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TALMUDIC METHODOLOGY
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SHIUR #06: PEH SHE-ASAR PEH SHE-HITIR

One of the most useful and ubiquitous legal tools is the institution of “*migu*.” If a litigant possesses the ability to triumph with the employment of a particular claim (*ta’anah*), he may similarly win the case by lodging ANY claim. Several *gemarot* relate to a unique form of *migu* known as “*peh she-asar peh she-hitir*.” If a litigant could have remained silent, the fact that he did not assures us of the truthfulness of his claim.

The first three *mishnayot* in the second *perek* of *Ketuvot* list three different cases of *peh she'asar peh she'hitir*. In the first instance, a squatter on land approaches an unsuspecting person and confesses that the land belonged to that person's ancestors. However, he claims to have purchased the land. The squatter is believed to have indeed purchased the land because he could have remained silent; since the other party was unsuspecting, the squatter could have remained on the land without any opposition.

In the second instance, witnesses who are summoned to notarize a contract upon which their signatures appear testify that they were coerced to sign the document. These witnesses are believed because they could have invalidated the *shetar* by simply withholding their testimony; the un-notarized *shetar* would then be unactionable.

In the final instance, a woman whom we don't know ever to be married claims that she was divorced and can therefore be permitted to remarry. This woman is believed because if she had never admitted to her marriage, we would have assumed she was single and that there was no problem with a subsequent marriage.

The *gemara* (*Ketuvot* 22a) attempts to derive the principle of *peh she-asar peh she-hitir* from a *pasuk* that suggests instead that its logic is so compelling that it does not even require a *pasuk* as support. It is clear that *peh*

she'asar peh she'hitir operates at a Biblical level based on the systemic logic of Halakha; no specific *pasuk* is necessary.

Interestingly, many leading *Rishonim* (Tosafot, *Ketuvot* 22a; Ritva, *Ketuvot* 16) assume that *migu* is also a Biblical device based on the *pasuk* cited by the aforementioned *gemara* regarding *peh she-asar peh she-hitir*. Implicit in this assertion is the parity between *peh she-asar peh she-hitir* and *migu*. However, there are a number of indications that the two legal principles are quite different.

The first indication that *peh she'asar peh she'hitir* is qualitatively different from a classic *migu* is the fact that it is unanimously adopted even by R. Yehoshua. Throughout the first *perek* of *Ketuvot* (primarily 12-15), R. Yehoshua denies the application of *migu*. Yet he acknowledges the acceptability of *peh she-asar peh she-hitir*, suggesting that he views it as FUNDAMENTALLY different and not merely QUANTITATIVELY more powerful. This indeed IS how Rashi interprets R. Yehoshua's differentiation between *migu* and *peh she-asar peh she-hitir*.

Perhaps the most well-known consequence of viewing *peh she-asar peh she-hitir* as autonomous from *migu* surrounds the question of a *peh she-asar peh she-hitir le-mafrei'a*. Can a litigant assert a claim based on the option that he ONCE possessed (but has since forfeited) to remain silent? Can a woman who already informed us of her married status SUBSEQUENTLY – and after a significant interval – claim that she was divorced? Is her final claim accepted because in the PAST she could have accomplished her legal goal of asserting marriageability by remaining silent? Typical *migu* applications may not allow this retroactive employment; according to many *Rishonim*, “*migu l'mafrei'a*” is unacceptable. However, the Me'iri *Ketuvot* (22a) allows a *peh she-asar peh she-hitir* retroactively, implying that *peh she-asar peh she-hitir* operates differently from *migu*.

A different proof that *peh she-asar peh she-hitir* is fundamentally different from *migu* stems from the above cited *mishna* in *Ketuvot* (18b). *Migu* is generally limited when it opposes witnesses, or even the equivalent of witnesses. For example, if a person claims a scenario that opposes general trends (known as *anan sahadî*), the *migu* is possibly ineffective (see *Bava Batra* 5b, where the *gemara* is unsure). Yet witnesses who testify that their signatures were coerced, they are believed despite the fact that every *shetar*

“testifies” to its own validity. When a contract is produced in court, the actual document testifies that the signatures were processed legally. By asserting otherwise and testifying that they were coerced, the witnesses are contradicting the implicit testimony of the contract. It would seem that at the very least, we can ASSUME that contracts are generally signed validly; the witnesses’ statements about their coercion seem to oppose an *anan sahad*. Nevertheless, the *mishna* sides with the *eidim*, whose testimony is accepted. This is a strong indication that *peh she-asar peh she-hitir* is very different from *migu*, overpowering contradictory testimony in a manner that *migu* cannot. (See especially Tosafot, *Bava Kama* 72b, and the Ritva, *Makkot* 3b, who lodge this claim that *peh she-asar peh she-hitir* can defeat opposing testimony.)

Another example of *peh she-asar peh she-hitir* operating beyond the scope of *migu* is found in its ability to extract money. Many *Rishonim*, including the majority of Tosafists, maintain that a *migu* can only be employed to defend against a plaintiff; it cannot be employed to extract money. However, several *Rishonim* (see the Me’iri, *Ketuvot* 18b) claim that a *peh she-asar peh she-hitir* CAN be utilized to extract money. This serves as further indication that *peh she-asar peh she-hitir* is premised upon a totally different mechanism from *migu*.

The above examples all suggest that *peh she-asar peh she-hitir* is different from *migu* and therefore more powerful. Presumably, however, if *peh she-asar peh she-hitir* operates differently from *migu*, it may also exhibit limitations that *migu* does not suffer. Most striking is a situation of *peh she-asar peh she-hitir* followed by the arrival of witnesses who eliminate the premise of *peh she-asar peh she-hitir*. The entire foundational advantage of *peh she-asar peh she-hitir* is the absolute lack of information beyond the assertions of the litigant. Without his or her information, the case cannot even begin. The litigant’s silence could have achieved victory, and based on this, ANY claim asserted will similarly triumph. Because an unknown woman is assumed to be single and could have maintained that status by remaining silent, she is believed if she claims that she was married and subsequently divorced. What happens if after these claims are registered, witnesses arrive who affirm her alleged marriage but do not testify about any divorce? The dynamics of the case have changed radically. We now have INDEPENDENT information about her marriage. It appears that the *Amora'im* debate this issue in *Ketuvot* (23b).

If *peh she-asar peh she-hitir* operates in an identical manner to *migu*, the subsequent arrival of *eidim* should not affect the woman's believability. Her testimony was originally believed through *migu* or *peh she-asar peh she-hitir*; subsequent legal changes cannot affect that fact that at the moment of her testimony she was trusted. Her statements about her divorce were registered as true based on her (then) current ability to achieve marriageability through silence. If, however, *peh she-asar peh she-hitir* operates differently, perhaps the new evidence would subvert the application of *peh she-asar peh she-hitir*. This would require a more precise definition of how exactly *peh she-asar peh she-hitir* operates independent of *migu*.

Until this stage, we have not defined the MANNER in which *peh she-asar peh she-hitir* operates differently from *migu* - if it is indeed a different device. According to *migu* logic, *peh she-asar peh she-hitir* grants the litigant greater reliability due to alternate legal options of victory. But perhaps *peh she-asar peh she-hitir* actually empowers the litigant to DICTATE the verdict. Since ALL information about this litigation stems from the possessor of the *peh she-asar peh she-hitir*, he is allowed to arbitrarily determine the outcome of the litigation. He is not BELIEVED to lodge a CLAIM but rather he is equipped with legal capacity to CIRCUMVENT the process of claims and testimony: he can independently DETERMINE the verdict. This is often referred to as "*ba'alut*," control, suggesting empowerment and not reliability. The entire litigation would not have occurred had the *peh she-asar peh she-hitir* possessor not offered the initial information.

Viewed in this light, the subsequent arrival of *eidim* who provide independent information may strip the *peh she'asar peh she'hitir* capacity. The woman was never believed to assert that she was divorced. Rather, in a vacuum of information, she can unilaterally DETERMINE her marriageability. Since we had no information to begin with, she can dictate her status. It is almost as if we ignore her statement regarding that she is single (she was previously married and subsequently divorced). We allow her to "set" her status. Once *eidim* arrive and assert that she was married, however, we may open a court case without her enjoying this unique empowerment. If *peh she'asar peh she'hitir* is akin to *migu*, once the woman is believed in her statement about her divorce, she attains halakhic marriageability. If *peh she'asar peh she'hitir* does not grant her believability but rather empowerment, that can be altered as the dynamics of the case change.