

CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חרות ואחריות

www.TorahLeadership.org

"Taking Responsibility for Torah"

DOES "IT'S NEVER BEEN DONE" IMPLY "IT SHOULD NEVER BE DONE"? PART 2

Rabbi Aryeh Klapper, Dean

PART 1 of this series established that there is no bar under halakhah to arguing that an unprecedented action is halakhically permitted. This principle is expressed pithily by Mishnah Zevachim 12:4 as "אין לא ראינו ראייה", "We have not seen' is not proof". Nonetheless, scholars may be required to conform when unsophisticated communities object to a practice on the grounds that they have never seen it done, even when the objection is halakhically groundless. I argued that the Modern Orthodox community should be regarded as sophisticated by historical standards, but that there might – or might not – be reasons to treat it as if it were unsophisticated in certain cases.

RAMO Choshen Mishpat 37:22 expresses the position that despite the Mishnah Zevachim, there are circumstance under which "לא ראינו הי ראייה", "We have not seen' is proof". This installment will seek to identify as precisely as possible the conditions under which this statement of RAMO applies.

Sifte Cohen (Shakh) to 37:22 connects this RAMO to the opening of Shulchan Arukh Yoreh Deah (YD), the very first topic covered in the formal semikhah curriculum. YD 1:1 itself is based on the opening line of Mishnah Chullin: "הכל שוחטין" "everyone slaughters, and their slaughtering is valid". Who is included in "everyone"? Talmud Chullin lists a variety of marginal men, which leaves open the possibility that women are excluded. Beit Yosef mentions that the peculiar work Hilkhote Eretz Yisroel excludes women, but presents the position that women are included as the near-absolute consensus of halakhic authorities, and to my knowledge this claim has not been challenged since.

However, granted that this is true as halakhah, Beit Yosef also cites the position of Agur, a late fifteenth century German-Italian halakhic collection. Agur writes that while all halakhic authorities agree that women may slaughter legally, a custom has arisen that they do not slaughter, and this custom should be regarded as having legal force going forward. Agur takes this position using extravagant rhetoric, describing it as "מנהג מבטל הלכה", "custom nullifying law".

אף על פי שדעת הפוסקים כן
המנהג בכל גלות ישראל שלא ישחטו
ומעולם לא ראינו נוהג לשחטו
ולכן אין להניח לשחטו
כי המנהג מבטל הלכה

ומנהג אבותינו תורה היא.

Even though the opinion of the decisors is such (that women may slaughter) the practice in all the diaspora of Jewry is that they should not slaughter and I have never seen a woman practice slaughter and therefore one should not allow women to slaughter because the custom nullifies law and the custom of our ancestors is Torah.

Beit Yosef himself nonetheless rejects Agur.

ואני אומר:

שאם היה אומר שהיו רוצות לשחוט ולא הניחין –
היה אפשר לומר שהיא ראייה,
אך ראיית לא ראינו אינה ראייה.

But I say:

*If he has said that women wished to slaughter and were not allowed to do so –
It would be possible to say that this is a proof
but a proof of the form 'We have not seen' is no proof.*

He accordingly codifies in Shulchan Arukh that women may slaughter. RAMO, however, cites what appears to be the position of Agur:

יש אומרים

שאין להניח נשים לשחוט,
שכבר נהגו שלא לשחוט,
וכן המנהג שאין הנשים שוחטות

Some say

*that women should not be allowed to slaughter
as they have already adopted the practice of not slaughtering,
and this is the custom: Women don't slaughter.*

Shakh contends that RAMO's adoption of Agur's position here reflects his statement in CM 37:22 that under some circumstances "I have not seen" is a valid proof.

בזה ישבתי בתחילת ספרי שפתי כהן ליוורה דעה [סימן א' סק"א] דברי
האגור [סי' אלף ס"ב]

שכתב

שאין להניח נשים לשחוט
שכבר נהגו שלא לשחוט,
שהב"ש שם השיג עליו דלא ראינו אינה ראייה.
ואני כתבתי דבמנהג הוי לא ראינו ראייה,
וכמ"ש מהרי"ק והר"ב כאן.

*On this basis I justified at the outset of my work Sifte Cohen to Yoreh Deah
the words of Agur,
who wrote that
women should not be allowed to slaughter,*

as they have already adopted the practice of not slaughtering,
Beit Yosef there challenged him by saying that “I have not seen” is no proof,
But I wrote that with regard to minhag “I have not seen” is a proof,
as Maharik and RAMO write here.

The key distinction Shakh makes is about the level of halakhah. In areas that are Biblical or Rabbinic law, “I have not seen” is no proof. But in areas of customary law, “I have not seen” is proof.

Shakh does not suggest, or even contemplate, a claim that the fact that something hasn’t been done is the **reason** that it may not be done going forward; it is merely **evidence** that a custom to that effect was **deliberately** instituted.

וטעם נכון יש בדבר,
דכיון שהמנהג כך
והדבר שכיח כן,

אם היה הדבר מותר - אי אפשר שלא היינו רואים פעם אחת כן נוהגים
להתיר,

אלא ודאי המנהג הוא כן,
שנהגו בכונה לאסור
וכן להפך

There is a solid rationale for this.

*Since the practice is such
and the matter comes up frequently*

*if it were permitted – it is impossible that we would not have seen once them
practicing allowing this,*

rather certainly the custom is such,

**meaning that they intentionally adopted the practice of making it
forbidden
or vice versa.**

Shakh states that his position is based on Maharik and RAMO. The question then is whether Maharik and RAMO in fact support his distinction between levels of law.

Shulchan Arukh CM 37:22 discusses a halakhic difficulty with democracy. In a democracy, every member of the community is party to any suit between the community and an individual member, just as in the United States government attorneys appear for “the People”. Therefore, every member of the community should be disqualified as a witness in such case as *nogeia* (interested), and all laws and agreements should be unenforceable. Mechaber explains that democratic “social contracts” include a waiver of the requirement for valid witnesses. For this reason, even relatives can testify in such cases.

RAMO adds the following:

כל דבר התלוי במנהג בני העיר –
אין אומרים בו תרי כמאה,
אלא אזלין ביה בתר הרוב
וכן כל כיוצא בזה
שאינו צריכים עדות ממש.

וכן לא אמרינן בכיוצא בזה 'לא ראינו אינו ראייה' אלא הוי ראייה
(מהר"ק שורש קע"ב),

*Everything that depends on the minhag of the citizens –
we do not say regarding it that two witnesses are the equivalent of 100;
rather we follow the majority of witnesses.
and all similar standards*

since we don't require formally valid testimony.

*Similarly, we do not say in such matters that “I have not seen” is no proof”;
rather it is a proof (Maharik 172)*

The key sentence here is the first – “Everything that depends on the *minhag* of the citizens”. SHAKH apparently understands *minhag* here to refer to law at the halakhic level of custom. I contend, however, that this is clearly incorrect in context. *Minhag* here does not refer to customary law, but rather to facts of practice which are in and of themselves halakhically neutral, but which issues of Biblical or Rabbinic law depend on.

For example: Halakhic day-labor contracts include an implicit stipulation that the hours and conditions of work conform to standard local practice. Suppose that an employer hired a day-laborer and then sought to force that employee to pay to rent the necessary tools from him. The employee objects and brings witnesses who state that no employer has ever made such a demand, and that it therefore violates community standards. A *beit din* would accept this testimony, even though it has the form “we have not seen”, and decide for the employee.

However – other employees and employers would be free in the future to explicitly agree to such a rental. The *beit din*'s ruling is based on **descriptive** minhag, and relates to Biblical and Rabbinic law; the issue has nothing to do with **prescriptive** minhag.

Accordingly, RAMO here has no relationship to the position of AGUR regarding **prescriptive** minhag, and SHAKH has no evidence that testimony of the form “I have not seen” is acceptable in cases regarding **prescriptive** minhag. In other words, the argument that “It’s never been done” means “It should never be done” is not correct in any area of halakhah, whether Biblical, Rabbinic, or customary.

In PART 3 of this series we will see that RAMO’s position correctly represents Maharik, and that many great *acharonim* have similarly concluded that SHAKH’s contention regarding minhag cannot be sustained.

Shabbat shalom!

The mission of the Center for Modern Torah Leadership is to foster a vision of fully committed halakhic Judaism that embraces the intellectual and moral challenges of modernity as spiritual opportunities to create authentic leaders. The Center carries out its mission through the Summer Beit Midrash program, the Rabbis and Educators Professional Development Institute, the Campus and Community Education Institutes, weekly Divrei Torah and our website, www.torahleadership.org, which houses hundreds of articles and audio lectures.