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Center for Modern Torah Leadership



חירות ואחריות

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"Taking Responsibility for Torah"

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

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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 ראיה", "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. If a sophisticated community objects to a practice on those grounds, scholars can simply explain their grounds for leniency. 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.

The conclusion of PART 1 is sometimes challenged on the basis Rabbi Moshe Isserles' statement in Shulchan Arukh Choshen Mishpat 37:22 that sometimes "We have not seen' is a proof. Part 2 demonstrated that R. Isserles was not addressing the question of whether an unprecedented action can be permitted. Rather, he was discussing whether "We have not seen" can be evidence of practice in cases where the law is affected by standard practice. For example: Unless otherwise specified, a halakhic labor contract incorporates local community standards. If an employer required workers to rent proprietary tools, and the workers sued, a beit din would have to determine whether the requirement violated community standards. To that end, R. Isserles stated, a beit din could rule that if no one had ever seen a local employer impose such a requirement, then doing so would be a violation of the contract.

One might argue that while Rabbi Isserles's statement is limited, perhaps his source has broader application. PART 3 will demonstrate that this is not so.

Rabbi Isserles's statement is footnoted to Maharik 172. This appears to be a typo, as the relevant material is in Shoresh 170 and 171.

Maharik received a question from the people of Firenze, Italy. In their community, engaged men would transfer

sivlonot, or marriage gifts, to their fiancées in advance of the wedding. Some engagements were subsequently cancelled before the wedding. This raised two intertwined issues: Must the fiancée return the *sivlonot*? and, Does she required a get in order to remarry? The basis for allowing her to keep the *sivlonot*, and to require a get, was the possibility that the groom intended the giving and acceptance of the *sivlonot* to effect *kiddushin*.

Recent immigrants to Firenze had indeed required gittin in such cases. This was deeply troubling to the halakhic aborigines. Many of them were descended from women who had married without a get after breaking an engagement. Were their foremothers adulteresses? Were they mamzerim?

Maharik's first response (170) discusses "We have not seen" in two ways.

First,

והנה גלוי ומפורסם הוא כי כולם נוהגים מנהג זה, ואיש מהם לא נעדר
ופעמים רבות חוזרים בהם או מת החתן ב"מ קודם זמן החופה
ולפי מה ששמעתי מזקני הארץ הזאת ותושביה
שלא ראו שום פוצה פה ומצפצף להצריכה חליצה כשמת
או גט כשמתחרטין

It is open and public that they all without exception have this practice (giving *sivlonot* before betrothal) and many times the engagement is broken off, or the chatan dies before the chuppah/ *betrothal* and according to what I have heard from the elders and residents of that land

they never saw anyone speak up and require the kallah-to-be to have a chalitzah (if the chatan died) or a get when they change their minds (and break off the engagement)

Here, the absence of evidence is used to prove two different facts:

1. That the custom of giving *sivlonot* before betrothal is universal in that country
2. That no one in that country has every considered the woman married after a broken engagement.

Plainly, each of these facts are descriptions. There is no halakhic bar to giving *sivlonot* after betrothal, and if that

became the custom, people would be justified in requiring a get if an engagement were broken after the *shivlonot* were given, or *chalitzah* if the groom-to-be died, because we would presume that the *shivlonot* were preceded by a secret betrothal.

Second,

וראיה מהא דגרס בפ' שני דכתובות (דף כב)

תנו רבנן

שנים אומרים נתקדשה ושנים אומרים לא נתקדשה -

הרי זו לא תנשא; ואם נשאת - לא תצא וכו'

ומפרש לה רב אשי הכי

שנים אומרים ראינוה שנתקדשה ושנים אומרים לא ראינוה שנתקדשה

ופריך עלה

פשיטא לא ראינוה אינה ראייה

ומשני

לא צריכה דדיירי בחצר אחת

מהו דתימא אם איתא דמקדשין קלא אית ליה למילתא

קמ"ל דעבידי אינשי דמקדשי בצינעא

והרי לך

דאי לאו משום טעמא דעבידי אינשי דמקדשי בצינעא,

הוה לן למימר דאם איתא דמקדשי קלא אית ליה למילתא,

ואפילו להכחיש העדים שמעידין שראוה שנתקדשה,

ואף על גב שלא ראינוה דקאמרי אינך אינה ראייה;

We can bring proof from Ketubot 22:

A beraita:

Two (witnesses) say she was betrothed, and two say she was not – she may not marry (another man), but if she marries – she need not be divorced . . .

The Talmud challenges this:

Obviously!? “We did not see her” is no proof!?

The Talmud responds”

It is not obvious in a case where they lived in the same courtyard. I might have thought that if they had been betrothed, it would have become known

The beraita teaches us that people sometimes betroth secretly.

So you see

that were it not for the argument that people sometimes betroth secretly,

we would say that if they had been betrothed, it would have become known,

even when that contradicts witnesses who testify that they saw her betrothal,

even though the statement of the other witnesses that “we did not see her betrothed” is no proof.

Here Maharik points out that obviously witnesses who say “we did not see X” are not directly contradicting witnesses who say “we saw X”. The witnesses who “didn’t see” might simply have been inattentive. Nonetheless, if there are reasons to presume that X did not happen, we will give the witnesses who did not see X a certain amount of credibility.

Plainly this again relates purely to description.

Witnesses have no obligation to see or not see betrothals.

In 171 Maharik addresses the same case, this time in response to a critique. The first relevant element is that the newcomers argued that their very presence demonstrated that the old custom was no longer universal. Maharik responds to this in a variety of ways not relevant to our issue. The second element begin with a claim that one can use witnesses together with an argument from silence to prove a negative.

ואשר כתב עוד כי לא ראינו ולא שמענו אינו ראייה

אלא דבר פשוט הוא דדוקא שיש שתי כתי עדים המכחישים זה את זה

אחת אומרת ראינוה שנתקדשה ואחת אומרת לא ראינו כך וכך

אבל היכא שאין הכחשה

כי הכא, שאין אדם מעיד שנהגו הראשונים להחמיר באלו הסבלונות

פשיטא ופשיטא דמהמני האומרים ומעידים שלא ראו ולא שמענו מימים

הראשונים שום פוצה פה ומצפצף

That which my critic wrote that “We have not seen or heard is no proof” –

obviously it applies only in a case where two sets of witnesses contradict each other

One saying “we saw her betrothed”, the other saying “we did not see such and such”

But where there is no contradiction,

as here, where no one testifies that the earlier ones had the practice of being stringent regarding *shivlonot*,

it is more than obvious that that we believe those who testify and say

“we have never heard or seen anyone from the earliest days opening their mouth to object”.

...

As further proof of this claim, Maharik cites a beraita on Eruvin 41, in which Rabbi Yehoshua seeks to undo a ruling of Rabban Gamliel after the latter’s death. His colleagues reply:

יהושע - אין שומעין לך

שכבר הוקבע הלכה כמותו

ולא היה אדם שעירער בדבר

Yehoshua, we will not heed you

as the halakhah has already been fixed in accordance with his opinion and no person objected to this

Maharik notes that “no person objected to this” is valid evidence of the fact that no one objected, so long as no witnesses testify that they heard of an objection.

So Maharik as well addresses only issues of fact; he never addresses the question of whether “it’s never been done” means “it must not be done”. This leaves us as we began, with no evidence that such an idea has ever been normative Halakhah. I hasten to add that this does not mean that it is now forbidden to argue that it should become normative.