converted and subsequently abandoned Judaism? The answer is clear and unequivocal: the second option is far better for him. Since the rabbis of North Africa held that it was the Rabbinic Court's obligation to actively promote the wellbeing of the Jewish husband despite his being far from the epitome of righteousness, it was clear to them that the way to achieve this was by converting his non-Jewish spouse.

It is important to note two very significant assumptions that are implicit in the position that Rabbi Mas'oud identifies as the traditional position of North African rabbis – and that he himself adopts as his own. The first is, that the validity of the wife's *giyyur* is not seen as in any way impugned by the fact, that already prior to her *giyyur*, her future commitment to Judaism is recognized to be doubtful. I.e., it is a valid halakhic option to conduct a ceremony of *giyyur* for someone who at the very

³⁰ BT Yevamot 47b was discussed in chap. 1 (at note 14), as was Maimonides (at notes 28-32). *Nimuqei Yosef* is a work composed in pre-expulsion Spain by Rabbi Yosef Haviva, and printed in standard editions of the Talmud in conjunction with Rabbi AlFasi's halakhot.

³¹ *Pirḥei Kehuna, Even Ha'ezzer*, #10, p. 82d.

moment of *giyyur* we (the rabbis) realize may well soon revert to a non-Jewish lifestyle. Clearly, this view is totally at odds with the modern position of certain ultra-Orthodox rabbis (such as Rabbi Schmelkes) described in the first chapter of this book.³² The second assumption is, that it is not within the provenance of the rabbis to adopt a paternalistic attitude towards the woman applying for *giyyur* and to tell her: "You say you want to become a Jewess, but we know that this is against your best interests, as it is better for you to remain a gentile than to become an apostate Jewess, whom God will punish severely for her sins. Therefore, for your own good, we refuse to convert you!". Rather, the policy of North African rabbis, is, that if an adult woman applies for *giyyur*, her application *ipso facto* reveals that in her opinion it is preferable for her to become a Jewess. It is not our place to take a paternalistic stance toward her by determining that she does not understand what is best for her. Similarly, we can see that in the view of North African rabbis (as explained by Rabbi Mas'oud), the children are better off being Jews - even with non-religious parents - than being Gentiles.³³

³² See chap. 1, text after note 50 (An essential defect in 'acceptance of the commandments').

³³ For an example of a paternalistic approach on these matters, in which an Ashkenazic contemporary of Rabbi Mas'oud argues passionately that we rabbis must operate on the assumption that it is better for a person to remain a Gentile than to convert and live as a secular Jew (and similarly, that it is better for an infant to be born as a Gentile than to be born into a non-observant Jewish home), see: Rabbi Ya'akov Breisch, Responsa *Helqat Ya'akov*, vol. 1, Jerusalem 1951, *Yoreh De'ah*, #13.