

## CENTER FOR MODERN TORAH LEADERSHIP



## HALAKHIC POWER AND HALAKHIC POLICY: MAMZERUT AND IGGUN PART 2

By Rabbi Aryeh Klapper

At the outset of his shiur at the 5739 Conference of Israeli Dayyanim, then-Chief Rabbi Shlomo Goren made a declaration that is often greeted with a significant degree of skepticism:

“I hereby announce clearly and explicitly that all my words are intended *lo l’halakhabh v’lo l’maaseh, rak l’iyun ul’virur hilkhati b’alma*” (=neither as a legal ruling nor as a basis for halakhic practice, but rather for mere halakhic analysis and clarification).

The phrase *lo l’halakhabh v’lo l’maaseh* is based on a dialogue between Rabbi Asi and Rabbi Yochanan on Bava Batra 130b:

“Said Rabbi Asi to Rabbi Yochanan:

If sir says to us ‘the halakhah is so’, may we act based on that statement?

(Rabbi Yochanan) said:

You may not act until I tell you *halakhah l’maaseh*.”

This story initially generated the disclaimer that something was not said *ela l’halakhabh v’lo l’maaseh*, (only as *halakhabh* and not *l’maaseh*) The variant used by Rav Goren developed (probably) in the late 18<sup>th</sup> century, either because of a typo (*ela* to *lo* requires only eliding the initial *alef*) or because of a desire to escalate. My suspicion is that many readers’ reaction was that the rabbis doth protest too much.

Rav Goren may have been consciously ironic. His shiur analyzes a suggestion that Rav Shalom Mordekhai Schwadron (MaHaRSHaM, 1835-1911, Poland, Responsa 1:9) made *l’halakhabh velo l’maaseh*. The first comment Rav Goren makes is that perhaps Rav Schwadron meant only that it was too late to use the suggestion in the case he was discussing, but intended it to be authoritative for practice in any subsequent case. Surely Rav Goren realized that his own disclaimer could be similarly waved aside.

Maharsham’s suggestion was as follows.

Mishnah Gittin 32a records that

Initially,

(the husband) would gather a court to cancel his agent(-for divorce-delivery) in another place (meaning: where his agent was not present).

Rabban Gamliel the elder decreed not to do this as a matter of *tikkun olam*.

The relevant *tikkun olam* was lest a wife receive her divorce from an agent, not knowing that her husband had cancelled the agency, and remarry. Her subsequent children would be *mamzerim*, and it is *tikkun olam* to preventing children from having that status.

What if a husband defies Rabban Gamliel’s decree? A *beraita* on Gittin 33a records a dispute between Rebbe and Rabbi Shimon ben Gamliel. Rebbe says that the decree is purely hortatory; if the husband nevertheless annuls the agent, the get cannot be validly delivered. Rabbi Shimon Ben Gamliel argues that the decree must have teeth for Beit Din to affect behavior; therefore, it must be that the rabbis annul the original wedding if the husband cancels the agency without the agent present.

Gittin 33a also cites a dispute between Rav Sheshet and Rav Nachman as to whether the original practice required a beit din of three, or only two witnesses. Tosafot there suggests that Rebbe agrees that the marriage is retroactively annulled if the husband cancels the agent in front of fewer than necessary witnesses, i.e. in front of one witness according to Rav Nachman, or two according to Rav Sheshet. Maharsham reasonably concludes that according to Tosafot, everyone agrees that the marriage is annulled if the husband cancels the agency in front of one witness.

However, Tosafot Gittin 32a wonder: Doesn’t this allow a cooperative husband to retroactively resolve situations of adultery or mamzerut by sending a get via agent and then cancelling the agency in front of one witness?! Tosafot cite two responses: Rabbi Isaac of Dampierre (RI) says that so long as the formalities are correct, the rabbis are not displeased – perhaps they are

pleased – that the situation has been resolved. Rabbeinu Tam says that the marriage isn't annulled when the husband's intention is to resolve the issues of adultery or mamzerut. Doesn't Rabbeinu Tam's objection apply to Maharsham's case?

Maharsham responds that annulment is a rabbinic power, and the rabbis can decide where it does and doesn't apply. Rabbeinu Tam meant that the marriage is not annulled when the husband deliberately tries to annul it AND THE RABBIS WOULD NOT WANT IT ANNULLED. In cases where the husband is acting at rabbinic direction, of course it is annulled. (It's not clear what happens when the husband is acting at the direction of some rabbis but in defiance of others.)

So Maharsham's suggestion was to have the husband send a get via agent and then cancel the agency in front of only one witness. Rav Goren however raises a new difficulty. Marriage and divorce generally need to be verified by two witnesses. But Maharsham's suggestion requires the cancellation to take place with only one witness present!

Rav Goren states that "he has heard" that the solution is to have the husband cancel the agent in front of two consecutive witnesses, with only one present at any time. However, he contends that the question of whether consecutive witnesses are sufficient should be the same for the validity of the cancellation and for evidence of the cancellation. Therefore, this strategy would have to treat the cancellation as happening in front of two witnesses, which would make it valid according to Rav Nachman, and the mamzerut issue is not solved.

Rav Goren raises two broader objections.

First, he contends that Maharsham has not correctly presented Rabbeinu Tam. Rabbeinu Tam's full argument is that rabbis should never encourage cancelling the agent, and thereby triggering annulment, because that would lead to promiscuity. Thus there are no possible cases in which the cancellation would happen at rabbinic direction. (He suggests tentatively that even RI's position applies only to cases where the goal is to prevent execution for adultery, and not to cases where the goal is to prevent or undo mamzerut, but notes that RA'AH (Rabbi Aharon HaLevi) quoted in Shitah Mekubetzet interprets RI as applying even and perhaps especially to mamzerut.)

Second, he notes that Rabban Gamliel made a decree against cancellation because it has negative consequences, so how can rabbis encourage cancellation?!

These objections seem weak. Rabban Gamliel's decree against cancellation was made before the issue of annulment came up, and Rabbeinu Tam could agree that a narrow set of cases presented a different cost-benefit ratio. Rav Goren himself seems not to have taken them as dispositive. He reports that Maharsham's suggestion was utilized in isolated cases in Yerushalayim and Tveryah – it's not clear how many in each location.

However, perhaps because of the problem that one witness cannot establish that the cancellation happened, he suggests using a different means to the same end.

Mishnah Gittin 78a reports that if a woman is standing in a *reshut harabim* (public space), and her husband throws her a get, and it lands close to her – she is divorced. The Talmud there defines "closer to her" as "within her four cubits". Since it is universally agreed that a woman is divorced only when she acquires the get, the Talmud must be saying that she acquires it BY VIRTUE of it having landed within her four cubits in a public domain.

However, the school of RAMBAN, and possibly RAMBAM, contend that acquisition via one's four cubits is not Biblically valid. The woman in the Mishnah's case is therefore divorced only because the Rabbis, in order to prevent situations of iggun (it's not clear to me exactly what cases they needed to resolve), declared that one can acquire a get via four cubits in a public domain. Since Biblically she still does not own the get, the rabbis must actually annul the marriage as soon she acquires the get rabbinically. Annulment is by definition retroactive. Rav Goren suggests that this mechanism be used instead of Maharsham's.

Last week's essay reported Rav Simcha Kuk's response to Rav Goren that annulment should be used in extreme cases to resolve iggun but not mamzerut. This is similar to the position that Rav Goren originally attributed to RI in Tosafot, which he then rejected on the basis of Shitah Mekubetzet. Rav Kuk did not directly address Rav Goren's difficulty with Maharsham. However, since he reported that his father and Rav Tzvi Pesach Frank used Maharsham's suggestion in one agunah case, it seems unlikely that he found Rav Goren's alternative a necessary improvement. We'll move on next to responses from other dayyanim to Rav Goren, including that of Rav Ovadiah Yosef.

Shabbat Shalom!

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