

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY
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Dedicated in memory of Gertrude Spiegel a"h
by Patti and Michael Steinmetz and Family

SHIUR #11:
ZACHIN LE-ADAM SHELO BE-FANAV AS A DERIVATIVE OF
SHELICHUT

One of the most ubiquitous halakhic tools is the apparatus known as *shelichut*. Activities meant to induce new halakhic states may be delegated to agents through the process of *shelichut*. The ubiquity and potency of *shelichut* is due in part to the fact that it is derived from three separate *pesukim* in three very different areas of Halakha (*kiddushin*, *teruma*, and *korbanot*).

For *shelichut* to work, it typically requires a DIRECT appointment by the *ba'al davar*, the person who will dispatch the *shaliach* and who will absorb the halakhic consequences of the action performed. However, several *gemarot* assert the ability to represent another person without direct appointment. If the given activity is overwhelmingly beneficial, a “*zekhut*,” it can be performed by an agent who has not been explicitly appointed. This ability is known as “*zachin le-adam shelo be-fanav*.” The *Rishonim* differ as to the relationship between classic *shelichut* and *zachin*, and this debate affects to the nature of *shelichut* itself.

Many *Rishonim* – particularly Rashi (*Bava Metzia* 12b, *Gittin* (9b) and *Tosafot* (*Nedarim* 36b, *Gittin* 11b and *Ketuvot* 11a) – claim that *zachin* is a derivative of *shelichut*. Despite the absence of an overt declaration of agency, one person can represent another in matters that are beneficial. Ultimately, there is only one track allowing halakhic representation – the *shelichut* track. *Zachin* is merely unconventional *shelichut*!

Tosafot (*Ketuvot* 11a) and the *Ran* (*Nedarim* 36b) – as well as Rashi in *Gittin* (9b) – claim that *zachin* comprises “appointment by assumption.” Even

though no explicit appointment has occurred, we can ASSUME THAT the beneficiary would have appointed the *zachin* representative had he known that the benefit was available. Halakha often allows *umdana*, assumptions that serve in place of explicit declarations. In the case of an agent, ASSUMPTION of appointment is sufficient and functions as ACTUAL appointment.

Without question, this interpretation changes our view of how a *shaliach* is appointed. We might have assumed that appointing a *shaliach* is similar to any other halakhic process that changes the status of a person or item. Accordingly, it would require full *da'at* (cognitive intent), since the appointment effectively changes the status of the agent from a common person into a halakhic *shaliach*. If this were true, "assumed *da'at*" would not be sufficient to create this appointment. Whenever a person's *da'at* fuels a halakhic change, it is required in "real time" and not just as an assumption. Presumably, then, if assumed *da'at* is sufficient to drive appointment of a *shaliach*, the process of appointment is dissimilar to typical status changes.

Perhaps *minuy* (appointment) does not actually ALTER the status of a *shaliach*; rather, it merely broadcasts GENERAL AGREEMENT or interest that another's actions should service the halakhic interests of the representee. This would invite novel applications of *minuy*. For example, can a *shaliach* be appointed to perform actions upon a *davar shelo ba le-olam*, an item that will materialize in the future but does not yet exist? Real halakhic processes cannot affect these items based on the principle of "*ein adam makneh davar shelo ba le-olam*." If *minuy* were similar to classic halakhic "change mechanisms" (known as "*chalos*"), perhaps it could not work regarding items upon which classic *chalos* is non-operative. However, if *minuy* is not a *chalos* – as evidenced by the fact that assumed appointment can serve as actual appointment – perhaps *minuy* CAN be projected pertaining to items that have not yet materialized even though classic *chalos* (such as *kinyan*) would not obtain.

The *Ketzot* (*siman* 105) disagrees with the notion that assumed appointment suffices as halakhic *minuy*. Interestingly, his opposition was not based on a logical concern, but rather on a *gemara* in *Bava Metzia* (21b-22a). The *gemara* first considers sanctioning the use of a *shaliach* appointed by assumption to perform *teruma* designation. Yet the *gemara* rejects this option, preferring instead to interpret the situation as one of classic *shelichut*. The

Ketzot assumes that this rejection resulted from the *gemara's* rejecting the VERY NOTION of assumed appointment, choosing the only other option – actual, classically-appointed *shelichut*. (In truth, there are numerous ways to interpret the *gemara's* rejection, many of which maintain the validity of appointment by assumption but reject it in the PARTICULAR CASE of designating *teruma*.)

Instead of viewing the category of *zachin* as assumed appointment of a *shaliach*, the *Ketzot* maintains that the halakhic system itself appoints individuals to act as agents on behalf of an unknowing recipient in situations that are overwhelmingly beneficial to them. Precedent for halakhically/objectively designated *shelichut* exists in the context of *Kodshim*. Many *gemarot* suggest (see *Kiddushin* 23b) that *Kohanim* perform certain services as a *shaliach* of the owner of the *korban*, yet classic appointment is not required. One explanation is that the Torah appoints the *Kohanim* as automatic agents in the performance of *avodot ha-Mikdash*.

The *Ketzot* suggests a *nafka mina* between his concept of institutional appointment and Tosafot's concept of assumed appointment. The *gemara* in *Bava Metzia* (10a) suggests that a situation of *shelichut* that benefits some but injures others would fail. Thus, an agent cannot seize funds on behalf of one creditor if others creditors would be impeded from collecting (“*tofes ba'al chov be-makomo shechav le-achrini*”). Rashi claims that a classic *shaliach* WOULD succeed in this case, but a *zachin* agent cannot benefit some while harming others. Evidently – at least according to Rashi – this scenario impairs *zachin*, but not *shelichut*. If *zachin* were simply *shelichut* by assumed appointment, this limitation would be questionable. Just because a person's benefit negatively affects others does not mean he doesn't desire that benefit. If a person desires a benefit, we can assume he would have appointed a *shaliach*, and *zachin* – namely, *shaliach* by assumed appointment – should certainly operate! However, if the appointment is institutional – that is, the halakhic SYSTEM automatically designates agents for beneficial tasks – the *gemara's* limitation makes sense. From the Torah's perspective, benefit to one person that entails harm to another cannot be considered "BENEFICIAL" and cannot be institutionally designated to an agent. The unique *zachin* limitation in situations of benefit to one and harm to another is perfectly suited to the logic of the *Ketzot*.

It should be noted that the *Ketzot* asserted this logic within Rashi's position. Previously, Rashi was cited as having clearly articulated *zachin* as *shelichut* by assumed appointment. It is difficult to assume that he would agree with the *Ketzot's* version of institutional appointment. Rashi would presumably offer a different logic to explain the limitation of *zachin* in situations of benefit to some and harm to others.

Perhaps a different question about *zachin* can be studied in light of these two models of *zachin* as *shelichut*. Should a process be gauged as beneficial in subjective terms or objective terms? Presumably, if the appointment is assumed, we may assume interest as long as the process is PERSONALLY beneficial, regardless of common norms. However, if the *Ketzot* is correct and the halakhic system appoints a *shaliach* for beneficial activities, perhaps a more objective gauge should be employed.

An interesting comment is cited by the Ramban in *Chullin* (39b). Marriage is generally viewed as non-beneficial (*chov*), and therefore not subject to *zachin* representation. An un-appointed *shaliach* cannot execute marriage on a man's behalf since this would obligate him to halakhic marital payments. However, the Ramban quotes a minority opinion that if a husband, upon discovering a *zachin* employment, expresses interest in the marriage, it is retroactively proven that marriage FOR HIM was beneficial and the *zachin* is retroactively validated. This position allows personal preference in determining *zachin*-worthy activities. Even something that is typically considered a *chov* can be personally determined to be a *zekhut* and therefore subject to *zachin*. It is unlikely that the *Ketzot* would agree to this position; those who define *zachin* as appointment by assumption would have an easier time adopting this perspective.

A reverse case appears in a comment of the Rashba in *Kiddushin* (23b). Can a clear-cut benefit be rejected based on personal opposition? The *gemara* in *Kiddushin* allows *zachin* in liberating a slave. A non-appointed *shaliach* can unilaterally accept a bill of emancipation (*shetar shichrur*) from the owner of a slave because it is generally beneficial for slaves to be liberated. One would think that if the slave, upon discovering the *zachin* attempt, registers his opposition, the liberation is deemed non-beneficial and *zachin* fails. However, the Rashba claims that EVEN IF THE SLAVE OBJECTS, *zachin* operates. (The Rashba is forced to distinguish between

this situation of “forced *zachin*” and the simple reading of *Bava Batra* 138a, which implies that *zachin* can NEVER be forced.)

The fact that the Rashba allows compulsory *zachin* in a situation GENERALLY deemed to be beneficial appears to reflect the logic of the *Ketzot*. Since *zachin* is halakhically appointed *shelichut*, it works in situations that are conventionally regarded as beneficial. Personal preference may not affect the institutionalized *shelichut* appointment. However, if *zachin* entails appointment by assumption, it is difficult to imagine that it could work in situations in which clear opposition is registered.