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Partnerships & Corporations: Part I

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HALACHIC PARTNERSHIPS: THE THREE SCHOOLS OF THOUGHT

While there are two *perakim* in Shas named *Hashutfim*: - one in Nedarim and one in Bava Basra – only certain specific halachos of partnerships are discussed in these chapters. There is no comprehensive, systematic discussion of the laws of partnership and the day-to-day relevancies anywhere in the Gemara. The Rishonim, therefore, glean most of the halachos of *shutfus* from various other areas, such as the laws of *kinyanim*, *shomrim*, *shluchim* and *po'alim*, and apply them to cases of partnerships.

There are three basic schools of thought amongst the Rishonim regarding how halachic partnerships are made:

1. **The Rambam's opinion:** The Rambam is of the opinion that a valid *kinyan*, physical act of a transaction, is necessary for a halachic partnership to be formed; however, he rules that it is not always possible for such a *kinyan* to be made to formalize all types of partnerships. He states that it is only possible to make a *kinyan* and thereby form a partnership if the partners are pooling assets that already exist. By making a *kinyan*, they agree to be partners and to share in these existing assets; therefore, they will jointly share any revenue that these assets generate. However, he states that it is not possible to make a *kinyan* and form a partnership in regards to assets that do not yet exist. Such assets fall under the category of "*davar shelo bah l'olam*", items that are not yet in this world, and it is impossible to conduct any transactions with such non-existing assets. Thus, it would not be possible to make a *kinyan* and form a halachically binding partnership between two partners offering a service and agreeing to evenly split the revenue they intend to earn in the future.
2. **The Ra'avid and Rashba's opinion:** The Ra'avid and Rashba agree with the Rambam that a *kinyan* is required to formulate a binding partnership; however, they assert that a *kinyan* can be made to create a partnership agreement even for assets that have yet to be generated. To justify such an arrangement, they point to the halacha of an *eved*, slave. One may purchase a slave, and, in doing so, acquire all his future earnings, even though they do not yet exist. Once one owns the slave, the future earnings automatically transfer to the owner as soon as they are earned. So too, they posit, when a partnership agreement is formalized, each partner becomes akin to a "slave", so to speak, of the other partners, and part of their future income diverts to them.
    a. The Kesef Mishnah says that if the partnership agreement was explicitly written in this way, with the partners agreeing to be obligated to work for one another, as opposed to merely trying to acquire the future income, the Rambam would agree that it could plausibly work. He

disagrees, however, with the assumption that a standard partnership agreement could be interpreted in this manner.

b. Another mechanism some Acharonim suggest would work even according to the Rambam is the concept of "*hischayvus*" committing oneself to perform a certain act. Although the partners cannot make any transactions regarding the income that does not yet exist, they can commit themselves to transfer those assets once they acquire them. In effect, they can give their word to hand over half their earnings at a later date, and they would be bound by their word. The Minchas Pitim is skeptical of this suggestion and argues that *hischayvus* only works to obligate oneself to transfer funds in general, but not to commit someone to allocate his profits from a specific transaction that hasn't occurred as of yet.

c. The Maharam of Rottenberg takes a more permissive approach and rules that partnership agreements do not need a valid *kinyan* at all. He states that the basis of such mutually beneficial agreements is "*gemiras daas*", the reciprocal agreement of all parties involved, for which a *kinyan* is unnecessary.

3. **The Chazon Ish and other Acharonim** explain the reasoning of the Maharam by saying that a *kinyan* is not an inherent requirement for a transaction to be valid; rather, it is merely a tool used to ascertain that both parties fully agree to the deal. If each side has different interests – for example, one side is a buyer and one side is a seller – a *kinyan* is necessary to clearly display that the two parties both fully commit to the transaction. When all sides have mutual interests, however, there is no need for a *kinyan*.

Some Acharonim point out that Maharam's view of *kinyan*-less partnerships is even more powerful in some ways than the *kinyan avadim* paradigm of the Ra'avid and Rashba. They state that a *kinyan avadim* would only work for future revenue generated by work – such as when two partners each offer a service and pool their income – but it would not work for revenue generated from the business – such as buying and selling properties – as there is no way to liken such business deals to the concept of slavery. According to the Maharam's idea of *gemiras da'as*, however, partnerships can be enacted with no *kinyan* at all for any future business venture, as it is understood that all sides agree and commit to the deal.

MINHAG HAMAKOM AND DINA D'MALCHUSAH: DO THEY APPLY TO PARTNERSHIPS?

Minhag hamakom, the common custom, is a tool that has potency in halacha. It is even more powerful in the area of Choshen Mishpat, with the Yerushalmi going so far as to say that "*minhag hamakom* can override halacha." This leads to the question of whether *minhag hamakom* can create a partnership even when a *kinyan* cannot, such as for assets that were not yet earned according to the opinion of the Rambam. If the common custom is to formalize a partnership for future assets, will this suffice to create a partnership where a *kinyan* can't?

The Radvaz and Chasam Sofer opine that *minhag hamakom* can overcome the problem of not having a proper halachic *kinyan*. The Minchas Pitim disagrees with this view and says that common custom only has the power to enforce certain stipulations on a deal, even if those clauses were not explicitly agreed upon. Since the common custom is for those stipulations to be included in a deal, it is self-understood that both parties agree to them. However, he says that common custom cannot overcome the absence of a *kinyan* to create a brand-new deal out of nothing. He explains that even if one would explicitly say that he wants the halachic kinyan to be valid, he would not be able to do so, as it would still be a *davar shelo bah l'olam;* therefore, *minhag hamakom* cannot possibly be stronger than an explicit pronunciation in halacha.

While we do find a *kinyan* based on common custom called "*situmta*", which could mean a handshake or any action that is commonly done in a certain location but not found in halacha, the Minchas Pitim suggests that this can only be accomplished with a physical action and not through mere words or assumptions, even if they are the *minhag hamakom*.

This assertion that a physical action is necessary for *situmta* to be valid is actually the subject of a *machlokes* between numerous Poskim. The other claim, that *minhag hamakom* cannot overcome a fundamental problem with a transaction, such

as *davar shelo bah l'olam*, is also the subject of a disagreement amongst earlier Poskim. A source for this is a Tosafos that says that when a bride and groom become engaged, penalty clauses can be imposed if either party breaks the engagement. Some Rishonim explain that these penalties are valid, and are not considered *asmachta* – a clause the parties never really intended to fulfill - because it is the common custom to have such fines in certain places. Since *asmachta* is a fundamental problem in the transaction, we see that these Rishonim believe that *minhag hamakom* can overcome such a problem. Other Rishonim disagree and learn the explanation of Tosafos differently, basing their objection along the same lines as the *Minchas Pitim's* argument that common custom cannot be more powerful than an explicit stipulation.

Other Poskim take the view that even the Rambam would agree that a partnership for future revenues would be valid if that is the "*dina d'malchusa*", law of the land. Since we know that "*dina d'malchusa dina*", the law of the land is halachically valid, if the local laws validate such partnerships, the halacha would recognize that, according to these Poskim.

CORPORATIONS: DO THEY EXIST ACCORDING TO HALACHA?

The concept of corporations, wherein shareholders own stakes in a company that has no official owners but is considered to be its own entity, has only existed for the last couple of centuries; therefore, the halachic literature regarding them is all fairly modern. The main question the Poskim struggle with is whether corporations can be considered a halachic entity, or whether they would just be considered simple partnerships, albeit with many terms and clauses.

Regarding the monetary issues, this question does not bear much weight, as all the shareholders and creditors can agree to do whatever they want with their money. If everyone agrees that the shareholders of a corporation have limited liability and are not personally responsible to repay any debt, that is perfectly fine – as all the parties committed to this financial structure when they agreed to do business with the corporation.

The areas where this question is more relevant are those of *issur v'heter*. For example, is it permissible for Jews to own shares in a corporation that owns a bank that collects interest? Are they now partners in a business that collects interest from Jewish borrowers, which would be prohibited, or is the corporation considered its own entity, which would mean the shareholders are not collecting interest and, therefore, are permitted to own shares? Another question in the same vein would be whether Jewish shareholders are permitted to own stock in companies that buy and sell chometz on Pesach or if they can own shares in a company that has employees working on Shabbos.

A minority of Poskim are of the opinion that a corporation is a halachically recognized entity, which would remove all of the above problems for shareholders. Others, including the Igros Moshe, Shevet Halevi, and Moadim U'Zemanim, say that there is no precedent for such a thing in halacha, and a corporation can only be viewed as a complex partnership. According to them, we would have to find other *heterim* for the issues listed above.

Even according to the Poskim who view corporations as partnerships, some issues may be avoided by the nature of such companies. The Maharshag rules that the *ribbis* issue is not a problem if the shareholders have no personal liability for debts incurred by the corporation. He rules that the prohibition of taking interest does not apply to partners who do not accept such liability at the end of the loan. Similarly, some Poskim rule that the prohibition of owning chometz does not apply if the partners have no personal liability. Others say that the shareholders should sell their shares in the chometz over Pesach. There is a question if a standard *mechiras* chometz to a non-Jew would work for such a sale or if the shares would need to be sold in a stock market-type setting that is recognized as legally valid for such stocks. Some Poskim rule that the standard *mechiras* chometz suffices, even though it would not be recognized by law as a valid sale of shares in a company.

One argument for why corporations can be halachically recognized even though there is no halachic precedent for such a thing is based on the abovementioned precept of *dina d'malchusa dina*. Some dispute this argument, with the Moadim U'Zemanim stating that *dina d'malchusa* cannot be used when it contradicts the Torah. Others disagree with his reasoning, claiming that *dina d'malchusa* is

valid even if it directly contradicts Torah, but still say it is not valid in this instance because it does not have the power to create an entirely new type of ownership that halacha does not recognize at all.

FORCED PARTNERSHIPS:

There is one more kind of partnership that is not based on agreements or law, but is actually a de facto or automatic partnership that individuals can be forced to join.

Several Gemaras discuss cases where people share a common need that can be taken care of with one expenditure. In such instances, individuals can be forced to pay for this expense, even against their will. For example, if a common property needs a new fence, all the residents can be compelled to pay for its construction. Similarly, if a river is blocked and needs to be dredged to provide water for all the fields downstream, they all can be forced to pay for the expenditure of dredging the river.

This type of partnership may be relevant to a discussion about modern-day governments.

Rav Shaul Yisraeli writes that the rules of *dina d'malchusa* do not apply to modern governments because that concept was only stated regarding the monarchies of olden times when kings wielded absolute power. He says that today's government officials are actually agents working on the people's behalf. Thus, the country is more like a partnership that appoints employees to do their work for them.

Rav Ezra Batzri strongly disagrees. He writes that the main principle of a partnership is an agreement between the partners. If a partnership appoints employees to oversee their business ventures, the employees cannot force them to accept their decisions against the partners will. In a government, however, all the citizens have to accept whatever the government officials say; therefore, it does not represent a partnership at all.

In defense of Rav Yisraeli, he may have meant that a government is comparable to the type of partnership we just described, where everyone has mutual interests and can be forced to participate. In a country, it is in everyone's interest to have law and order and to appoint officials to govern and decide what individuals can and cannot do. In this way, a contemporary government does resemble a partnership of this type.