

FURTHER IYUN

A Perspective on Ta'amei HaMitzvot Through an Exploration of the Mitzva of Shiluach Hakein

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Famously, the *Rishonim* were at odds as to how to conceptualize mitzvot. There were those who claimed that mitzvot worked on a supernatural plane, above the level of human existence, and others who claimed that, far from being mystical actions affecting another world, mitzvot effect change in the here and now, in this world.

The mitzva of *Shiluach Hakein* is an excellent test case for these various opinions, as within this context specifically we can see how each finds halachic expression. The question as to whether one has an *obligation* to find a nest in order to fulfill the mitzva of *Shiluach Hakein*, and if so, to what extent, revolves around the underlying purpose of mitzvot in general.

In *Devarim* 22:6–7, the Torah states:

If you're on the road and you happen upon a bird's nest, in a tree or on the ground, [full with] chicks or eggs, and the mother is hovering over the chicks or the eggs, do not take the mother bird and the chicks. Send the mother bird away and then take the offspring, so that things will go well for you and your life will be extended.



The reward for such a mitzva is great, and tempting! Simply by sending away the mother bird and taking the chicks, one merits a long and good life!

Through an exploration of the Gemara, we will see some of the halachic parameters of the mitzva; from there we will explore the nature of the mitzva – is this a mitzva *kiyuvit* (voluntary mitzva¹) or a mitzva *chiyuvit* (an obligatory mitzva); from there, we will explore the nature of mitzvot in general and see how the various opinions understand the nature of the mitzva of *Shiluach Hakein*.

Should One Search for a Bird's Nest in Order to Perform the Mitzva?

The Gemara in *Chullin* (139b) discusses the exact scope of the mitzva:

“If you're on the road and happen on a bird's nest;” what is the Torah coming to teach us with this verse? Because it says later on, “Send away the mother bird and take the eggs;” I might have thought that one needs to go searching in the mountains and hills for a bird's nest [with which to perform the mitzva]. [Therefore] the Torah writes, “If it

1. An exploration of the exact definition of these two terms is outside the scope of this essay. The understanding utilized in this essay is according to the *Minchat Chinuch* (325:9). See *Sha'arei Yosher* (3:20:410–414) for a dissenting view.

happens before you,” to teach you that [this *din*] is only when it happens by chance.

“Nest” – in anywhere, “bird” – to teach you a kosher bird and not a non-kosher bird, “before you” – in a private domain, “on the way” – in a public domain. How do I know [this is the *din*] in trees? The Torah says, “In any tree.” How do I know [this is the *din*] in pits, trenches and caves? The Torah writes “or on the ground.”

And now that we have included all these various things [in our *drasha* of] the *pasuk*, why does the Torah write “before you on the road”? To tell you: Just as on the way it’s not in your ownership, so must all nests [that you want to perform the mitzva] be out of your ownership. From here we learn that doves from the coop and from the attic that built their nests in parts of the building that receded or jutted out, and geese that nest in orchards – one can perform the mitzva with them, but if they nested inside the house, and similarly Herodian doves, one cannot perform the mitzva with them.

The Gemara goes through each of the words of the *pasuk* to identify the various *dinim* that pertain to the mitzva of *Shiluach Hakein*. Crucially, the Gemara comes to the conclusion that one has no obligation to search for a nest with which to perform the mitzva; rather, if one happens upon a nest, one can perform the mitzva.²

The **Semak** (251) confirms the conclusion of the Gemara and writes:

We taught in *Perek Shiluach Hakein* that the mitzva of *Shiluach Hakein* is only practiced

when the nest is not prepared [for such a purpose] but rather happens by chance.

This conclusion is also confirmed by the **Rif**³ and the **Rosh**,⁴ who both quote the Gemara as it’s written. The **Ran**⁵ and the **Meiri**⁶ also write that the mitzva is only practiced when one happens upon a nest by chance, not when the nest is prepared and waiting for the mitzva.

As we have seen, the Gemara and the *Rishonim* overwhelmingly understand that the mitzva is only in effect when the nest is happened upon by chance, or at the very least in a place where it is not under human control.

If You Find a Bird’s Nest, Do You Have to Perform the Mitzva? (Mitzva *Chiyuvit/Kiyumit*)

The next question we must address is the *chiyuv* to perform *Shiluach Hakein*. If one finds a nest, and doesn’t want the eggs or chicks, must one nevertheless send the bird away (mitzva *chiyuvit*) or is one only *chayav* to perform the mitzva if one wants the eggs or chicks (mitzva *kiyumit*)?

In order to answer this question, we turn to the Gemara in *Chullin* (138b–139a):

By profane [birds] and not by sanctified [birds]. Why not? For the *pasuk* says: “Send away the mother bird” – that which you are obligated to send, and not that which you are not obligated to send, but rather to bring to the Temple treasurer.

Ravina said: Therefore, a bird which has killed a human is exempt from the mitzva of *Shiluach Hakein*. Why? The *pasuk* says to send that which you are obligated to send,

2. We will explore in a later section whether or not one *must* perform the mitzva in such a circumstance.

3. *Chullin* 48a.

4. *Chullin* 12:1.

5. Chidushei HaRan, *Chullin* 139b.

6. *Beit HaBechira*, *Chullin* 139b.

not that which you are not obligated to send but rather to bring to the *beit din*. How would such a case happen? If the bird's *din* has been decided already, it's *chayav mitah!* Rather, the case is where the *din* hasn't been decided and he needs to take the bird to the *beit din* to fulfil the mitzva of "And you should remove the evil from within your midst."

Based on this Gemara, the **Ran** (*Chidushei HaRan, Chullin* 139a) asks a question. Shouldn't the positive and negative mitzvot associated with *Shiluach Hakein* come and push off the positive mitzva of *ובערת*?⁷ He answers by explaining that the mitzva of *ובערת* carries more weight than that of *Shiluach Hakein* because there is no choice about *ובערת*, while concerning *Shiluach Hakein* the individual doesn't have to perform the mitzva if he's not interested in the eggs/chicks. From the Ran we see quite clearly that the mitzva is a mitzva *kiyumit* – a mitzva that is performed on a voluntary basis, where if one puts oneself in a certain circumstance the mitzva must be performed, but where there is no obligation on the person to perform the mitzva.

Another Gemara can help us to clarify the issue further. The Gemara in *Chullin* (140b) asks a series of questions about *Shiluach Hakein*:

Asked R. Yirmiyah: A cloth that you spread [over a nest], does it make a separation [that would separate between the eggs and the bird and therefore enable one to take the eggs without performing *Shiluach Hakein*]? Do feathers make a separation? Do irregular (i.e. non-fertile) eggs make a separation? Do two rows of eggs one on top of the other make a separation? Does a male bird [which isn't part of the *chiyuv* of *Shiluach Hakein*] with a

female bird on top of him make a separation? Undecided.

In **Rashi's** (s.v. *mahu she'yachutz*) explanation of the Gemara he writes:

Two rows of fertile eggs one on top of the other what's the *din*? If he only wants the bottom eggs, do the top eggs create a barrier which would exempt him from sending away the mother bird, or not?

Tosafot (s.v. *sh'nei sidrei betzim*) also explains the Gemara this way:

Meaning, [the question in the Gemara is asking] do the lower row of eggs create a separation before the mitzva of *Shiluach Hakein* [is in effect], for it wouldn't be a separation, it would be forbidden to take the eggs until he sends the mother away, as we explain later.

R. Yair Bacharach⁸ understood that the approach of Tosafot and Rashi implies that one can choose whether or not to perform the mitzva or not, for if this was not the case, one would be obligated to perform the mitzva on the first row of eggs, and the problem would be moot.

It seems clear from these two Gemarot and the *Rishonim* that the mitzva of *Shiluach Hakein* is a mitzva *kiyumit*, and need only be fulfilled when one wants the eggs or the chicks. Many *Acharonim* agree with this conclusion. The **Pitchei Teshuva** (y.d. 292) writes that it's not a clear obligation and there's no *bitul aseh* for not performing *Shiluach Hakein*, though similar to *tzitzit*,⁹ one who doesn't perform the mitzva given the opportunity is not completely protected in a time of trouble.

7. *Devarim* 13:6: והנביא ההוא או חלם החלום ההוא יומת כי דבר סרה על ה' אלוקים המוציא אתכם מארץ מצרים והפדך מבית עבדים להדיחך: מן הדרך אשר צוך ה' אלוקים ללכת בה ובערת הרע מקרבך:

8. *Chavot Yair* 67.

9. A classic mitzva *kiyumit*.

The **Chatam Sofer** (o.c. 1:100) connects the discussion here to that regarding another aspect of the nature of the mitzva of *Shiluach Hakein* – is it a *mitzvat aseh* in and of itself, or a *lav hanitak l'aseh* (a positive commandment that comes to repair a transgression¹⁰). He writes that if one holds like R. Yehuda that it's a *mitzvat aseh* in and of itself to send the mother bird away, this seems to be the case whether or not one wants the birds – in any event one must perform the mitzva. However, if one holds like the Rabbanan that *Shiluach Hakein* is a *lav hanitak l'aseh*, then the mitzva is a mitzva *kiyumit* that one performs only in an instance where one wants to take the chicks/eggs. The **Chazon Ish** also writes that it is a mitzva *kiyumit*, and proves his opinion from a *beraita* in *Chullin* (141b) that states that pigeons of a dovecote or of an attic nesting in someone's property are *chayav* in *Shiluach Hakein* but it's rabbinically prohibited to take them because of *darkei shalom*. The **Chazon Ish** proves from here that if it were an absolute *chiyuv* from the Torah to send away the bird whenever one came across a nest, it wouldn't make sense to push aside a Torah obligation for a rabbinic prohibition of “*darkei shalom*.”

We've seen that overwhelmingly, the *Gemarat*, *Rishonim*, and *Acharonim* rule that one is not obligated to send the mother bird away if one does not want the chicks/eggs, and certainly there is no advantage to searching after a nest.

Various Approaches in the *Rishonim* to the Mitzva of *Shiluach Hakein*

From this point, we will begin to explore the opinions of the *Rishonim* as to the reasoning behind the mitzva of *Shiluach Hakein*. We will

discover that there are two main schools of thought, and that these two approaches affect the modern day approach to the performance of the mitzva, at times even at odds with the halacha as we've understood it until now.

In the *Moreh Nevuchim*¹¹ (3:48), the **Rambam** writes:

The commandment concerning the slaughtering of animals is necessary. For the natural food of man consists only of the plants deriving from the seeds growing in the earth and of the flesh of animals, the most excellent kinds of meat being those that are permitted to us. No physician is ignorant of this. Now since the necessity to have good food requires that animals be killed, the aim was to kill them in the easiest manner, and it was forbidden to torment them through killing them in a reprehensible manner by piercing the lower part of their throat or by cutting off one of their members, just as we have explained.

It is likewise forbidden to slaughter it and its young on the same day, this being a precautionary measure in order to avoid slaughtering the young animal in front of its mother. For in these cases animals feel very great pain, there being no difference regarding this pain between man and the other animals. For the love and the tenderness of a mother for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man. This law applies in particular to an ox and a lamb, because these are the domestic animals that we are allowed to eat and that in most cases it is usual to eat; in their case the mother can be differentiated from her young. This is also the reason for the commandment

10. For a further discussion of לאו הניתק לעשה see *Makkot* 15a, *She'egat Aryeh siman* 81.

11. Translation from Maimonides, M., Pines, S. and Strauss, L. (1995). *The Guide of the Perplexed*. Chicago [u.a.]: Univ. of Chicago Press.

to let [the mother] go from the nest. For in general the eggs over which the bird has sat and the young that need their mother are not fit to be eaten. If then the mother is let go and escapes of her own accord, she will not be pained by seeing that the young are taken away. In most cases this will lead to people leaving everything alone, for what may be taken is in most cases not fit to be eaten. If the Law takes into consideration these pains of the soul in the case of beast and birds, what will be the case with regard to the individuals of the human species as a whole? You must not allege as an objection against me the dictum of [the Sages], may their memory be blessed: He who says: Your mercy extends to young birds, and so on. For this is one of the two opinions mentioned by us – I mean the opinion of those who think that there is no reason for the Law except only the will [of G-d] – but as for us, we follow only the second opinion.

In the opinion of the Rambam, mitzvot are more than simply arbitrary acts – they are useful and effect a change in the world.¹² He writes that the mitzva of *Shiluach Hakein* is meant to help humanity to become kinder and more compassionate, and ultimately to create a situation where the offspring of the bird are not taken at all.

The **Ramban**¹³ writes about *Shiluach Hakein* in a similar fashion. Initially, he brings two reasons for the mitzva: the Torah wants to make humanity more merciful (like the Rambam), and secondly that the Torah is worried about extinction; were we to allow one to take the mother and the child the same time, the Torah would theoretically be allowing the both the offspring and the source of reproduction to be

killed at once, thus theoretically allowing for the extinction of the entire species. After this brief explanation of the mitzva, he launches into an exploration of the purpose of mitzvot in general in the Rambam's thought:

And this is the general idea that the [Rambam] extrapolated about mitzvot which have a reason: It is exceedingly clear that there is in every [mitzva] a reason, purpose, and advantage to Man, apart from the reward from the One Who commanded them, may He be blessed. And this is what the Sages of blessed memory wrote ... And it is clear that there is nothing stopping one from understanding the Torah except for intellectual blindness, and that they have already been revealed, even those most difficult among them, to the Sages of Israel...

And these *aggadot* which were used to question [the Rambam] are talking about something else entirely in my opinion. They are talking about the fact that there is no utility to Hashem from the mitzvot, rather the utility [of the mitzvot] is for Man himself to prevent damage, a destructive outlook on the world, a despicable characteristic, or to remember the miracles and wonders that the Creator blessed be He performed. And this is the meaning of the phrase, "to cleanse them" – that they should be like pure silver, for the purifier of silver does not simply do things without purpose, but rather to remove all impurities [from the silver]. So too, the mitzvot are to remove from our hearts all destructive beliefs and to teach us the Truth and to remember Him always... And this is something agreed upon by all of our Sages.

And the intent of all these [mitzvot] is for our sake, and not for Him the Exalted One,

12. For further *iyun*, see *Moreh Nevuchim* 3:26.

13. *Devarim* 22:6.

but rather all that we were commanded is in order that his creations be purified without any impurities of thought or action.

The Ramban here lays out the idea that mitzvot are not mystical actions which affect a sphere above our comprehension, changing G-d. Rather, he argues quite forcefully that the mitzvot are for us, humans, to make us better. They are aimed at inculcating proper values and thoughts into our every moment, to purify us. In this sense, explains the Ramban, the mitzva of *Shiluach Hakein* is to teach humanity mercy and compassion.

On the opposite side of the spectrum, we find the opinion of the kabbalists. **Rabbeinu Bechayei**¹⁴ suggests three separate approaches for the mitzva; a simple explanation, a rational explanation, and a mystical explanation. The first and second reason match those of the Ramban that we brought above, namely that the Torah is aiming to make humanity more merciful, and also wants to prevent extinction. The third is essentially two kabbalistic reasons. The first concerns us less, and essentially says that through the mitzva, we bring down the flow of blessing down into the world. The second kabbalistic reason echoes that of the *Zohar*, that through performing the mitzva we cause God to have mercy on the Jewish people.

The *Tikkunei HaZohar* (23a) writes:

Further, “Send away [the mother bird],” come and see: There is an angel appointed over the flying animals, those identified as ‘birds’, and Sandalphon is his name. When Yisrael fulfill the mitzva [of *Shiluach Hakein*] and the mother is shooed away, and the offspring scream, he [Sandalphon] speaks in favor of his birds and says to Hashem, Doesn’t it say “And His mercy is on all his creatures”? Why have you decreed

on this bird that it should be expelled from its nest?

And when Yisrael fulfill this mitzva, the angel appointed on the birds speaks in favor of his birds. And what does Hashem do? He gathers all of His legions and says, “Behold, all those who are appointed on the birds speaks in favor of them. Who among you will speak in favor of my children Yisrael, my firstborn child Yisrael, and in favor of the *Shechina* which is exile, whose nest is Jerusalem, and whose children are in exile under harsh rulers, the nations of the world, and there is no one who will beg mercy on their behalf and speak in their favor?! At that moment Hashem cries out and says, “For My sake, For My sake I will act, and I will act for the sake of My Name.” And through this G-d’s mercy is awakened on His *Shechina* and on His children in exile.

In this piece, the *Zohar* explains that the ultimate reasoning behind the mitzva is to awaken the mercy of Heaven and return Yisrael from exile. Through the performance of the mitzva, God remembers His nest, and His children, and has mercy on Yisrael.

The implications of these varied approaches are immense. According to the non-kabbalistic approach, the mitzva is there to teach a concrete lesson about compassion and mercy to the Jewish people. In this school of thought, it is better to *reduce* the performance of the mitzva rather to increase it, to the point where, in the words of the **Rambam**, “In most cases this will lead to people leaving everything alone, for what may be taken is in most cases not fit to be eaten.” Indeed, this is what the view of the *Rishonim* reflects, as we’ve seen above. One should not run after the mitzva, but rather perform it only out of necessity; as we

14. *Devarim* 22:7.

saw above, if one does not need the birds, there's no obligation to perform the mitzva.

However, the approach of the *Zohar* contradicts this conceptualization of the mitzva. In the eyes of the *Zohar*, the more that the mitzva can be performed, the better! Each opportunity to perform the mitzva is another opportunity to awaken the mercy of Heaven and bring the redemption closer.

It is worth pointing out a flaw in the approach of the *Zohar*, over and above the fact that it seemingly ignores the halachic conclusion of the Gemara and the *Rishonim* that we've discussed up until this point. It seems to only be relevant in a time of exile. According to this approach, what was the purpose of the mitzva during the over four hundred years after the Jews entered Israel, for the over four hundred years during which the First Temple stood, or the over four hundred years of the Second Temple, all of which time we were not in exile? There seems to be a glaring hole in the approach of the *Zohar* to explaining the mitzva of *Shiluach Hakein*.

Various Approaches to *Shiluach Hakein* in Light of the Explanations for the Reasoning of Mitzvot

Notwithstanding the questions we have posed to the approach of the *Zohar*, its approach seems to have been accepted by a number of *Acharonim*. The *Chavot Yair* writes¹⁵ that it's recommended, according to the *Zohar*, to send the mother bird

away and cause her pain through searching for her offspring, and this is how he rules *l'ma'aseh*.¹⁶ The *Birkei Yosef* also rules this way, as does **R. Akiva Eiger**¹⁷ and the *Aruch HaShulchan*.¹⁸

On the other hand, the *Chatam Sofer* asks our question that we raised above on the internal logic of the *Zohar* and rules, "and it's known, where there is an argument between the revealed [Torah] and the hidden [Torah], we have nothing to do with the hidden [Torah], and 'the revealed is for us and our children.'"

Concluding Thoughts

We have seen the roots of the mitzva of *Shiluach Hakein*, and how each detail is learned by the Gemara from the *pasuk*. We have seen that the overwhelmingly clear conclusion from all the early authorities is that one need not search for a nest with which to perform the mitzva of *Shiluach Hakein*, and further, one need not perform it if one has no interest in the offspring. We mentioned the *machloket* between the *Rishonim* and the *Zohar*, and we've seen the conclusions *halacha l'ma'aseh* of the *Acharonim*.

It's worth ending off with the wise words of the *Rashba*,¹⁹ which can help us to make a decision as to our personal practice regarding this mitzva:

And I would be surprised if there were any in this generation who were worthy of speaking of the splendor of the subject. And from lack of knowledge, even from those who are worthy, only a very few will properly understand the depth of the subject and its intricacy.

15. *Chavot Yair*, loc cit.

16. Although the *Chavot Yair* notes (as stated earlier in this essay) that Tosafot appears to disagree, he ultimately rules against Tosafot. It should also be pointed out that the *Chavot Yair* believes that the Gemara's comments concerning searching for a nest in the mountains (also cited earlier in the essay) supports this conclusion as well (as it indicates that one need not search for one, but if one finds out, he must send the mother away).

17. Y.D. 292 s.v. *Shiluach Hakein*.

18. Y.D. 292:1.

19. *Shut HaRashba* 1:94.