

TALMUDIC METHODOLOGY
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SHIUR #10: TZEROROT AS A NEW PARADIGM

In previous *shiurim* (numbers 4, 5 and 8 Talmudic Methodology 5771), we addressed the nature of *tzerorot* damage. Because the damage is performed indirectly, through the "*koach*" of the animal, it is not be considered classic "*nizkei mammon*." The *Halakha Le-Moshe Mi-Sinai* reduced the payments from full *nezek shalem* to partial *chatzi nezek* amounts. Although *tzerorot* seems to be an extension of *regel*, it may be a hybrid between *keren* and *regel*, as evidenced by many of the *keren halakhot* that Rava attempts to apply to *tzerorot* cases, such as *mi-gufo* limits on payment and the *ha'adah* process.

R. Ashi (19a) introduces a fascinating question which may transform our understanding of *tzerorot*. What would happen if the *tzerorot* occurred in irregular fashion? The classic *tzerorot* scenario entails an animal walking normally and flinging pebbles in the process. What would happen is the pebble projections occurred through an animal's stomping? Normal *tzerorot* enjoys a reduction to *chatzi nezek*, and general and direct irregular *keren* activities enjoy a reduction to *chatzi nezek*; should irregular *keren* type *tzerorot* activities enjoy a DUAL reduction, leading to a $\frac{1}{4}$ payment? R. Ashi does not reach a conclusive response, and his hesitation is intriguing. Why, indeed, shouldn't this double exemption apply?

R. Ashi's hesitation to apply the dual reduction may stem from a question regarding the nature of *keren tam* damages. When the Torah legislated half payments for *keren tam*, did it intend a fixed SUM or a PERCENTAGE? In other words, should *keren* pay precisely half of the damage or half of the normal full restitution? This question itself may stem from the *gemara's* earlier query (*Bava Kama* 15a) regarding whether half payments of *keren* entail a discounted monetary compensation ("*mammon*") or a levied fine ("*kenas*"). If the payments

are compensatory, it is likely that the half payments represent a percentage – that is, half the payment of what would normally be rendered in an instance of typical damage. However, if the *keren* payments are penal, perhaps they are locked-in at 50% of the overall damage, not 50% of normal restitution.

Thus, if *keren* payments are compensation, perhaps a *keren* form of *tzerorot* should pay half the typical *tzerorot* amount, in which case $\frac{1}{4}$ payments should be rendered. If, on the other hand, *keren* payments are a fine that is FIXED at half of the total damage, a *keren* form of *tzerorot* should still pay $\frac{1}{2}$, even though the starting point for typical damages in that case would be half. Rav Ashi may have been probing the nature of *chatzi nezek* payment for *keren*, an issue entirely unrelated to *tzerorot*.

Alternatively, R. Ashi may have been inquiring about the nature of *tzerorot*. The conventional model of *tzerorot* suggests a 50% discount because the damages occur through the animal's *ko'ach*. Essentially, *tzerorot* conforms to the classic model of *nizkei mamon* (damages performed by a person's possessions), with the exception of the "indirectness" of the action, which accounts for the half *nezek* discount. Aside from the adjusted payment tables, *tzerorot* behaves like the other typical forms of *mazik*. If this is the case, the rules and exceptions of typical *mazikim* can be "overlaid" with *tzerorot*. For example, if *tzerorot* damages occur three times in succession, the process of *ha'adah* should result, augmenting the payments to full restitution. Along the same lines, if the *tzerorot* occurred in an unusual manner, we should apply the *keren tam* half payment discount on top of the *tzerorot* "INDIRECT ACTION DISCOUNT," and a *keren form* of *tzerorot* should pay $\frac{1}{4}$ damages.

Rav Chaim introduced a very different view of *tzerorot*, arguing that indirect damages caused by an animal ARE NOT ATTRIBUTIBLE TO THE ANIMAL in the same way that indirect human actions are attributable to the human. Because an animal does not act with cognition, only bodily actions are attributable to it. Unlike cases of human action, we do not assume that "*kocho kigufo*" regarding animals. Since indirect actions of an animal are not considered authored actions, *tzerorot* damages should not really obligate ANY payment according to conventional *Bava Kama* rules. The *Halakha Le-Moshe Mi-Sinai* essentially establishes an entirely NEW PARADIGM of *hezek* named *tzerorot*

and assigns it with *chatzi nezek* payments. *Tzerorot* is not an incorporated element of the *Bava Kama* system with a *chatzi nezek* discount, but rather an entirely independent model that does not necessarily accord with the standard rules of *Bava Kama*.

This perspective on the nature of *tzerorot* may account for R. Ashi's hesitation in applying a $\frac{1}{4}$ payment in case of a "*shinuy*" of *tzerorot*. The view of *chatzi nezek* payments as a DISCOUNT from standard full restitution presumes symmetry between *tzerorot* and classic *hezek*; *tzerorot* is simply indirect, and thus discounted. According to Rav Chaim, however, *tzerorot* is an entirely new form of payment, entailing an autonomous form of damage, and is thus not subject to the classic rules of *Bava Kama*. The *chatzi nezek* charge was an ASSIGNED payment, not a STARTING POINT to be further updated by applying additional *Bava Kama* clauses. In that case, perhaps the *halakha* locked-in *tzerorot* to half payments, rather than issuing a reduction that could be coupled with a different discount. *Tzerorot* payments can never dip below 50%, and *tzerorot* activities carry identical payments regardless of whether they occur under *keren* circumstances or *regel* conditions. *Tzerorot* is immune to *Bava Kama* applications.

This approach of Rav Chaim may have been presented by Rabbenu Peretz in his comments to Rava's question about *tzerorot* and *hada'ah* (See Rabbenu Peretz to *Bava Kama* 18b). As discussed previously, Rava wanted to know whether *tzerorot* should pay 100% after three damages the same way that *keren* is upgraded to *nezek shalem* after three occurrences. It is not clear why Rava hesitated to apply *hada'ah* to *tzerorot*. Rabbenu Peretz asserts that Rava maintained that *chatzi nezek* payments are a fixed sum, which could thus NOT BE EXCEEDED OR ALTERED by the process of *hada'ah*. Even though the process of *hada'ah* may logically transform *tzerorot* into a more regular activity, *chatzi nezek* is the ceiling for *tzerorot* payments. Rabbenu Peretz does not articulate why *tzerorot* payments should be capped, nor does he assert the categorical independence of *tzerorot* found in Rav Chaim's presentation. However, his capping of *tzerorot* payments according to Rava may reflect Rav Chaim's autonomous classification of *tzerorot*. Just as *tzerorot's* independence may limit payments according to Rava, it may similarly fix payments at half according to R. Ashi, even though logic would dictate further reduction.

Interestingly, the independence of *tzererot* may be implicit in an earlier *gemara* (3b). Investigating the various *avot* and their respective *toladot*, the *gemara* attempts to classify *tzererot*. The simple reading of the *gemara* yields an assignment of *tzererot* as a *tolada* of *regel*. The *gemara* then questions this classification based on Rava's application of *keren's mi-gufo* laws to *tzererot*. After all if Rava applies a *keren* rule to *tzererot* (*migufo*) he may define *tzererot* as *keren*! At this stage, we would expect the *gemara* to respond that its qualities resemble *regel* and that it is therefore subsumed within that category, even though Rava was willing to apply a *halakha* of *keren* to it.

Yet the *gemara* actually responds that *tzererot* is considered a *tolada* of *regel* because it shares another *halakha* with *regel* (the *reshut ha-rabim* exemption). Why is the *gemara* concerned with the *halakhot* of *tzererot* and not its essential characteristics? Shouldn't the inherent traits (motivation, form of damage) determine the designation and not the *halakhot*, which should logically be a by-product of those characteristics?

This *gemara* may be affirming Rav Chaim's claim. *Tzererot* does not inherently conform to ANY category not *regel* nor *keren*; its traits are totally unique. If we were to assign a category based on its characteristics, no one *av* would stand out as the favorite. Instead, we classify *tzererot* as a *tolada* of *regel* because its HALAKHOT most resemble *regel*. The *gemara* was therefore alarmed that Rava applied *keren halakhot* to *tzererot*; if the *halakhot* of *tzererot* veer from *regel*, there should be no reason whatsoever to align *tzererot* with *regel*.

Of course, Rav Chaim's statement raises a very interesting question: why assign *tzererot* at all as a *tolada* of ANY *av*? If *tzererot* is indeed completely independent, why attempt to catalog it within unrelated categories? In some respects, the *gemara's* "uncertainty" about *tzererot's* natural identity confirms Rav Chaim's principle of independence, but the insistence on assigning *tzererot* with SOME *av* may refute Rav Chaim's concept.