

Who Counts First

Counting Sefira Yourself / Part 2

By Rabbi Moshe Pinchasi

In our previous article, we discussed the prospect of considering the *Hazan's* counting as your own. We concluded that it is better to count yourself, and that even if one heard the counting from someone else with the intent to fulfill the *Mitzvah*, it is best to repeat the count oneself – without a *Beracha*.

In this article, we will discuss the universal custom for the *Hazan* or rabbi to count *Sefirat Ha'Omer* out loud. While most communities today have the custom that the *Hazan* counts first, many communities have an age-old *Minhag* that the congregation counts first and the *Hazan* repeats.

Make No Mistake

It seems that the custom in the times of the *Rashba* was that the *Hazan* counts first followed by the congregants. Although we explained that it is best to count oneself, nevertheless, Ribbi Yaakov Shaul Elyashar (the "*Yissa Beracha*") [1] cites the *Sefer Ben Yedid* [2] who writes that this custom was instituted in order to let the congregants know what the right count is and avoid mistakes. This explanation is also cited by the *Kenesset HaGedola* [3] in the name of the *Maharit* [4].

However, the *Yissa Beracha* adds that the original custom in *Yerushalayim* was that the community counts first and then the *Hazan*. The reason for this

Minhag is because if the individuals hear the counting from the *Hazan* it may be that they have already fulfilled their obligation. On the other hand, they may have to recite *Sefirat Ha'Omer* themselves, as we previously explained. Thus, the custom was that the community counts first. This explanation is also cited in the *Maharashdam* [5].

This may be an issue in places where the custom is that the *Hazan* counts first. If the community already hears the count from the *Hazan*, wouldn't they be entering this issue of having already fulfilling the *Mitzvah*? The *Kenesset HaGedola* explains that while the congregants do not have in mind specifically not to fulfill their obligation with the *Hazan's* counting, nevertheless, since they plan on counting themselves immediately after the *Hazan's* counting, they are clearly not relying on his count but only ensuring that they will count the proper day and that their *Beracha* will not be in vain.

Why Repeat?

We must now understand why in those communities who count before the *Hazan*, the *Hazan*

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would repeat the *Sefirat Ha'Omer* out loud if the community already counted individually. To explain this, the *Shulhan Gavoha* writes[6] that there may still be some individuals who do not know how to recite the *Beracha* and the *Sefira*, and therefore, the *Hazan* repeats the count and has them in mind.

An additional benefit of having the *Hazan* recite the *Sefira* out loud is that those who don't count with a *Beracha* due to a *Halachic* complication

(forgetting to count one day etc.) may rely on the *Hazan's* count[7]. Accordingly, the *Hazan* should have in mind when he recites the *Beracha* and *Sefira* out loud to count on behalf of those who cannot recite the *Beracha* or the *Sefira* for whatever reason.



In light of this, Ribbi Hayim Palacci[8] writes that while, strictly speaking, it is best that the community counts first to avoid the aforementioned issues, practically speaking, there is a real need to have the *Hazan* count first and let the congregation know what the proper count is. Indeed, the *Yissa Beracha* concludes that while the custom in his youth has been that the community counts first, upon seeing the amount of mistakes individuals would make in their counting, most synagogues in *Yerushalaim* have instituted that the *Hazan* counts first, and it is indeed an appropriate custom.[9]

Sources:

- [1] או"ח סי' ס"ה [2] להג"ר ידידיה שמואל טאריקה זצ"ל, ה'ל' תמידין ומוספין [3] סי' תפט הגה"ט סק"ג [4] שו"ת מהרי"ט (למורה"מ טראני ח"א ס"ס קפ) [5] למורה"ש די מדינה, או"ח ס"ס א [6] סי' תפט סק"ו [7] וכמ"ש האחרונים, יעו' במשנ"ב (שם ס"ק

לז) [8] סי' ה סעי' יט [9] ויש להעיר ע"מ שנהגו שהחזן אומר קודם הברכה "ברשות מורי ורבותי", והציבור עונים "שמים", ולכאורה נראה דהוא מכיון להוציא את הציבור יד"ח ואף הם מסכימים לצאת בברכתו, דאי לאו הכי לשם מה צריך החזן ליטול רשות מן הציבור לומר הברכה, ובר מין דין הלא מאחר שידוע לחזן שכ"א יברך לעצמו אחר שגומר הוא את הברכה, א"כ אומדנא דמוכח הוא שאינו מכיון להוציאם יד"ח, וא"כ לשם מה נוטל מהם רשות לברך. וע"פ כל הנ"ל צ"ע מה שמופיע ברוב ככל הסידורים שהש"ץ אומר קודם הברכה "ברשות מורי ורבותי", והלא אין כוונתו כלל להוציא את הציבור, אלא להורות את המנין הנכון והדרך אשר הילכו בה, וא"כ אין כלל מקום לזה, ולולא דמסתפינא אמינא שבטעות

נדפס נוסח זה בסידורים וכבר היו דברים מעולם, ויותר נפלאתי כששמעתי אחד העם שסח לי לפי תומו שכוונתו לצאת בברכת הש"ץ ולא בספירה, בחושבו שזהו הטעם שאומר הש"ץ ברשות מורי ורבותי, וכבר כתב ההלל שיוצא בה יד"ח מהחזן, וא"כ נמצא שאף יוצאת מכשלה לעם מנוסח זה שהרי הש"ץ אינו מכוון לפטור את העם בברכתו, היות וידוע הוא

שכולם מברכים אח"כ [ואע"פ שכי לעיל דלדעת שו"ע הגר"ז אין הכוונה מעכבת לצאת יד"ח למ"ד מצות אינם צריכות כוונה, מ"מ אי"ז השיטה הרווחת בפוסקים ועכ"פ אין נראה לנהוג כן לכתחילה], ולולא דמסתפינא הייתי אומר שיש לבטל את נוסח זה קודם הברכה, ואולי יש ללמד זכות ע"ז אם הש"ץ יכוון בברכתו להוציא את מי שרוצה לצאת, ואז תהיה עכ"פ הצלה לאותם עמי הארץ שאינם בקיאים לספור וכמש"כ השו"ג, או כמשנ"ת לעיל כדי להוציא את אותם ששכחו לספור יום א', דלכתחילה יש להם לבקש מאדם אחר שיוציאם בברכתו, ואם הש"ץ יכוון להוציאם יהיה הדבר נקל עליהם מלטרות כל יום ויום אחר אדם שיברך בשבילם, אך מה נעשה שכיום הש"ץ יודע שאינו מוציא יד"ח בברכה זו, וכאן עמד קנה במקומו, וה' יצילנו משגיאות בתורתו, אמן.

Might as Well...

Are you allowed to use an item that you intend to return?

By Dayan Yehoshua Grunwald

As we discussed in previous articles, sometimes the buyer has the right to return an item to the seller while, at times, it may be subject to the seller's

discretion. An important discussion regarding an item that is bound for return as it was a *Mekah Ta'ut* – a mistaken purchase – pertains to the usage of such an item prior to its return. There are three basic *Halachot* regarding the usage of a mistaken purchase:

1. The buyer may not use the item that he plans on returning because that would constitute *Gezel* – theft.
2. If, after discovering the defect, the buyer used the item, before informing the seller of his claim to invalidate the sale, he can no longer demand a return.
3. The buyer must pay for any usage of the item that he is returning. There are two possible reasons:
[A] *Nehene* – benefitting, i.e. the benefit that he had from the product that belonged to the seller.
[B] To relieve himself of the violation of *Avak Ribbis* – lit. the “dust” of interest – or a very minute form of interest^[1].¹

Not Yours

As far as the first *Halacha* is concerned, whatever would be ordinarily permitted under the laws of *Gezel* would be permitted in this case as well. As such,

- If the item is an article that can be used for a *Mitzvah*, we apply the rule of “*Niha Leh L'Inish D'Liavad Mitzvah B'Mamono*” – an owner is happy that another should use his item for a *Mitzvah*² [2] – and therefore one does not have to seek the owner's permission for such a usage. This can typically apply praying from a *Siddur* when the buyer can't contact the seller to obtain explicit permission to use it.
- If it is the type of item that one does not mind if others use it, the buyer can use it as well. This typically applies to most used or defective items that can be used over and over without losing value.



The Right of Return

The basis for the second *Halacha* that one loses his right to return the item once he used it, is based on the assumption that a person does not want to steal. Given the *Halacha* that using an item of an invalid sale constitutes stealing, we can assume that the buyer waived his right to demand a return rather than assume that he stole. Therefore, this *Halacha* would not apply once the buyer informed the seller that he is returning the item, in which case it is clear that the buyer wants to return the item. In such a case, the sale is invalidated and any **subsequent** use has no bearing on the invalidation of the sale.

There are numerous exclusions to this limitation, though:

1. If the buyer had a situation that compelled him to use the article (an “*Oness*”) he may still demand a return even though he used the article³.^[3]

Rav Z.N. Goldberg *shlit"a* is of the opinion that this logic would apply to any case where the user had the right to use the item without a concern of *Gezel*, as was previously discussed (c.f. footnote 1).

2. According to some *Poskim*, if it is a significant defect where it is obvious that no one would overlook such a defect, the buyer may demand return, even though he used it before claiming the right to return it.
3. According to some *Poskim*, if the seller has no proof that the buyer used it, the buyer can claim that he never forgave his right to demand a return. This is based on a ‘*Migo*’ (a claim on the basis of a possible alternate claim) that he can say he never used it.⁴^[4]
4. According to some *Poskim*, if it is an item that is designated to be rented out (or sold), the usage doesn't constitute waiving the right to renege on the sale, since in such cases it wouldn't be *Gezel* to use it with intention to pay for the use.⁵^[5]

Pay Per Use

As far as the third *Halacha* that one must pay for the usage of an item he intends to return, it should be noted that when this *Halacha* is applicable, the buyer must pay for all the usage he had of the item, including the usage performed before he discovered the defect.

As we mentioned, this *Halacha* has two possible reasons:

[A] *Nehene*: One must pay for benefitting from his friend's item. This would only require him to pay if the seller wants the money and it fits the *Halachic* criteria of paying for benefitting from another.

It should be pointed out that:

- When the buyer had another item that he could have used instead and the seller couldn't have rented out this item anyways, he essentially didn't benefit from the usage and would be exempt from paying for its use.
- Even if the buyer didn't have another item to use, but the seller anyhow had no loss from the fact that he used it, he would be exempt from paying for the use based on the rule of "*Ze Nehene VeZe Lo Hasser*" – *this one (the user) is benefitting and this one (the owner) isn't losing*.
- According to some opinions, the obligation to pay for deriving benefit won't apply in a scenario of a mistaken purchase of a moveable object (*Mitaltelin*).^{6[6]}

[B] *Avak Ribbit*: Based on the rule that whenever the buyer reneges on the sale because of *Mekah Ta'ut* – a mistaken purchase – the sale is invalidated retroactively from the time of purchase, then, the money that was given to the seller is considered a "loan". If the buyer is exempt from paying for the usage, he in essence receives from the seller the benefits of usage plus *full* reimbursement of the loan, which constitutes a minor form of *Ribbit*.

Rav Nissim Karelitz *shlit"a* is quoted^{7[7]} as saying that in most cases when it is simple courtesy for the seller not to demand compensation for the usage of the item, it wouldn't constitute *Ribbit* either, since the forgiveness of paying for the usage is for the purpose of improved customer relations.

Sources:

[1] *Levush*, quoted in *S'ma* (S"K 33) [2] See *Taz* (*Siman* 359) that extends this to all cases where the user is in need of and is willing to pay all costs for its use, because it is a *Mitzvah* for the owner to allow another to use his item in times of need. The author of this article heard from Rav Z.N. Goldberg *shlit"a* that based on this *Taz* the user retains his right of returning the item after using it when he was in need since there was no *Gezel* involved. [3] *Pitche Teshuva* 232;1 [4] See, however, *Sefer Dine Mamonot*, which states that according to some opinions the seller can force the buyer to swear that he didn't use the item. Accordingly, the seller would be able to make the buyer swear that he didn't forgive his rights to renege on the sale. [5] See *Sefer Meshiv BaHalacha* (*Siman* 8) [6] See *Ohr Gadol* on *Mishnayot* (*Bava Metzia*, *Perek* 4). See, however, *Ohr Sameah* (16;8) that disagrees. [7] See *Darche Mishpat*, Vol 3, pg. 149.

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