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WAS RABBEINU GERSHOM A HALAKHIC PROGRESSIVE?

Rabbi Aryeh Klapper, Dean

First of a multipart series on halakhic solutions to male iggun (men who are in a dead halakhic marriage but are unable to remarry halakhically).

In the late tenth or early eleventh century, according to halakhic tradition, Rabbi Gershom of Mainz, known as Rabbeinu Gershom Meor HaGolah ("Luminary of the Exile"), enacting two decrees that radically changed the terms of Jewish marriage.

First, he banned polygamy.

Second, he banned divorcing women without their consent.

These decrees were accepted almost immediately throughout the Ashkenazic community, and over the centuries have largely become accepted by the Sephardic community as well.

Banning polygamy changes the *emotional* contours of marriage. It defines the affective relationship between husband and wife as not only mutual but also exclusive.

Banning nonconsensual divorce changes the *power* contours of marriage.

What motivated Rabbeinu Gershom to make these decrees?

Three centuries later, Rabbeinu Asher (ROSH) offered this rationale for the ban on nonconsensual divorce (Responsa ROSH 42a):

אך כי ראה הדור פרוץ ומזלזלין בבנות ישראל בזריקת גט,
ותקן להשוות כח האשה לכח האיש

Because he saw **the generation** unbounded and degrading daughters of Israel by 'throwing the divorce',
and so he decreed **to equalize the power of the woman to the power of the man.**

"Throwing the divorce" is an idiom for nonconsensual divorce; if a wife refuses to accept the divorce document from her husband, he can simply toss it at her or into her property. This is Torah law, and the rabbis of the Mishnah and Talmud felt no need to change it. ROSH asserts that a new social ill grew up in post-Talmudic Jewish Germany and impelled Rabbeinu Gershom to enact his decrees. It is not clear what that ill was, or why Rabbeinu Gershom's decree was so rapidly accepted in Ashkenaz.

Another way to frame the question is: Doesn't the possibility of nonconsensual divorce necessarily degrade women relative to men? Why did Rabbeinu Gershom think that only his and subsequent generations required the power of the wife to be equal to that of the husband?

In the eighteenth century, Chatam Sofer offered this pungent expansion of ROSH's formulation:

When the unbounded ones who degraded the proper daughters of
Israel grew numerous –
"In the evening she came, and in the morning she returned"

Chatam Sofer's quote of Esther 2:14 strikingly compares a Jewish wife to a Persian virgin commandeered by Achashverosh for a one-night stand – here today and replaced tomorrow. The problem with his explanation, as with ROSH's, is that he doesn't explain what changed in Rabbeinu Gershom's time to newly create this issue. Why was the decree against nonconsensual divorce a reaction to a new social ill, rather than a correction of a structural injustice? Why wasn't the possibility of nonconsensual divorce a per se degradation of Jewish women?

I suggest that ROSH and Chatam Sofer are placing Rabbeinu Gershom in the context of the Talmudic explanation for the institution of the *ketubah*. The *ketubah* guarantees the wife support or a lump sum should she be widowed or divorced. Talmud Bava Kamma 89b declares that the rabbis permitted marital cohabitation only in the context of a *ketubah*

So that she not be light in his eyes, to divorce her

In other words, the Talmud recognizes that the possibility of nonconsensual divorce makes women "light" in the eyes of men, and that this is a problem [1]. It presents the rabbis as trying to solve this by making divorce expensive. In Rabbeinu Gershom's community, this solution was apparently no longer effective [2], and so he banned nonconsensual divorce altogether. But why didn't the Talmudic rabbis adopt this method in the first place?

Here I think it is useful to look at the context in which ROSH's explanation appears. He is discussing the case of a man who discovers after two years of marriage that his wife is subject to a medical condition that makes living with her (in his opinion)

impossible and perhaps dangerous, but who is also financially unable to pay her *ketubah* in full. She refuses to accept a divorce without full payment, and meanwhile demands both financial support and conjugal rights. ROSH responds as follows:

In the days of the Talmudic Sages,
if a wife developed such a blemish –
her husband would divorce her and be obligated to pay her
ketubah;
he would pay whatever he had on hand, and the rest when he
became able to.
But now that the Gaon Rabbeinu Gershom z”l decreed that he
cannot divorce her against her will,
it is implausible that he should be obligated to provide her
support, clothing, and physical intimacy –
**if that were so, the power of the woman would be much
greater than the power of the man,**
as if such a blemish developed in a man –
we would not compel her to remain with him,
rather we would compel him to divorce her and pay the *ketubah*,
so how can we say that if such a blemish develops in a woman,
we compel him to be with her **and** to support her!?
If a man, who biblically divorces only by his free will,
can be compelled to divorce and pay the *ketubah* if he develops
blemishes,
a woman, who biblically can be divorced against her will –
shouldn’t this be true all the more so!?
But Rabbeinu Gershom set a boundary in this matter.
But isn’t it a *kal vachomer* that he never even considered in such a
situation “chaining the man”
and preventing him from fulfilling “be fruitful and multiply”?!
Rather, in this case certainly he may divorce her and pay her
ketubah,
**because Rabbeinu Gershom’s enactment
did not make the power of the woman so much greater than
that of the man,**
rather,
because he saw the generation unbounded and degrading
daughters of Israel by ‘throwing the divorce’,
and so he decreed to **equalize** the power of the woman to the
power of the man:
just as the man divorces only willingly,
so too the woman is divorced only willingly.
But it would be completely implausible to say
that in a situation where the man would be coerced to divorce,
he would not be able to divorce the woman against her will.
Even if you were to say
that he standardized the issue
so that no man could ever divorce a man against her will,
nonetheless
in a situation where the man would be coerced to divorce
the woman too is coerced to accept the divorce
and if she refuses to accept it –
he may default on providing her with food, clothing, and physical
intimacy,

and she cannot say “I do not wish to accept the divorce until he
pays me my *ketubah*”,
as this is no claim,
since she is legally obligated to accept the divorce
as I have demonstrated.

ROSH does not advance the egalitarian thesis that Rabbeinu Gershom sought to equalize men and women in order to justify a halakhically expansive understanding of the legislation. Rather, he uses it as a ceiling, in order to reject an interpretation that, in his view, would give women more power than men.

ROSH makes us confront the reality that Rabbeinu Gershom’s legislation may have decreased inequality at the price of increasing unjustified suffering. Rather than take the modern approach of no-fault divorce, which in theory equalizes marital power by denying either spouse the right to prevent the other from leaving the relationship, Rabbeinu Gershom increased women’s power over men.

For ROSH, I suggest, the Talmudic rabbis were unwilling to make this tradeoff. Rabbeinu Gershom became willing to do so only because something happened to decrease women’s stature within marriage. ROSH presents Rabbeinu Gershom as reactive, not progressive.

But it seems likely to me that Rav Moshe Feinstein, in a responsum to Rabbi Shimon Trebnik dated 25 Tevet, 5721 (Igrot Mosheh EH 1:115), read ROSH and Rabbeinu Gershom quite differently.

Stay tuned for Part 2 of this series coming soon!

[1] Why would the rabbis see this as a problem, if the Torah set up a system that permitted it? The simplest answer, enshrined in our standard *ketubah*’s phrase **לְדַחְזֵי לִיכִי מְדֹאֲרִיתָא**, is that the rabbis merely increased the amount of a Biblically mandated *ketubah*. Why would they increase it? I suggest that the rabbis understood the Torah as balancing the goal of protecting women from unjustified divorce with the risk of deterring men from committing to marriage. The rabbis saw the balance shifting, either because women’s social bargaining position improved, or else because the risks of unjustified divorce increased, and responded accordingly.

[2] We can’t know how Rosh conceived of Rabbeinu Gershom’s community. Perhaps he thought they were so rich that the *ketubah*-payment had become an ineffective deterrent to divorce; perhaps, as in some batei din in contemporary America, the *ketubah* was calculated by weight of silver and the price of silver crashed; perhaps clever lawyers or secular laws had made effective enforcement of the *ketubah* impossible.