YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #10: Is the Double Portion of a *Bekhor* a Gift from His Brothers?**

The [previous *shiur #09*](http://www.vbm-torah.org/archive/metho73/09metho.htm) discussed the conceptual labeling of the double portion of the *bekhor* as a gift, a *matana*. Although this delays the point of acquisition, it certainly empowers the *bekhor* with the right of refusal or renunciation. Who is the source of this gift – the deceased father or the *bekhor*’sbrothers? The simple reading of the *pasuk* suggests that the father delivers the gift to his firstborn son, describing his act as, "*latet*," “to deliver.” The *pasuk* describes the FATHER’S act as “*latet*” to deliver implying that the father delivers the gift. However, R. Yaakov of Lissa in his *sefer* *Netivot Ha-mishpat* (*siman* 278) advances a very different claim, suggesting that the bothers inherit the entire estate and are then biblically obligated to deliver a gift of a double portion to the *bekhor*. He identifies several *halakhot* that stem from this conceptualization of the double portion as a gift from the BROTHERS.

The *Netivot* asserts this theory to explain two interesting *halakhot* about the allocation of the double portion of *bekhor*. First, he disagrees with a comment of the *Ketzot Ha-Choshen* (278) mentioned in the [previous *shiur #09*](http://www.vbm-torah.org/archive/metho73/09metho.htm). The *Ketzot* ruled that since the Torah empowers a *bekhor* to disavow his second portion, he may renounce it even PRIOR to his father's death. Although cancellation of one’s inheritance rights at that stage is not generally recognized, a *bekhor* possesses a unique "renunciation right" which can be executed even prior to his rights actually materializing. The *Netivot* sharply disagrees, reasoning that the rights to a second portion are unrelated to the father. If they were, perhaps the *Ketzot* would be correct in reasoning that the rights can be cancelled during the father's lifetime. However, since the gift is really delivered by the brothers, the concept of a gift only emerges once the father dies and the brothers inherit the estate. Thus, based on his viewing the double portion as a gift from brothers, the *Netivot* rejects the *Ketzot*'s scenario of rejecting *bekhor* rights prior to the death of the father.

In truth, the notion that the gift of the double portion is “delivered” by the brothers was already stated by a Tosafot in *Bava Batra* (12b). The *gemara* derived from a *pasuk* that, when possible, the double portion should be allocated as one contiguous land. Tosafot question the need for a *pasuk* to illustrate this point; standard laws prohibiting immoral Sedom-like behavior should obligate the awarding of a contiguous double portion. In fact, the *gemara* mandates that when possible, an ordinary non-*bekhor* inheritor should receive his "standard portion" adjacent to his previously owned lands. Denying this right would constitute immoral Sedom-like behavior, which halakha disallows (*“kofin al middat Sedom*”). Why does the *gemara* need to find a *pasuk* as the source for a halakha that should result inherently?

In their second answer, Tosafot claim that halakha cannot obligate brothers awarding a second portion to their eldest brother to allocate adjacent lands based on the general directive to act morally. The double portion is a GIFT from the brothers, and gifts are not subject to modifying legislation aimed to prevent "immoral" behavior. By definition, a gift-giver is behaving morally, regardless of which lands he delivers as his gift. Since the ordinance preventing Sedom-like behavior cannot compel delivering an "integrated' double portion, it must be inferred from a special *gezeirat ha-katuv*, relevant specifically to *bekhor* inheritance

Tosafot already explained the notion that the brothers and not the father deliver the gift to the first born. Of course, Tosafot’s suggestion is a far more moderate articulation than that of the *Netivot*. Tosafot define the identity of the double portion as a gift from the brother, and therefore immune to further legislation aimed at preventing callous Sedom-like behavior because a gift is moral regardless of its content. The *Netivot* maintains that the MECHANISM of delivery resembles a gift from the brothers therefore the *bekhor* cannot annul these rights prior to the death of his father – the earliest point at which a gift from brothers can be conceived.

The *Netivot* applied this principle to a different anomaly of the *bekhor* portion as well. The *gemara* in *Bava Batra* (136b-137a) describes a *safek* regarding the identity of a *bekhor*. The two contenders for the title of *bekhor* must authorize one another to collect by writing a *harsha'ah*, a legal document authorizing another to collect a debt on your behalf. After this co-authorization, either contender may extract the double portion from the estate. Even if he is not the true *bekhor*, he has been authorized by the other individual who is the *bekhor*. Typically, money contested between two parties can be extracted from the current possessor WITHOUT a *harsha'ah*. The current possessor CERTAINLY does not own the money, and he must relinquish it to the two relevant parties so that they can determine its true owner. In this situation, the double portion is DEFINITELY NOT owned by the estate, but by the *bekhor*. Why must the two *bekhor* candidates craft a *harsha’ah* to extract the money from the estate?

The *Netivot* claims that since the double portion is a gift from the brothers, the estate does not relinquish the money until a certain and definite *bekhor* candidate is identified. If the money went directly to the *bekhor* from the father, the two *bekhor* candidates could have legitimately extracted the money even without a co-authorization. Since, however, the money actually transfers to the brothers, who are then obligated to deliver a gift, the brothers become temporary owners of the double portion and are only forced to relinquish the money to someone who represents both potential *bekhor* options through the device of *harsha’ah*.

I am not sure that the question of WHO delivers the gift is as important in the case of the *safek* issue as the *Netivot* maintains. Ultimately, what prevents the two *bekhor* candidates from extracting the double portion without *harsha’ah* is the STATUS of the inheritance prior to parceling. Is the estate owned by no one, as it awaits division and allocation? Or does halakha recognize the inheritors as joint owners and holders of the estate until further division? Many maintain that the holdings are indeed considered owned by the *“tefusat ha-bayit*,” a partnership-based alliance of inheritors holding the land until distribution. If this is true, obviously two contenders to the status of *bekhor* would not be able to extract the double portion, as the remaining inheritors are considered partial owners. Presumably THIS question – whether inheritors own the estate prior to division – and NOT the assertion of the *Netivot* – whether the brothers are obligated to deliver a gift or the gift is from the father – would more directly explain the inability of the *bekhor* candidates to extract the double portion without *harsha’ah*.

The assertion of the *Netivot* does open an interesting horizon toward understanding some of the unique aspects of the double portion. As already discussed in the [previous *shiur #09*](http://www.vbm-torah.org/archive/metho73/09metho.htm)*,* does a *bekhor* begin to possess ownership “rights” to his double portion before *chaluka* (as regular inheritors possess at the very least), or does he not possess any rights prior to this stage? This question was the basis of the *machloket* between R. Pappa and R. Pappi and influences the *bekhor*’s ability to disqualify those rights. In addition, the question of which rights a *bekhor* possesses prior to *chaluka* affects whether he inherits a double portion of the *shevach*, the appreciation of lands. If he acquires rights to his double portion at time of death, he would also receive appreciation of those assets between time of death and *chaluka*. As noted in the previous *shiur*, this is the basis of the debate between R. Yehuda and the Rabbanan. It is clear that the point at which a *bekhor* begins to enjoy ownership rights over his double portion affects major issues regarding which properties he receives a double portion from.

Unquestionably, the notion of the *Netivot* is linked to this issue. If the gift is actually delivered from the brothers to the *bekhor*, it would likely be one which is delayed to the point of *chaluka*, at which point the standard inheritors begin to make their first decisions. If the *bekhor* receives rights prior to *chaluka*, this would probably eliminate the brothers as the source of that gift, since they are not active at the time of death.