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-gufa 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 ¼ 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 ¼ 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 ½, 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 ¼ 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 ki-gufu” 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 ¼ 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 tzerorot may be implicit in an earlier gemara (3b). Investigating the various avot and their respective toladot, the gemara attempts to classify tzerorot. The simple reading of the gemara yields an assignment of tzerorot as a tolada of regel. The gemara then questions this classification based on Rava’s application of keren’s mi-gufo laws to tzerorot. After all if Rava applies a keren rule to tzerorot (mi-gufo) he may define tzerorot 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 tzerorot 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 halakh of tzerorot and not its essential characteristics? Shouldn’t the inherent traits (motivation, form of damage) determine the designation and not the halakh, which should logically be a by-product of those characteristics?

This gemara may be affirming Rav Chaim’s claim. Tzerorot 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 tzerorot as a tolada of regel because its HALAKHOT most resemble regel. The gemara was therefore alarmed that Rava applied keren halakhot to tzerorot; if the halakhot of tzerorot veer from regel, there should be no reason whatsoever to align tzerorot with regel.

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