

KRIAT SHEMA 4:8

by Rabbi Yitzchak Etshalom

8. All those who are *tamei* (ritually impure) are obligated to read K'riat Sh'ma and to say the B'rakhot beforehand and afterwards [even] while they are in their state of *tum'ah*. Even though they could ascend out of their state of tum'ah that same day - such as those who touch a *sheretz* (rodent) or a *niddah* or a *zavah* (types of ritual impurity dealing with genital emissions) or her bed etc.

Ezra and his court (circa 450 BCE) ordained that only a *ba'al keri* (one who has had a seminal emission) should not read words of Torah - and they distinguished him from all other people who are *tamei* [in this regard] - until he performs ritual ablution. This decree, however, never "caught on" throughout Israel [the Jewish people] and a majority of the community was not able to maintain it, therefore it became nullified.

The Jewish people are accustomed to reading Torah and reading K'riat Sh'ma even though they are *ba'alei keri'in* because the words of Torah are not susceptible to *tum'ah*; rather they remain forever pure, as it says: "Behold, My words are like fire, oracle of YHVH..." (Yirmiyah [Jeremiah] 23:29) - just as fire is not susceptible to tum'ah, similarly the words of Torah are not susceptible to tum'ah.

THE ROLE OF PUBLIC ACCEPTANCE IN RABBINIC ORDINANCES

Yitzchak Etshalom

I.

SOURCES

Ein gozrin g'zerah 'al hatzibbur ela im kein rov tzibbur y'kholin la'amod bah - "We do not enact a decree upon the community unless a majority of the community is able to live up to it". This phrase appears in the Bavli in three places:

(a) Bava Batra 60b - in explaining why the attempt to ban all meat and wine in response to the destruction of the Mikdash was not successful;

(b) Avodah Zara 36a - to explain why the prohibition of non-Jewish oil was annulled;

(c) Bava Kamma 79b - to explain why the Rabbis, who prohibited raising small animals (e.g. sheep) in Eretz Yisra'el, did not extend this prohibition to include large animals (e.g. cattle).

In both Bava Batra and Avodah Zarah, a Biblical source for this notion is presented:

baM'era atem Ne'arim, v'oti atem kov'im, hagoy kulo - (lit. "you are suffering under a curse, yet you go on defrauding me, the whole nation of you" (Malakhi 3:9)). Rashi (Avodah Zarah 36b) explains that if the *goy kulo* - entire nation - accepts upon themselves a stringent rule (such as bringing the tithes to the storehouse - see Malakhi 3:10), then the decree is valid; but, if not, it has no force. (The upshot of the verse, in this light, is that the people accepted *b'arur* - with the force of a curse - this behavior, yet they didn't live up to it. Since they all accepted this rule, they are held responsible for ignoring it.) As the Gemara in Horayot (3b) points out - commenting on the same verse - *rubo k'kulo* - a majority of the nation defines the whole nation. Therefore, if a majority of the nation agrees to a specific stringency within the law, it becomes law for everyone - even those who protested the *gezerah* from its inception.

II.

OBSERVATIONS:

(a) WHOSE INITIATIVE?

However, in looking carefully at the three sources cited above, we see two very different circumstances under which the role of *rov tzibbur* is introduced:

In Bava Kamma and Avodah Zarah, the discussion revolves around Beit-Din initiated rules, which were limited (Bava Kamma) or annulled (Avodah Zarah) because of the relative feasibility of the community's upholding them.

On the other hand, in Bava Batra, the *p'rushim* who declared that they wanted to desist from wine and meat were not operating as a Beit-Din, rather as individuals who wished to intensify their mourning for Yerushalayim and the Beit haMikdash. Why does the principle of *Ein gozrin g'zerah 'al hatzibbur ela im kein rov tzibbur...* apply here?

(b) "POPULARITY" AND "FEASIBILITY"

In the sugya in Avodah Zarah (alone), a second issue is raised - which is possibly part of the *ein gozrin* consideration:

The Mishnah in Shabbat (1:4) relates that at one time, Beit Shammai and Beit Hillel had a particularly serious and tempestuous session in the court, in which the school of Shammai outnumbered the Hillelites and they were successful in passing a lot of legislation - 18 gezerot. The Gemara in Avodah Zarah (and Shabbat - 17b) associates some of these decrees with "measures of social distancing" - e.g. not to drink wine made by a non-Jew etc. One of the decrees was not to use non-Jewish oil (see the Gemara in Avodah Zarah for two possible rationales for this decree). The Mishna (Avodah Zarah 2:6) records that R. Yehudah haNassi and his court annulled this decree. The Gemara is bothered by this annulment, based on two considerations:

(a) No court may annul the rulings of another court unless it is greater in wisdom and in number (=members) than the first. (M. Eduyot 1:5). Since the gezerah to forbid such oil was made by a greater court (the schools of Shammai and Hillel) - or, possibly, dates back to Daniel (see A.Z 36a) - how could R. Yehuda haNassi annul it?

(b) Regarding these 18 gezerot, R. Yohanan declares that "even if Eliyahu (the prophet) and his court would come (and try to annul one of them), we would pay no heed. This is evidently based on the tremendous vigor with which these gezerot were passed. The Bavli records one version of the passions evoked in the court on that day - but the Yerushalmi (Shabbat 1:4) has a much stronger version. In any case, these 18 gezerot are irreversible, even by a greater court - so how did R. Yehuda haNassi annul the "oil" decree?

According to the Bavli, there were two steps (it seems) involved. First of all, the court checked with the population and found that the oil decree had not caught on - most people were still using non-Jewish oil. The court then utilized the rationale of *ein gozrin...*, which they credited to R. Eliezer b. R. Tzadok and R. Shim'on b. Gamliel.

There are two ways to read the association of these two issues:

(1) The fact that the gezerah did not catch on means that there will not be a great social upheaval or difficulty in rescinding the order. We can then go back to the original gezerah and posit that it was made in error, since it was not maintainable by most people. Therefore, annulling it will not be procedurally incorrect (since it was made "erroneously") nor will it cause much confusion (since it didn't catch on.)

(2) The fact that it didn't catch on is the proof positive that it was a gezerah that was not maintainable by most people. In other words, there aren't two separate issues here, rather one sheds light on the other.

The Yerushalmi (Shabbat 1:4) seems to support the second approach - "R. Yohanan said in the name of R. Eliezer b. R. Tzadok: I have a tradition that any gezerah which the court decrees for the community and a majority of the community does not accept - it is not a gezerah." In other words, (applying this to the oil decree), since the oil decree never caught on, it never had the force of gezerah and was never valid. Therefore, even a lesser court could annul it. However, this is a bit odd - why would we need a court to annul it, if it never was in force?

One possible answer goes to the core of why a Beit-Din may not annul the rulings of another Beit-Din unless it is greater in wisdom and numbers. It may be an issue of "correctness" - we want to make sure that they know what they are doing. It may also/alternatively be an issue of "k'vod Beit-Din" - the honor and respect for the court. This respect is obviously necessary to maintain in any society which is law-driven and court-guided. Therefore, we might posit that a court may not overrule an earlier, greater court for both reasons - but, if only the "kavod" issue remains, a lesser court may overturn the ruling; but it must do so procedurally (not just "announcing" that the earlier

ruling was never valid), in order to maintain the integrity of the earlier court in particular and the court system in general.

Tosafot (Gittin 36b s.v. ela) raise the possibility that there are two independent issues here: That popularity (how much it caught on) and feasibility (how likely is it that most people could live with this gezerah) are independent pieces. If one exists, there is a need for the court to overturn the ruling - and it must be a greater court. Only in case both popularity and feasibility have failed do we allow a lesser court to overturn the ruling.

III.

RAMBAM'S APPROACH

Rambam, in Hilkhhot Mamrim (2:5-7), states:

"5. If the Beit-Din (Rabbinic Court) saw fit to enact a *gezerah* (decree) or a *takkanah* (ordinance) or to establish a *minhag* (custom), they must first consider the matter and first ascertain if a majority of the community can endure these or if they cannot endure them. We never enact a decree on the community unless a majority of the community can endure it. [So far, this fits the general gist of the statement as recorded in the Bavli - pre-facto.]

"6. If the Beit-Din enacted a gezerah and they imagined that most of the community could maintain it - and subsequent to their ruling, the people were unsure about it and it didn't spread through most of Yisra'el, it is null and void and they may not force the people to follow it.

"7. If they enacted [a decree] and they thought that it had spread throughout all of Yisra'el and the matter stood that way for many years and then, after a long time, another court checked throughout Yisra'el and saw that this decree had not spread throughout all of Yisra'el, it may annul [the decree], even if it was a lesser court than the first in wisdom and numbers."

There are three possible explanations for the difference between a non-popular gezerah which was discovered on the spot and one discovered years later:

- (1) As long as it is the same court which discovers the "non-existence" of its gezerah, they may declare it null and void without resorting to further (reversing) legislation. On the other hand, a later court may not do so without legislation. This is a purely procedural issue.
- (2) A slight variation on (1): Legal maneuvers may have been initiated based on this ruling in the intervening years, either by the original court or by a later one. These maneuvers may involve prosecution, change of personal status etc. If the later court would just declare the original gezerah to be null and void, it would create a juridical headache of possibly epic proportions; hence, new legislation which changes the rule from here on in.
- (3) The honor for the court is something which grows with time; the longer a law has been "on the books", the greater the danger of disrespect being shown by just "erasing" it rather than legislating

against it.

Summing up the Rambam, "popularity" is not the same as "feasibility" - but the two interact. First of all, the court must see if the gezerah is "doable"; if they think so, but it doesn't catch on, that either indicates that they were wrong - or that, nevertheless, they may not make such a gezerah. It seems that the popularity issue has a central place in gezerot - which we need to explore.

IV.

THE PURPOSE OF GEZEROT

The legislative job of the court is to further the needs of Am Yisra'el and to promote the laws and spirit of the Torah. As an example, when Nehemiah saw that people were involving themselves in business-type activities on Shabbat - which were technically legal but which totally flew in the face of what Shabbat is supposed to accomplish - he made a gezerah against handling certain types of tools. (See Nehemiah 13:15-16, Shabbat 123b). Some gezerot, such as the 18 gezerot of Beit Shammai, were enacted to further social goals within the Jewish people.

One of the central features of Halakhah is its unifying nature - all Jews following Halakhah share a relatively common perspective on major life-issues and values and, perhaps even more significantly, share a common practice. Part of the goal of the court is to bring the people closer to Torah - and to each other.

This was the goal of those perushim who wanted to avoid meat and wine in response to the destruction. They were not just suggesting personal stringencies; they were attempting to bring Am Yisra'el along for the ride, to have everyone (or, at least a majority), join in this behavior. This is why the principle of *ein gozrin...* applies to that case also; since most people could not live up to this standard, the result will be one of divisiveness and of pushing people further from Torah. All of those folks who are sincere in their commitment but are not ready to give up meat and wine will feel like second-class Jews, in spite of their total commitment to Halakhah.

The principle of *ein gozrin...* is not merely one of judicial prudence; it cuts to the heart of the mission of the court - to bring the Jewish people together, under the protective wings of the Shekhinah (Divine Presence). Bringing some of the people is not half an achievement - in this case it is a step backwards.

now, to the questions:

Q1: Why does Rambam have to tell us that those who are tamei are obligated in this Mitzvah - and to tell us that they do it in the complete fashion (i.e. w/B'rakhot)?

A: The Mishnah in Berakhot (3:4) cites a dispute between Rabanan and R. Yehudah, as to whether a ba'al keri reads K'riat Sh'ma and makes Berakhot. There is an implied distinction between K'riat Sh'ma (purely words of Torah) and Berakhot (addressing God). Rambam needs to clarify that not only

are words of Torah beyond the reach of tum'ah, but that this also holds true for Berakhot.

Q2: Why did Ezra and his court make this ruling specifically aimed at a ba'al kerî?

A: Rambam (MT Tefillah 4:4), citing the Gemara (Berakhot 22a), gives the reason for Ezra's decree as one of minimizing sexual intercourse - "that scholars should not be constantly with their wives like roosters". By restricting the reading of K'riat Sh'ma (and, later, Tefillah) for anyone who has had sex - until he goes to the Mikveh - such intercourse would be limited. See, additionally, MT De'ot 5:4.

Q3: Why is the community's level of acceptance - coupled with the "contagiousness" of the decree - the deciding factor regarding the (im)permanence of that decree?

A: See the shiur.

Q4: Why did Rambam choose to end Hilkhos K'riat Sh'ma with this particular Halakhah?

A: Although Rambam ends each Sefer (volume) of Mishneh Torah with *divrei aggadah* (homiletical teachings), that is not necessarily true for the end of each section of Halakhot, as in our case. However, I believe that there are several interesting points which are implicit in this Halakhah and which shed light on matters relating to K'riat Sh'ma in general:

(a) K'riat Sh'ma - and all that it implies (Kabbalat Ol Malkhut Shamayim, Talmud Torah, declaring God's Unity) are not beyond the pale for anyone - even someone who is temporarily in a state of tum'ah. Even though, as we discussed several times (see the Introductory shiur & 3:01), K'riat Sh'ma may be assumed under the rubric of "Avodah" (worship - an extension of Mikdash [Temple] service), nevertheless, this level of Avodah, unlike that in the Mikdash, is not exclusive and allows for tum'ah.

(b) The power of community (see the shiur). This has a particular significant place in Talmud Torah, where the individual scholar (as highlighted by Rabbah b. Nahmani - Bava Metzia 86a), the community of scholars (Bava Metzia 59b - *tanuro shel 'Akhnai*) and all of 'Am Yisra'el (see Pesachim 66a - *hanach lahem l'Yisra'el; im ein Nevi'im hein, b'nei Nevi'im hein* - "if the Jewish people aren't prophets themselves, surely they are the children of prophets") play significant roles. Here, it is highlighted by the role of the community in the ultimate acceptance/rejection of Rabbinic decrees.

(c) The absolute purity of Talmud Torah (which, of course, includes K'riat Sh'ma) - which is compared to fire. The fire metaphor goes far beyond the "untouchability" of words of Torah, relative to tum'ah; it implies a level of purgation, of cleansing and of the touch of the ethereal upon that which is corporeal. Much to think about as we study and become sanctified through that process.

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