

כל נדרי THE KEY TO UNDERSTANDING-העבריינים?

כל נדרי opens with the follow line:

בישיבה של מעלה ובישיבה של מטה, על דעת המקום ועל דעת הקהל, אנו מתירין להתפלל עם העבריינים.

Who are the עבריינים?

מרדכי מסכת יומא פרק שבעת ימים רמז תשכה'-ונכנסים לבית הכנסת, ומתירין חרם להתפלל עם כל איש אשר עבר על גזירת הקהל אפילו אינו מבקש שיתירו לו; (כריתות דף ו', עמ' ב') דארב שמעון חסידא כל תענית שאין בו ממושעי ישראל אינו תענית שהרי חלבנה ריח רע ומנאה הכתוב בין סמני הקטורת ואמר אביי מהכא (עמוס ט', ו') ואגודתו על ארץ יסדה'.

Translation: We enter the synagogue and lift the ban on praying with those individuals who violated communal decrees even if those individuals have not asked that the bans be lifted. This practice is based on what we learned (Crisis 6b) Rabbi Shimon Chisda said: any fast day on which sinners in the community are not asked to participate is deemed to not be a fast day. This rule is based on the fact that the odor of galbanum is unpleasant and yet it was included among the spices for the incense (Kitores) used in the Beis Ha'Mikdash. Abaye said: 'We learn this rule from the verse (Amos 9, 6): And has founded His vault upon the earth.

The עבריינים are those individuals who were excommunicated from the Jewish community because they violated rules established by the community. Many hold the misconception that the עבריינים are the Marranos- Jews who chose conversion over death during the Spanish Inquisition. That the מרדכי, a student of the מהר"ם, Maharam M'Rottenberg, and who lived in the 1200's, refers to the custom provides evidence that the practice originated in Ashkenaz well before the Spanish Inquisition. Professor Daniel Goldschmidt in an article entitled: ההיתר להתפלל עם העבריינים in the Journal, טורי ישורון, תשרי תשל"ב, pages 8-9, attributes the practice of reciting the above opening line to the Maharam M'Rottenberg (1220-1293 CE). Professor Naftali Wieder, in an article entitled: ההיתר להתפלל עם העבריינים, in his book: התגבשות נוסח התפלה במזרח ובמערב, Vol. 1, pages 391-394, points out that the ראבי"ה (1140-1220 CE), who was the teacher of the teacher of the Maharam M'Rottenberg, already referred to the practice of reciting that opening line in his book, 'מסכת יומא סימן תקכח' - חלק ב - ראבי"ה² חלק ב.

1. רבינו גרשום מסכת כריתות דף ח' עמ' ב'-מהכא ואגודתו על ארץ יסדה. כלומר כשהן באגודה אחת על הארץ הטובים והרעים ומשברים לבם וחוזרין הקדוש ברוך הוא יסדה העולם מתקיים בשבילן.

Translation: From this verse: And has founded His vault upon the Earth. In other words, when they, good people and bad, come together on earth to spill their hearts and repent, G-d, creator of the world, maintains the world for them.

2. This book is based on a handwritten manuscript that was put into book form only in the late 1900's.

In the same article, Professor Goldschmidt describes the reason behind the practice of opening כל נדרי with the above line:

היתר זה ניתן בגלל אנשים שעברו על חוקי הקהלה, בפרט על פקודות שפורסמו באיום של "נידוי" לעבריינים, ונידו אותם, ובזה נשאר מובדלים מן הקהל. ידוע בזמנים של רדיפות ולהיזן מבחוץ לא נשאר בידי קהלות אלא לנדות אנשים כאלה. המנודה לא היה רשאי להשתתף בתפלת הציבור, ואם בכל זאת הופיעו, לא היה הקהל רשאי להתפלל עמם, נידוי זה בוטל כביכול למשך יום הכיפורים, אף אם לא יוכלו לבקש התרה עליו.

Translation: The ban is lifted for those who violated the rules of the community, particularly for those who were banned after being warned that they stood to be excommunicated. The threat was then carried out, thereby separating those individuals from the community. It is well known that at times of persecution and external pressure, communities took measures to protect themselves. They had no alternative but to banish those individuals who did not abide by those measures. Those who were excommunicated were not authorized to participate in communal prayer. If they appeared in synagogue, the service would be suspended since those present were forbidden to pray in the presence of the banned individuals. That ban was temporarily lifted for Yom Kippur even when those who were banned were not in a position to ask that the ban be lifted permanently.

How הרם was used by Jewish communities to regulate its members is illustrated in the following excerpt from the book: *An Introduction to the History and Sources of Jewish Law*, edited by N. S. Hecht³, B. S. Jackson, S. M. Passamaneck, D. Piattelli, A. M. Rabello, The Institute Of Jewish Law, Boston University School Of Law , Oxford University Press, 1996:

page 226-In Muslim eyes, the Jewish courts were simply a constituent part of the juridical system of the Muslim State, which respected the needs of the various religious communities under its rule by granting them legal autonomy. However, that autonomy was restricted, in that it did not confer powers of capital punishment and (civil) execution, which were retained by the Government. In consequence, *herem* (ban) and *niddui* (excommunication) become central instruments of punishment during the geonic period, alongside flogging. Although Jewish magistrates were also empowered to impose temporary imprisonment (until appearance in court) or to order that the accused's hair be shaved, the references to these measures in geonic responsa are so rare as to imply that they were not frequently used.

The use of excommunication was considerably expanded in comparison with talmudic practice. It was used both as a punitive measure, mainly in offences of a religious or moral nature, and as a means of enforcement, to compel litigants to appear at court or to comply with a verdict. Thus, on the one hand, it replaced the death penalty, insofar as a court was not empowered (according to Jewish Law) to

3. I had the pleasant experience of attending a course on Evidence taught by Professor Neil Hecht in my second year as a law student at Boston University Law School (1976-1977).

deliver death sentences during the Exile; on the other, it enabled the judges to circumvent the principle that fines could not be imposed in the Diaspora, since it forced, for example, a tortfeasor to pay the injured party compensation -- an innovation attributed to Rav Zemah Gaon. Geonic responsa show that the ban and excommunication were imposed for a wide variety of offences; as an enforcement measure it was applied mainly in cases involving money. (For excommunication as a punishment for religious lapses, see *Sha'are Teshuvah*, no. 116; *Hemdah Genuzah*, *supra* n. 13, no. 15; *Sha'are Tsedek*, 91b, no. 38; etc. For excommunication as an enforcement measure, see *Ge'one Mizrah u-Ma'arav*, no. 42; *Gaonica* 2, 154; etc.)

Among the religious offences punishable by excommunication (or the threat of such) were practices that betrayed leanings toward Karaism.

From the mid- ninth century, one discerns the first indications of the use of the excommunication and ban also to enforce *takkanot*, a trend which becomes stronger somewhat later. Rav Nahshon replied thus to a query as to how to excommunicate a person who had infringed a *takkanah* or decree issued by the community:

One decrees a 'blessing' (curse) upon the communities, that they should not speak to him, nor pray with him. But if he should agree to comply with the community *takkanah* that he violated, he is excommunicated for seven days. (M. Hershler, "Responsa and Enactment of Geonim and Early Authorities, from a Manuscript" [Hebrew], *Sinai* 66 (1970), 175. Cf. a responsum of Rav H'ananyah, *Sha'are Tsedek*, 57a, no. 16, and also *ibid.*, no. 17 : 'And several times it was necessary to excommunicate anyone who gives too much for his daughter's gift and dowry.')

page 297-It would appear that the most frequent form of punishment used in Spain was excommunication, which was particularly effective given the socioreligious context of the Middle Ages, in which it was virtually impossible to survive in any community in an excommunicated state.

Excommunication was normally imposed by either the *Bet Din* or the City Elders sitting in their quorum of ten. The actual ceremony of excommunication included various rituals such as the sounding of the *shofar* and the use of *Torah* scrolls. Excommunicated individuals were forbidden to cut their hair or to bathe; they were not included in religious ceremonies for which a *minyan* (religious quorum, of ten adult males) was required; other Jews were not permitted to associate with them, eat with them, study *Torah* with them or do any business with them. One major difference between the Spanish and the Ashkenazic authorities in this area was that the former permitted brief conversations with excommunicatees, whereas the latter forbade even this very limited contact (*Resp. Rambam* no. 311 ; *Resp. Rashba* Vol. 4 no. 86).

Excommunication was used mainly in order to protect the autonomy of the community and the maintenance of its religious framework. Specific offences

include attacking rabbinical authority (*Resp. Rambam* no. 268 ; *Resp. Rashba* Vol. 1 no. 763; Vol. 4 no. 315; Vol. 5 no. 236); breach of a custom (*Resp. Rashba* Vol. 4 no. 186); dishonouring judges or scholars (*Resp. Rif* no. 146 ; *Resp. Rambam* nos. 111, 268, 290 ; *Resp. Rashba* Vol. 1 nos. 279, 417, 460, 475, 608; Vol. 4 no. 264) and communal officers (*Resp. Rambam* no. 110 ; *Resp. Rashba* Vol. 1 no. 824) and having recourse to non-Jewish courts (*Resp. Rif* no. 14; *Resp. Rambam* nos. 26, 27, 221, 260; *Resp. Rashba* Vol. 3 no. 431). It was also applied against those transgressing communal regulations and conventions (*Resp. Rambam* nos. 27, 183, 242, 270; *Resp. Rashba* Vol. 1 nos. 549; Vol. 3 no. 430; Vol. 4 nos. 186, 296; Vol. 5 nos. 279, 281); for breaches of excommunication (*Resp. Rif* no. 146 ; *Resp. Rambam* no. 349 ; *Resp. Rashba* Vol. 1 nos. 696, 697; Vol. 4 no. 264) and for forbidden betrothals and marriages (*Resp. Rif* no. 180 ; *Resp. Rambam* nos. 157, 346, 349; *Resp. Rashba* Vol. 1 no. 649; Vol. 3 no. 446; Vol. 4 no. 314).

The procedure by which a חרם was imposed shares a marked resemblance to the acts that are performed as part of כל נדררי:

אורחות חיים הלכות שבועות ונדרים-יו. דין החרם. אם יש להם לבית דין או לגדולי הקהל להחרים שום אדם, יחרימו אותו במנין וספר תורה בזרוע. ואמרו זכרונם לברכה כל העובר על החרם כאלו עובר על כל התורה כולה.

Translation: Law of Cherem. If the court or the leaders of the community have a need to excommunicate a member of the community, they should do so in the presence of ten men and while one of them is holding a Sefer Torah. A Sefer Torah is held based on what our Sages taught: the behavior of a person who violates a ban is equal to the behavior of a person who violates all the laws of the Torah.

The words that were recited as part of the procedure by which a חרם was imposed also share a marked resemblance to the words that are recited as part of כל נדררי:

אורחות חיים הלכות שבועות ונדרים-נוסח החרם: בגזירת עירין פתגמא ובמימר קדישין אנו מחרימין ומשביעין ומקללין ומאריין על דעת המקום ועל דעת הקהל בספר תורה הזה בשש מאות ושלוש עשרה מצות הכתובות בו, בחרם שהחרים יהושע את יריחו, ובקללה שקלל אלישע את הנערים ונחזי נערו, ובשמתא דשמתיה ברק למרוז ובשמתא דשמתיהו אנשי כנסת הגדולה להווא גברא ובשמתא דשמתיה רב יהודה בר יחזקאל להווא גברא ובכל החרמות והאלות והקללות והנדרוין והשמתות שנעשו מימות משה רבינו עד עכשו.

Translation: The wording used to impose a ban on an individual are as follows: With this sentence by decree of the watchers (angels), this verdict by the order of the holy ones (angels), we excommunicate, swear and curse, with the consent of G-d, with the consent of the community and with this Sefer Torah, including the 613 Mitzvos written therein, in line with the ban imposed by Yehoshua on the booty captured from the city of Jericho and the curse that Elisha uttered against the youth and Gai'Chazei his student, the ban that Barak uttered against the city of Maroz (Shoftim 5, 23), the curse uttered by the Men of the Great Assembly against that man (?) and the ban that Rabbi Yehudah son of Yechezkeil uttered against that

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man (?) and in line with all the bans, curses, excommunications that were imposed from the time of Moshe Rabbenu to today.

On what basis could a חרם that was imposed on individuals be lifted temporarily so that they could participate in the communal prayer service on יום כיפור?

בית הבהירה למאירי מסכת נדרים דף כ' עמ' ב'—וקצת גאונים מתירים לאמרו (כל נדרי) אלא שאין כולל לין בו נדרי יחיד אלא נדרי צבור והסכמותיהם בנדר או בחרם ומפני שהצבור רשאים להתיר נדריהם לדעתם בלא שאלה וחרטה ובלא פתח ואפילו היה על דעת רבים. ואף קצת קדמונינו כתבו במסכת שבועות שהגזירות והתקנות שאנו גוזרין על דעת המקום ועל דעת הקהל יש להם היתר אף בלא חרטה שכך הוא דעת הצבור שיתירו לכשירצו. ודעת רבים מן הסתם חל על כל מה שהצבור נסכם אם לקיים אם לבטל וכל שהצבור נסכם עליו צורך מצוה הוא ומתוך שצורך ההפרה מפורסם אפשר להתירו אף על ידי עצמן אבל נדר ושבועה של יחיד אינו ניתר בדברים אלו, ומכל מקום הרבה גאונים חולקים לומר שאף נדרי קהל והסכמותיהם וחרמותיהם לא ניתנה התרתן אלא על ידי שאלה וילכו אצל חכם וכו' על הדרך שכתבנו למעלה אבל מודים הם שיש להם היתר אף כשהוא על דעת רבים, אלא שבקצת מקומות נוהגים להתיר שלא על ידי חכם ושאלה וחרטה אלא שמוציאים ספר תורה ומודיעים על ידי שליח צבור שהם נמלכים להתיר אותו הנדר מעיקרא.

Translation: Some Gaonim allow the recital of Kol Nidre provided that no mention is made of individual vows and is limited to communal vows that the community entered through vow or by decree of excommunication. Communal vows are different in that the community can voluntarily annul their vows without asking a Rabbi and without expressing regret and without a reason to disavow even when the vow was uttered with the consent of the community. Some of the earlier Sages wrote in their comments to Masechet Shavuot that oaths and decrees that are issued with the consent of heaven and with the consent of the community can be annulled even without expressing regret simply because the attitude of the community has changed. The consent of the community is presumed when any communal activity is undertaken—whether it is to institute or to cancel. In whatever manner the community chooses to act, it is considered as being done in furtherance of a Mitzvah. Since the reason to annul the vow is known, it is possible to annul it by their own actions. In contrast, the vow of an individual cannot be annulled in this manner. Notwithstanding the foregoing, many Gaonim held that even communal vows and decrees and bans cannot be cancelled without consulting with a Rabbi. Let them seek out an expert in vows, as we wrote above. Yet they do acknowledge that a way for a community to annul its vows even when the vow was entered by communal consent does exist. In some places it is permitted to annul communal vows even without consulting with an expert and without expressing regret. Instead they follow the procedure of removing a Sefer Torah from the ark and acknowledging through the acts of the prayer leader that they are electing to annul the vow ab initio.

The מאירי appears to support the thesis that כל נדרי was instituted as a means of lifting חרמים that had been imposed on Jews in the community so that those Jews would be welcome to pray with the community on יום כיפור. That the procedure to lift a חרם

required a מנין and the holding of a ספר תורה by the שליח ציבור, acts that are performed as part of כל נדרי, lends support the above thesis.

The use of the phrase: על דעת המקום ועל דעת הקהל in relation to vows and oaths has a long history:

תלמוד בבלי מסכת שבועות דף לט' עמ' א'—וכשמשיבין אותו, אומרים לו: הוי יודע, שלא על דעתך אנו משביעין אותך אלא על דעת המקום ועל דעת בית דין, שכן מצינו במשה רבינו, כשהשביע את ישראל אמר להן: דעו, שלא על דעתכם אני משביע אתכם אלא על דעת המקום ועל דעתי, שנאמר: (דברים כ"ט) ולא אתכם לבדכם וגו' כי את אשר ישנו פה; אין לי אלא אותן העומדין על הר סיני, דורות הבאים וגרים העתידין להתגייר מנין? ת"ל: (דברים כ"ט) ואת אשר איננו; ואין לי אלא מצוה שקיבלו עליהם מהר סיני, מצות העתידות להתחדש, כגון מקרא מגילה, מנין? ת"ל: (אסתר ט') קימו וקבלו, קיימו מה שקבלו כבר.

Translation: And when they adjure him, they say to him: 'Know that we do not adjure you according to your own mind, but according to the mind of the Omnipresent, and the mind of the Beth Din;' for thus we find in the case of Moshe our teacher: When he adjured Israel, he said to them: 'Know that not according to your own minds do I adjure you, but according to the mind of the Omnipresent, and my mind;' as it is said: Neither with you only do I make this covenant and this oath, but with Him that stands here with us. From those words we know that those who were standing by Mount Sinai were adjured; the coming generations, and proselytes who were later to be proselytised, how do we know that they too were adjured at that time? Because it is said: And also with him that is not here with us this day. But from those words we know only that they were adjured for the commandments which they received at Mount Sinai; how do we know that they were adjured for the commandments which were to be promulgated later, such as reading Megillas Esther? Because it says: They confirmed and accepted. They confirmed what they had long ago accepted.