

# The Long Arm of the Law

## The Nature and Parameters of Using a *Shaliach*

Question: I recently made a *bris* for my son. When the *mohel* was about to pick up the knife, he told me that the *mitzva* to perform the *bris* was actually mine, and hence I needed to appoint him as my *shaliach*. This led me to wonder if there were any other *mitzvos* where I could appoint someone else to act as a *shaliach* on my behalf. My assumption is that this would not be possible for all *mitzvos*. If so, what determines which *mitzvos* can or cannot be performed through a *shaliach*?

### 1. The Source

It is well known that in many areas of Torah it is possible to appoint a *shaliach* (an agent to act in one's stead). The Gemara<sup>1</sup> identifies two places where the Torah teaches us this concept. From there, we can extrapolate to other situations using *binyan av*:<sup>2</sup>

1. *Gerushin* – divorce: When describing the process through which a husband divorces his wife, the Torah<sup>3</sup> uses the term *veshilcha* (he shall send her), instead of the more intuitive term *vegirsha* (he shall divorce her). This teaches us that the procedure of *gerushin* may be performed via a *shaliach*.
2. *Korban Pesach*: When referring to the *mitzva* of slaughtering the *korban Pesach*, the Torah states,<sup>4</sup> “The entire congregation of Israel shall slaughter it.” Now, it is not feasible for the entire congregation to be physically involved in the slaughter of the *korban*. Rather, the Torah is teaching us that when someone slaughters on behalf of others, it is considered as if they also participated in the act. This is the origin of the classic phrase, “*shelucho shel adam kemoso*” (a person's *shaliach* [emissary] is like himself).

Let us explore the meaning of this concept, and see what exactly happens when one appoints a *shaliach* to act in his stead.

### 2. Return to Sender – The Case of the Insane Husband

The Gemara<sup>5</sup> discusses a case where a man appointed a *shaliach* to divorce his wife and subsequently took leave of his senses prior to the delivery of the *get* (bill of divorce). Now, if the husband would want to deliver the *get* himself under these circumstances, he would be unable to

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<sup>1</sup> Kiddushin 41a-b.

<sup>2</sup> This refers to a default presumption of analogy between all cases and the specified case (or cases), one of R' Yishmael's thirteen principles for deriving *halacha*.

<sup>3</sup> Devarim 24:1.

<sup>4</sup> Shemos 12:6.

<sup>5</sup> Gittin 70b.

do so. Any act performed by a person who is mentally incompetent is considered *halachically* ineffectual. What about his *shaliach*? Can *he* deliver the *get*? The Gemara states that his *shaliach* is similarly unable to act on his behalf, and the *get* may not be delivered unless and until the husband recovers. The Gemara does not explicitly discuss the *halacha* in the event that the *shaliach* delivered the *get* anyway...

What would happen if the *get* was delivered?

The Tur<sup>6</sup> states that if the *shaliach* delivered the *get* while the husband is mentally incapacitated, *aino klum* – it is nothing.

The Rambam<sup>7</sup> writes that if the *shaliach* delivered the *get*, it is *pasul* (disqualified).

Now, there doesn't seem to be a great deal of difference between the ruling of the Tur and that of the Rambam. It sounds like they are merely using different terminology to describe the same verdict. However, the Rambam establishes earlier in his *halachos* of *gerushin* that he uses the term *pasul* to refer to a *get* which has been disqualified on a *derabanan* (Rabbinic) level, but is actually kosher on a Torah level. It turns out, therefore, that there is actually a dispute between the Rambam and the Tur regarding the status of this *get*. According to the Tur, there has been no divorce on *any* level. According to the Rambam, the *get* is disqualified on a *derabanan* level, but the woman is actually considered to have been divorced on a *din* Torah level.

What is at the root of this dispute?

### 3. “Me and my *Shaliach*” – Exploring the Concept

The Ohr Sameach<sup>8</sup> investigates the conceptual underpinnings of appointing a *shaliach* to act in one's stead – what exactly happens? How can *someone else* do something that the person himself is meant to be doing? He presents two possible ways to quantify the way in which the Torah broadened the scope of one's activity when it allowed him to use a *shaliach*:

1. Transferring of status: The Torah allows a person to take the power he has to act in a certain area and transfer it to someone else. This means that in this matter the second person now stands in his stead. According to this, when we say that one's *shaliach* is *kemoso* (like himself), it means that he has effectively taken on the identity of the sender in this area.
2. Transferring of action: The Torah allows a person to set up a relationship with his *shaliach* whereby acts of the *shaliach* with regard to the relevant matter are considered as if the sender performed them. According to this way of understanding, the *shaliach* never attains the status of the sender; he is still “someone else.” Rather, when we say that one's

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<sup>6</sup> Even Ha'ezer sec. 121.

<sup>7</sup> Hilchos Gerushin 2:15.

<sup>8</sup> Hilchos Gerushin *ibid*.

*shaliach* is *kemoso*, it refers specifically to the realm of action. That is to say, whatever he does is considered as if the sender himself did it.

- How will these two ways of understanding the concept of *shlichus* help us understand the dispute between the Rambam and the Tur?

Every action requires *daas* – *halachically* valid mental awareness. If we say that *shlichus* is only allowing the *shaliach*'s actions to be considered those of the sender, then it ultimately remains *the sender* who performs the act. Therefore, if the sender has no *daas*, the act has been performed *without daas*, and will hence be invalid. In our situation, if the *shaliach* delivers the *get* while the husband has taken leave of his senses, then at most it is as if the husband delivered the *get* – but without *daas*! Such a *get* is null and void. This is the position of the Tur.

But if we say that *shlichus* serves to transfer the sender's power to act, then the *shaliach* can act with *his own daas*. This will be true even if the husband who originally sent him has no *daas* himself. This is the opinion of the Rambam, who rules that the *get* is disqualified *mi'derabanan* (as a protective measure to prevent the misunderstanding that a mentally incompetent person may himself divorce his wife), but is kosher on a Torah level.<sup>9</sup>

#### 4. When a *Shaliach* Turns Witness

The Gemara<sup>10</sup> discusses a most fascinating question: Many acts in the Torah need to have witnesses so that they can be verified later on. The people involved in the transaction themselves cannot serve as witnesses regarding their own act. The question is, can someone who was appointed as a *shaliach* to deliver money on behalf of someone else later serve as a witness to this transaction? The Gemara records a dispute among the *Amoraim* regarding this question. Rav maintains that a *shaliach* can indeed become a witness. Rav Shila holds that he cannot, for do we not say that *sheluchos shel adam kemoso* – the *shaliach* is like the one who sent him? If that is so, then he should be disqualified from testifying!

- How does this dispute relate to the above question regarding how *shlichus* works?

If we say that the *shaliach* attains the *identity* of the one who sent him with regard to this act, he will necessarily be disqualified to testify regarding this matter, as surely as the sender himself is disqualified. But if we say that *shlichus* only affects the realm of *activity*, i.e., whatever the *shaliach* does is considered the act of the sender while the *shaliach* retains his own distinct identity, then there is no reason why the *shaliach* cannot serve as a witness. He is essentially testifying about an act that someone else performed!<sup>11</sup>

#### 5. A *Shaliach* for *Tefillin* – My “Left-Hand Man?”

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<sup>9</sup> See Pri Chadash Even Haezer 121, quoted by the Ohr Sameach *ibid.*, who explains the dispute between Rambam and Tur in this fashion.

<sup>10</sup> Kiddushin 43a.

<sup>11</sup> Ohr Sameach *ibid.*

There is a most interesting question waiting to be asked regarding making a *shaliach*. If one's *shaliach* is considered to be like himself, then is it possible to appoint a *shaliach* to perform *mitzvos* on one's behalf, such as putting on *tefillin* or wearing *tzitzis*?<sup>12</sup> To appreciate the background to one of the classic answers to this question, we need to be aware of a basic qualification regarding *shlichus* that emerges from the words of the Rosh...

The Torah<sup>13</sup> tells us that a husband has the ability to revoke his wife's vows (*hafaras nedarim*) on the day that he hears them. The Talmud in Nedarim<sup>14</sup> discusses the question of whether or not a husband actually needs to hear the vows in order to be able to annul them. One of the proofs brought to resolve this question is a dispute among the *Tannaim* as to whether one can perform *hafara* via a *shaliach*. R' Yonasan states that, as with all other areas in Torah, a *shaliach* may be used. R' YOSHIAH, on the other hand, maintains that in this case the Torah has vetoed the use of a *shaliach* by stressing,<sup>15</sup> "The husband may uphold them [the vows], and the husband may revoke them." The Gemara states that from the very fact this dispute is taking place, we can infer that a husband may perform *hafara* without actually hearing his wife's vow. For is it not true that if he has appointed a *shaliach*, then he himself will not hear the vow?

- Look carefully at the above proof. Is there an apparent difficulty with the Gemara's inference?

If the husband has made a *shaliach* to annul vows in his stead, and one's *shaliach* is like himself, why, then, does the Gemara consider this case to be one where he has not heard the vow? Let the *shaliach* hear the vow in his stead as well!

The Rosh<sup>16</sup> explains that *shlichus* cannot work for something like hearing a vow. Hearing is something which *happens to a person*, and just because something happened to a person's *shaliach* does not make it as if it happened to him. This is why the Gemara concludes that if a *shaliach* may annul a vow, it must mean that annulment is possible even without hearing the vow.

- Which understanding of *shlichus*, discussed above, do these words of the Rosh seem to resonate with?

If we say that making a *shaliach* involves setting him up *in one's stead*, it seems reasonable to assume that as surely as he becomes the sender with regard to annulling the vow, he can also assume the sender's identity with regard to hearing it. But if we say that acting as a *shaliach* relates purely to the realm of *action* – i.e., that every act which the *shaliach* does is considered as if the sender did it, but he never actually becomes "him" – then we understand the words of the Rosh. For whereas the act of annulment that he performs may be considered the sender's act, at

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<sup>12</sup> See commentary of Tosafos Rid to Kiddushin 42b.

<sup>13</sup> See Bamidbar chap. 30.

<sup>14</sup> 72b.

<sup>15</sup> Bamidbar 30:14.

<sup>16</sup> Commentary to Nedarim loc cit.

the end of the day the only one who heard the vow was the *shaliach*, and he is not the sender! The position of the Rosh thus seems to be aligned with that of the Tur, his son.

Based on this proviso of the Rosh, the Ketzos Hachoshen<sup>17</sup> explains why it is impossible for a person to have someone else put on *tefillin* for him. Even if we invoke the mechanism of *shlichus*, at most it would be as if the sender is doing the act of putting *tefillin on the arm of the shaliach*! This, of course, will not help him to fulfill the *mitzva* of *tefillin*, which is to put them on his own arm. The same is true for *tzitzis* and any other *mitzvos shebegufo* (*mitzvos* involving one's body).<sup>18</sup> Regarding the *mitzva* of *bris milah*, by contrast, what is required of the father is an action. In this case, appointing a *shaliach* would be sufficient to consider the father as performing the *bris* himself.

## 6. Remote Controlled Judaism

The above explanation would seem to work very well with the approach of the Tur to *shlichus*, namely, that it affects actions, but not identity. However, we saw that the Rambam seems to understand *shlichus* as being able to set someone up in your stead. This being the case, the question returns: Why can I not appoint a *shaliach* to perform *mitzvos* for me?

Many commentators explain that the answer is based on *sevara* (reasoning). Whereas there is nothing about *shlichus* that says it would not work for all the *mitzvos*, it is clear from the very fact that the Torah commands us to do *mitzvos* that the intent is for us to perform them *ourselves*. It is inconceivable that the Torah has provided an entire program of *mitzvos*, all of which may simply be delegated to someone else to perform via *shlichus*.<sup>19</sup> It is the performance of *mitzvos* that defines Jewish living, and one cannot appoint a *shaliach* to be Jewish in his stead.<sup>20</sup> That said, in light of the fact that there are indeed certain *mitzvos* that one can fulfill via a *shaliach*, we would need to add that the *sevara* draws the line at *mitzvos* which involve a person's own body, as opposed to a *mitzva* like *bris milah* where only an action is required, and a *shaliach* may be appointed.

## 7. A Third Approach

Let us summarize the two ways we have understood *shlichus* so far:

1. Transferring the power and status one has with regard to a certain matter to another person, and setting up the *shaliach* in his stead.

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<sup>17</sup> 182:2.

<sup>18</sup> According to this approach, the *mitzva* of dwelling in a *succah* would be better defined as "placing *oneself* in a *succah*." See also Gemara Succah 41b regarding the *mitzva* of the four species, where the Gemara derives through a *drasha* that each person is obligated to take the species themselves, and the commentary of Kapos Temarim there.

<sup>19</sup> Ohr Sameach Hilchos Shluchin 1:1.

<sup>20</sup> Chelkas Yoav Choshen Mishpat sec. 4.

2. Establishing a relationship with another person whereby everything the *shaliach* does regarding the matter of their *shlichus* is considered as if the sender has done it.

In short, *shlichus* can either mean:

1. The *shaliach* acquires the status of the sender.
2. The sender acquires the actions of the *shaliach*.

R' Yosef Engel<sup>21</sup> considers a third possibility. Namely, the *shaliach* does not attain any aspect of the sender's status and his actions are considered entirely his own. The *chiddush* of *shlichus* is the ability to transfer the *results* of his actions to the sender. When one "makes a *shaliach*," he is not *empowering* him to do something which he would otherwise be unable to do, but rather registering his desire and consent that the *shaliach* use *his* power to act on the sender's behalf.

- Is it possible that one of the rulings mentioned above (section 2) could be understood in light of this approach?

The Rambam ruled that in the event that the husband lost his senses after appointing a *shaliach* to divorce his wife, the divorce can go through on a Torah level. We originally explained that the reason the husband's lack of *daas* will not nullify the divorce is because he has already *transferred* the status of "divorcer" to the *shaliach*, who has *daas*. According to this third approach, however, it is possible that the reason the *shaliach* can proceed is because the *shaliach* *always had* the faculties and ability to perform this act. All he needed was the consent of the husband to act on his behalf, which he has already obtained.

Indeed, there is compelling reason to conclude that the Rambam subscribes to this approach. In Hilchos Terumos,<sup>22</sup> the Rambam rules that if a person were to enter someone else's field and separate *terumah* from the owner's produce without his knowledge, we wait to see if the owner is amenable to this action. If the owner indicates that he is happy with what this person has done, then the action is valid.

- How does this ruling of Rambam shed light on his position regarding how *shlichus* works?

If making a *shaliach* involves setting a person up in one's stead, that is something which would need to take place prior to that person's actions on the owner's behalf, for a person needs to attain the status of *shaliach* before he is able to act as one! However, if we understand that a third party always contains the capacity to act on someone else's behalf subject to that person's consent, it is possible to understand how that consent can be ascertained even after the action has been done.<sup>23</sup>

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<sup>21</sup> Lekach Tov sec. 1.

<sup>22</sup> 4:3.

<sup>23</sup> Rav Shlomo Fisher, *Beis Yishai*.

And now, let us see how this approach will help us deal with the question of making a *shaliach* to perform *mitzvos*.

## 8. Means and Ends – Two Types of *Mitzvos*

While discussing the question of *shlichus* and *mitzvos*, one of the *Rishonim*, Rabbeinu Chaim Ohr Zarua,<sup>24</sup> explains that *shlichus* could work for certain *mitzvos*, such as taking *terumah*, performing *kiddushin*, etc., but would not work for others, such as *tzitzis*, *tefillin* and taking *lulav*.

- Why would *shlichus* work for some *mitzvos*, but not for others?

R' Elchanan Wasserman<sup>25</sup> explains that in order to understand why *shlichus* would only work for certain *mitzvos*, we need to consider that *mitzvos* can be divided conceptually into two categories:

1. Action based: The fulfillment of the *mitzva* lies entirely in the performance of an action. An example of this type is the *mitzva* of taking *lulav*. Once one has performed the act of picking up the *lulav*, the *mitzva* is fulfilled.
2. Result based: The goal of the *mitzva* lies in the action bringing about a certain effect. An example of this type would be taking *terumah*. The goal of the *mitzva* is not the act of picking up the produce, but in the result of conferring upon it the status of *terumah* and rendering the rest of the produce permissible.

With this division in mind, we will understand why Rabbeinu Chaim Ohr Zarua distinguished between different types of *mitzvos* regarding the possibility of appointing a *shaliach*. If the institution of *shlichus* can only affect the *results* of the *shaliach*'s action, transferring them to the sender, then *shlichus* will only be possible with *mitzvos* whose main fulfillment is in bringing about a certain result. *Mitzvos* whose fulfillment lies purely in performing an act, however, can never be done via a *shaliach*, for the act of the *shaliach* is never considered the act of the sender.

Regarding *bris milah*, we should note that there are many commentators, foremost among them Rabbeinu Chaim Ohr Zarua himself, who say that the *mitzva* is result based, for the fulfillment of the *mitzva* lies not in the act of performing the *bris*, but in the result of having formed within the child the *os bris kodesh* – the sign of the covenant between the Jewish People and Hashem. As such, a *shaliach* could be appointed to achieve this effect on behalf of the father.

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<sup>24</sup> Responsa sec. 128.

<sup>25</sup> Kovetz Shiurim Kesuvos sec. 253, see also Kovetz Shemuos Bava Metzia sec. 8.