YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

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**Shiur #07: Inheritance of a Brother**

The first *mishna* of the eighth *perek* of *Bava Batra* lists the various inheritors and the second *mishna* in the *perek* describes the order in which they inherit. Uncles are omitted from the first *mishna*, as they are not direct inheritors. Instead, they are inherit through a mechanism known as “*mishmush*,” which allows deceased relatives to participate posthumously in the transfer of inheritance. For example, if a daughter died prior to her father, her father’s inheritance will nevertheless transfer to her inheritors (typically (her siblings) her children) prior to transferring to her father’s father or father’s other children. An uncle can only inherit if the deceased has no descendants, no father, and no siblings. In such a case, *mishmush* will transfer the inheritance to the dead father and pass it along to the father’s siblings – that is, the uncle. Since an uncle’s inheritance is indirect, they are not afforded an independent category in the *mishna*.

One might think that a SIBILNG of the deceased is similarly an “indirect inheritor.” Perhaps inheritance only transfers vertically through parents and children, and not laterally through siblings. In the absence of children and parents of the deceased, the inheritance passes through *mishmush* to the father of the deceased; if he is already deceased, the inheritance passes to HIS primary inheritor – his son, the sibling of the deceased. We may have assumed that a brother is not a direct inheritor of the deceased but merely a *mishmush* beneficiary. However, the fact that the *mishna* lists a sibling and doesn’t list uncles seems to imply that although an uncle is merely a *mishmush* beneficiary, a sibling IS a direct and independent inheritor.

Tosafot (108a) note the contrast between uncles and siblings, but they do not make this distinction. Instead, Tosafot assume that a sibling is also only a *mishmush* beneficiary, just as an uncle is, and they offer an unrelated reason for the *mishna* listing a sibling even though he is not a direct inheritor. Similarly, Tosafot (108b, s*.v. yachol*, [2]) ask why the Torah mentions a sibling as an inheritor, since their benefits could have been inferred through *mishmush*. The obvious response would be that the scriptural mention of a sibling establishes siblings not merely as *mishmush* beneficiaries, but as DIRECT INHERITORS. The fact that Tosafot DO NOT reply in this manner suggests that this Tosafot as well, viewed a sibling as merely a *mishmush* beneficiary.

Surprisingly, most *Rishonim* agree with these two comments of Tosafot in assigning mere *mishmush* benefits to a sibling. As the Ramban asserts in his comments to *Bamidbar* 27, primary inheritance transfers upwards and downwards (parents and children), but not laterally; siblings only benefit through *mishmush*. The Rambam also claims that siblings are not considered direct inheritors.

Though most *Rishonim* denied direct inheritor status to a sibling, some did grant that title. Many believe that the Rashbam assigned direct inheritor status to a sibling since in his initial comments to the *perek* he justifies the sibling’s benefits by claiming “he is a brother.” This entitling would suggest that a sibling enjoys an independent status as *yoresh* and is not merely a beneficiary of *mishmush*. Similar indications emerge from a comment of Rashbam in an unrelated *sugya* in *Bava Batra* 125a. The *gemara* discusses someone who delivers a gift and stipulates that after the recipient dies, the gift should transfer to his own inheritors. R. Anan claims that the ultimate transfer (after the initial recipient dies) can pass along to his inheritors, but not to second level inheritors whose claim is based solely upon *mishmush*. As examples of DIRECT inheritors who CAN receive this indirect transfer, the Rashbam lists daughters, BROTHERS, or the father of the gift giver. Evidently, the Rashbam consistently viewed brothers as ACTUAL inheritors and not merely *mishmush* beneficiaries.

It appears as if Tosafot in *Kiddushin* (17b) also viewed the sibling as a primary inheritor. The *gemara* assesses whether an *eved ivri* is inherited by a son or a brother. It cites various roles of brothers and sons respectively, which may indicate their respective level of closeness to the deceased owner of the *eved ivri*. The *gemara* does NOT cite the higher ranking of a son over a brother regarding inheritance, as potential proof that a son is closer to a dead person than a sibling is. Tosafot claims that inasmuch as a brother is also a YORESH – even though not as close as a son – the *gemara* does not highlight this difference. The *gemara* instead prefers to locate *halakhot* which one relative enjoys and the other is completely deprived of (such as *yibbum*). Tosafot in *kiddushin* evidently agree with the Rashbam and disagree with Tosafot in *Bava* *Batra*.

The question of whether a brother is a direct inheritor or merely a *mishmush* beneficiary can be detected in the very interesting discussion of WHICH type of brother inherits. The *mishna* is very clear that only paternal brothers receive inheritance and not maternal ones. The *gemara* (110b) explains that only the paternal *mishpacha* is considered halakhic “*mishpacha*,” while the maternal one is not. This basis for this law can be understood in two different fashions. Perhaps the *gemara* is asserting that maternal brothers do not enjoy the halakhic status of a brother. This is indeed the impression given by the Rashbam’s comments to that *gemara*. Consistent with his opinion that a brother is a direct *yoresh*, the Rashbam was compelled to disqualify “brother” status from a maternal brother.

If however, a brother is merely the beneficiary of *mishmush*, a maternal brother would be automatically excluded simply because a mother does not inherit a son and therefore cannot facilitate *mishmush* to her live son, the maternal brother of the deceased. The *gemara* (110b) may itself suggest this reading because after disqualifying maternal brothers from inheritance, it endeavors to disqualify maternal brothers from *yibbum* performance. Had the original verse disqualified maternal brothers from the halakhic status as brothers, it would suffice to ALSO disqualify them for *yibbum*. Instead it appears that a maternal brother is eliminated from inheritance simply because his mother cannot facilitate the mechanism of *mishmush*, and the *gemara* must therefore still search for verses which would determine the qualification of a maternal brother for *yibbum*.

R. Akiva Eiger suggests two interesting consequences as to whether a brother is a “direct” or “indirect” *yoresh*. First, he questions whether creditors of the previously deceased father can collect inheritance earmarked for a brother. If a brother inherits DIRECTLY, the creditors of the father cannot collect. However, if the inheritance passes through the late father and on to the siblings of the deceased, the creditors of the father would be able to collect.

A second application concerns the intriguing position of R. Yochanan ben Brokah, who empowers a person to restructure his inheritance chain. Most assume that the Torah superimposes a pecking order and the deceased has no say about inheritance patterns. R. Yochanan ben Brokah (130a), however, allows reordering the hierarchy as long as the designated inheritor is part of the established inheritance chain. Thus, a daughter can be positioned before a son, but an outsider cannot be positioned before an inheritor. Would a person be allowed to position a brother before a son? According to the Rashbam, this would be feasible since a “halakhic inheritor” is being pre-positioned. However, according to the Rambam and Ramban, this would seem illegal, since Rebbi Yochanan ben Brokah only allows insertion of halakhically valid inheritors and a brother is merely a *mishmush* beneficiary, not a direct inheritor.