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TALMUDIC METHODOLOGY
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**SHIUR #19: CAN A VERBAL DECLARATION VIOLATE
HALAKHIC NORMS?**

In a previous *shiur*, we described the inability to articulate a *shevu'a* to cancel a mitzva, and possibly even one to support mitzva performance. The primary basis of this disqualification is the incompatibility between oaths and halakhic activities. Perhaps oaths only pertain to voluntary activities, and are therefore completely unsuited for *mitzvot* and *aveirot*. Alternatively, a different logic suggests that a *shevu'a* cannot cancel a mitzva, because the successful performance of a mitzva overrides *shevu'a* compliance.

The *gemara* in *Nedarim* (16b) distinguishes between a *shevu'a* to cancel a mitzva, which is meaningless, and a *neder* to cancel a mitzva, which may obtain. Most *Rishonim* believe that this difference is structural and speaks to the respective mechanisms of *neder* and *shevu'a*. Some *Rishonim*, however, suggest a dramatically different approach, which has echoes in a different but possibly related halakha.

The *Shita Mekubezet* in *Nedarim* cites the Re"em (R. Eliyahu Mizrachi) as arguing that by taking a *shevu'a* not to eat *matza*, for example, one overtly and explicitly cancels the mitzva. A *shevu'a* explicitly mentions a mitzva cancellation and since this is a frontal attempt to negate a halakha, it cannot operate. By contrast, a *neder* **indirectly** tampers with mitzva performance by banning benefit from an object, such as a *sukka* or *matza*, which only indirectly prevents performance of a mitzva. The *neder* doesn't **actually** mention mitzva cancellation but only bans use of the mitzva item.

If the clash between *shevu'a* and mitzva occurs at a structural level, it should matter little that the *shevu'a* explicitly contradicts a mitzva while a *neder* does not. Evidently, the *Rishonim* who adopt this distinction imply a different reason that *shevu'a* cannot cancel a mitzva – halakhic declarations that explicitly oppose Halakha are not valid. The Torah empowers various verbal declarations to create changed halakhic realities; when these realities clash with halakhic norms, the verbal declarations are disqualified.

Interestingly, the Rosh (*Nedarim* 16b) also explains the surprising effectiveness of a *neder* to cancel a mitzva (as opposed to a *shevu'a*, which cannot) due to the fact that a *neder* does not **appear** to directly and explicitly subvert the mitzva, since it only addresses serving benefit from an object, necessary for mitzva performance.

The *Machaneh Efrayim* appears to adopt this logic as well when he limits the ability of a *neder* to cancel a mitzva only to *nedarim* articulated about mitzva objects. Certain *nedarim* actually transform the halakhic status of a human body (such as the *neder* discussed in *Nedarim* 13b about banning benefit from someone's hands). A *neder* that alters the halakhic status of a human body would more directly contradict a mitzva, as it transforms the identity of a human otherwise meant to perform a mitzva. In this instance, a *neder* **would not** override the mitzva. This striking exception corroborates that the distinction between *neder* and *shevu'a* is not structural, but rather at the level of appearance. Ultimately, a *shevu'a* fails to cancel a mitzva in this case because it appears to be a more direct cancellation than a *neder*. A *neder* that is more direct than the standard *neder* would, in fact, also fail.

The *Machaneh Efrayim* notes a reverse situation as well – varieties of *shevu'a* that do not appear to directly contravene Halakha and might be effective in **indirectly** cancelling a mitzva. If the person who takes a mitzva-

cancelling *shevu'a* is unaware of the halakhic clash, perhaps the *shevu'a* should obtain. The *gemara* in *Gittin* (46a) discusses the oath taken to the Givonim under false pretenses. Technically, this oath to ensure their wellbeing contradicted the Halakha to eliminate all the indigenous populations of Canaan. The *gemara* discusses various elements regarding the binding nature of this *shevu'a* and never questions its effectiveness, even though it clashes with a halakha. The *Machaneh Efrayim* (as well as the Me'iri in *Gittin* and in his comments to *Shavuot* 25) assert that since the Jews were not aware of the halakhic clash (as they assumed that the Givonim had migrated from a distant land), their *shevu'a* was effective even though it contradicts a mitzva. Once again, if a *shevu'a* to break a mitzva fails on structural issues, the intention and awareness of the person taking the oath should be inconsequential. Evidently, verbal declarations cannot contradict Halakha; if the person is unaware, perhaps the level of contradiction is mitigated and the *shevu'a* can obtain.

Perhaps this logic is also latent in a fascinating distinction developed by the Ritzva (one of the *Ba'alei HaTosafot*) in his comments to *Shavuot* 24a (s.v. *ela hein*). He allows a *shevu'a* to break a mitzva if it meets two conditions: 1) It is a broad spectrum *shevu'a* banning broader activities and not just a mitzva activity. 2) The mitzva cancellation cannot be directly mentioned in the *shevu'a*, but must be alluded to and included in the broad spectrum of activities that are forbidden. For example, if a person takes an oath not to consume *matza*, he can ban *matza* on Pesach night as well. In his oath, he did not mention Pesach night, and he also addressed a broad spectrum of year-round *matza* consumption. By contrast, if a person takes an oath to eat general foods as well as forbidden food, even though he has included a broad spectrum of activities in his *shevu'a*, since he mentioned non-kosher foods, he ruins the *shevu'a*.

Why should a mere mention of the cancellation of the mitzva scuttle the *shevu'a*? Perhaps the Ritzva agrees that a *shevu'a* fails to break a mitzva because verbal declarations cannot directly contradict Halakha. *Shevu'a* **generally** directly contradicts and is ineffective. If the *shevu'a* does not mention the mitzva violation and also addresses many other types of activities, it does not directly clash with a mitzva, and is therefore effective.

The notion that verbal declarations that counter Halakha may be illegitimate is supported by an interesting comment by the Brisker Rav.

Classically, a person cannot condition a halakhic transaction that counters halakhic expectations. This limitation, known as *matneh al ma shekatuv ba-Torah*, applies (at least according to most *Tanna'im*) to both legal as well as monetary/contractual interactions. For example, a person cannot sell an overpriced item with the stipulation that the laws of *ona'ah* (which limit profiteering to 1/6 margin) should be suspended. Likewise, a person cannot conduct a *Kiddushin* on the condition that he is exempt from the marital obligations of *she'er*, *kesut*, and *onah* (sustenance, clothing, and marital relations). In each instance, a transaction was qualified by a **condition** that clashes with halakhic dictates. Presumably, this halakha of *matneh al mah shekatuv ba-Torah* limits the impact of “conditions.” Although stipulated “conditions” can typically reshape halakhic transactions, anti-halakhic conditions may not. As such, this halakha would be limited to transactions about which conditions or *tenaim* were stipulated.

Based on a *gemara* in *Bava Batra* (126), the *Ketzot* suggests that the rule of *masnah al mah shekatuv* does not merely govern the stipulation of conditions, but rather disallows any halakhic action/statement that are typically empowered to create halakhic effects but are used now to subvert Halakha. For example, a father is typically empowered to verbally allocate his estate prior to his death. Yet the *gemara* disallows a father from disowning his child from inheritance, since this would clash with the halakha that a child should inherit. Inheritance is not a transaction; the estate **automatically** transitions to the children without a legal transaction. In the absence of a transaction, this statement cannot be defined as a condition or *tenai* governing a transaction. Evidently, halakhic verbal actions (such as redistributing inheritance) that typically create halakhic effects are ineffective in countering halakhic expectations.

This very interesting concept may underlie an exemption to this rule of *al matneh shekatuv ba-Torah*. This exception is asserted by R. Ada bar Ahava (*Gittin* 84). The *gemara* discusses the case of a man who divorces his wife conditioned upon her violating an *issur* (such as consuming non-kosher foods). The *gemara* does not disqualify this ability, even though it is clearly anti-halakhic. R. Ada asserts that since the author of this halakhic process (the man) is not violating Halakha, but merely facilitating (and encouraging) the woman's violation, the “condition” or *tenai* is not suspended. If stipulated **conditions** cannot counter Halakha, it would make little difference **who** is violating Halakha through the fulfillment of a condition. Perhaps R. Ada

agreed to the view of the *Ketzot*; the *matneh al mah shekatuv* limitation prevents halakhic activities and halakhic declarations from violating Halakha. Since the Halakha will not be violated by the author of this halakhic declaration (but will evolve as a byproduct), it does not breach the principle of *matneh*.

The Brisker Rav asserted this view of *matneh* in his comments to *Nazir* (11a). According to R. Shimon, a *nazir* must willfully adopt the three aspects of *nezirut*. Stipulating classic *nezirut* assumes awareness of the entire package and yields full *nezirut*. However, if a *nazir* is unaware that he will be forbidden to drink wine, he has not “bought-in” to that aspect and is permitted to drink wine. Yet R. Shimon concedes that if a *nazir* states he is interested in the *nezirut* package but stipulates that he will drink wine, he is still forbidden to drink wine. Why should an unaware *nazir* be permitted to drink but one who stipulated his disinterest in the wine prohibition be forbidden to drink wine? The *gemara* defends this anomaly by asserting that the *nazir* who explicitly seeks wine permissibility has violated *matneh al ma shekatuv ba-Torah*.

The Brisker Rav questions this rule, since the *nazir* hasn't willfully adopted the entire *nezirut* package, and he should therefore be exempt, similar to the *nazir* who was unaware of the wine prohibition. Based on the above definition of *matneh*, the Brisker Rav suggests that any halakhic declaration that contradicts Halakha is rendered meaningless. Asserting permissibility of wine to a *nazir* is such a violation, and the statement is therefore deleted. The *nazir* who stipulated wine exemption is equivalent to a regular *nazir* who is aware of the full package and who merely articulated “general *nezirut*” and the entire package applies. He was aware and his statement about wine is omitted.

This concept may reflect the logic of the *Machaneh Efrayim* and R. Eliyahu Mizrahi about a *shevu'a* to cancel a mitzva. The failure may be similar to the failure of a condition that attempts to subvert Halakha. In each case, a verbal declaration is attempted, which under normal circumstances is halakhically empowered to create a *challos* or halakhic transformation. Yet since both the *shevu'a* and the “condition” counter Halakha, they are deleted, as if they had not been uttered.