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TALMUDIC METHODOLOGY
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SHIUR #15: BARI VE-SHEMA

The first rule of monetary litigation (dinei mammanot) asserts, "ha-motzi mei-chaveiro alav ha-re'aya" - literally, the one who comes to extract money shoulders the burden of proof. The accused, who physically possesses the disputed item or money, is given the overwhelming 'benefit of the doubt,' while the plaintiff must provide powerful evidence to mandate a favorable verdict. Generally, the standards are quite high; actual witnesses (eidim) or a contract (shetar) are powerful enough to compel the extraction of money. Other, lesser forms of proof (migu, rov, karov, chazaka) are generally not robust enough to effect this process.

Several gemarot cite an interesting machloket Amoraim regarding the efficacy of "bari ve-shema." How would halakha rule in a scenario where the plaintiff lodges a concrete and confident claim (bari) while the defendant responds with an uncertain claim (shema)? Would we award the money to the confident litigant in place of the unsure one – who happens to be the muchzak (the person holding the disputed item and who thus enjoys the leverage of ha-motzi mei-chaveiro alav hare'aya)? The most elementary example of bari ve-shema involves a case where Reuven confidently demands 100 dollars from Shimon who responds that he is unsure whether he actually owes the money.

Rav Nachman and Rav Yochanan rule that the disparity between their claims is not sufficient grounds to extract money - bari ve-shema lav bari adif. As stated earlier, one of the most basic and permanent 'fixtures' of mammanot is that the motzi (extractor of money) must furnish proof. Since, in this case, he hasn't supplied eidim or a shetar, he does not triumph. This position is eminently logical and consistent with conventional wisdom.

It is Rav Huna's and Rav Yehuda's position which appears provocative - bari ve-shema bari adif. Even without providing evidence, we remove the disputed money from the shema defendant and award it to the bari plaintiff. How can we reconcile this position with the indisputable consensus of ha-motzi mei-chavero alav hare'aya?

The first and most apparent option suggests that Rav Huna views the discrepancy between claims as reflective of the actual disputed event, so that this disparity itself is a form of evidence. Generally, evidence arrives in the form of external testimony (witnesses, shetarot). But sometimes, internal assessments of the manner in which claims were presented may also be interpreted as a form of evidence. Quite literally, we can infer from the

presentation of claims that the bari plaintiff is telling the truth and this indicator is sufficient to overpower the status quo of the shema defendant. A gemara in Ketubot (16a), which parallels bari ve-shema to rov (statistical probability), merely reinforces the notion that bari ve-shema might comprise some sort of internal evidence. In fact, Rashi in Ketubot (16a) clearly expresses this view, that the disparity of claims signals some sort of evidentiary likelihood in favor of the plaintiff. Similar sentiments are expressed by Tosafot in Bava Kama (46a).

A closer reading of the phraseology of Rav Huna's position might yield a different explanation. Rav Huna did not claim bari ve-shema bari NE'EMAN (that the bari is BELIEVED). Instead, he formulated his principle as bari ve-shema bari ADIF – the bari prevails. Somehow, the bari triumphs even without evidence to his veracity. Even if the evidence is inadmissible (because it is inferred evidence in the face of actual possession), the bari somehow emerges as the victor in this case. The Ra'avan (in his commentary to Sota) suggests this alternative approach. Though the defendant enjoys physical possession, his inability to clearly and confidently defend that possession (by positing a claim and a defense to the bari's complaint) subverts his position. The halakhic status of 'muchzak' is not merely a product of physical grip. Rather, it is a combination of that grip coupled with the ability to mount a legal defense to claims. By asserting shema and, to a certain extent, capitulating, the defendant allows his status to erode. In fact, according to the Ra'avan, we might view the bari as the default 'muchzak' even though he doesn't enjoy the physical grasp, because he can more articulately trace the item's history. The tables having been shifted, we now award the bari with the disputed property because he is viewed as the 'muchzak,' and it is now his status quo which represents the default position and must be overturned by new evidence. We don't actually trust the bari more than we do the shema. Instead, 'bari adif' - his legal position is superior and he thereby prevails.

Several nafka minot might emerge from this fundamental question of how to justify Rav Huna's statement. Tosafot, in several locations, distinguish between two types of bari ve-shema. If the bari is a courageous claim (because the plaintiff had reason to anticipate stiff resistance from the defendant) and the shema is feeble (because we expect more reliable and more certain information from the defendant), bari indeed overrides the shema. If, however, the offset between the two claims is not that large - for example, the bari is relatively weak (he lodges a claim against a presumed uninformed defendant without access to information) and the shema (by extension) is understandable (he had no access to that knowledge) - even Rav Huna would concede that bari does not override the muchzak. By gauging the respective claims and the degree of disparity, Tosafot might be siding with the first version of bari adif: the sharp contrast between claims indicates that truth is on the side of the bari. Once the bari is 'weak' and the shema 'strong,' such internal evidence fades. Had Tosafot agreed with the Ra'avan, that the inability of the shema to legally defend himself undermines his stance, we would not distinguish between strong and weak shema's. The only relevant factor would be the function of a feeble claim in undermining the status quo; the degree or type of bari versus the type of shema would be inconsequential.

Another question might pertain to the possible effect bari ve-shema might have on the world of issurim. An earlier gemara in Ketubot (9a) suggested that a husband has the right to unilaterally establish an issur by claiming that his wife is a sota. Even though we would only administer punishment upon the arrival of two eidim supporting this claim, once the husband believes this to be true he must adhere by his own word. This principle is known as "shavyeh a-nafshei chatikha de-issura (literally, a person has the authority to unilaterally fashion a personal issur - see shiur #10). Many Rishonim (the Ramban, for example) claim that if the attempt of the husband is opposed by a bari ve-shema disparity, he no longer possesses the authority to unilaterally impose a 'shavyeh issura.' For example, if the argument becomes not whether she is a be'ula (in which case, each party can assert a definitive claim), but when and how this occurred (with the woman claiming that it DEFINITELY occurred through rape, which doesn't prohibit her to the husband, while he can only suggest that it might have been adultery, which would forbid her to him), then shavyeh fails in the face of bari ve-shema. Clearly, the Ra'avan's version of bari ve-shema would be limited to the world of dinei mammanot, since he formulates bari ve-shema's efficacy in exclusively mammon terminology. The shema undermines the status quo of the chezkat mammon (presumed ownership), allowing the plaintiff to triumph with moderate proof. Bari ve-shema would then have no application outside the context of mammon and in scenarios in which the chezkat mammon is irrelevant. If, however, Rav Huna envisioned bari ve-shema as some form of internal evidence, we might question how this evidence impacts other areas of halakhic dispute – such as shavyeh.

(Of course one can claim that in this case where the husband is not convinced that his wife is prohibited, there is no shavyeh a-nafshei whatsoever, since no personal issur has been introduced.)

AFTERWORD

There are two teshuvot of Rav Moshe Feinstein zt"l which cite an exchange of letters between Rav Moshe and Rav Schakh zt"l, discussing bari ve-shema. In teshuva 24 (Choshen Mishpat vol. 1), Rav Moshe cites an explanation of bari ve-shema similar to the Ra'avan's.

Having addressed Rav Huna's position – that bari ve-shema is sufficient and independent grounds to override the chezkat mammon (physical possession) and facilitate collection, we might turn our attention to the dissenting opinion of Rav Nachman and Rav Yochanan. They claim that bari ve-shema is not a tool which can extract money and that in fact the chezkat mammon prevents the claimant from collecting despite his bari ve-shema. Did Rav Nachman and Rav Yochanan entirely reject the notion of bari ve-shema? Do they maintain that we do not compare strength of claims and do not infer any evidence from a relative disparity between them? Or do they believe that bari ve-shema does, indeed, constitute some form of evidence to the benefit of the bari, but such insubstantial evidence is insufficient to override the prevailing assumptions of chezkat mammon - that the possessor is considered the owner until proven otherwise?

This question strikes at the heart of Rav Nachman and Rav Yochanan's position and yields several interesting consequences.

Would Rav Nachman admit to bari ve-shema's effectiveness if it does not face opposition by chezkat mammon? What would happen, for example, if bari and shema claims were lodged about an animal wandering freely in reshut harabim – presumably an animal upon which no chezkat mammon is exerted? Would bari ve-shema provide sufficient evidence to award the animal to the bari despite the fact that someone else is designated the mara kama (last known owner, though not the person currently in physical possession of the disputed item)? This issue is debated by the Ra'avad (cited in the shitta mekubezet to Bava Metzia 100), who holds that Rav Nachman would concede the success of bari ve-shema, and the Ramban (in his comments to Bava Batra 34b), who claims that even under these circumstances bari ve-shema would be ineffective. Conceivably, the Ra'avad interpreted Rav Nachman's position as a qualification of bari ve-shema. Indeed the comparative strengths are telling, but not telling enough to overpower chezkat mammon. They are, however, powerful enough to defeat the weaker force of mara kama and award the item to the bari claimant. By contrast, the Ramban might have read Rav Nachman's view as an utter rejection of bari ve-shema, granting it no role whatsoever in extracting moneys. (Alternatively, we can explain that the Ramban awards chezkat mamon status to the “mara kama” in the absence of actual possession.)

A second question pertains to a very particular form of bari ve-shema. Classically, the shema is expressed about the original debt. The claimant demands money based upon a particular event (an alleged loan or deposit of an item,) to which the defendant responds that he is unsure whether the event in question ever took place. What would happen if the defendant concedes the original event but expresses uncertainty over whether payment or return of item ever occurred? This situation, known as 'eini yodei'a im peratikha" (I don't know whether I paid back), is discussed by the Mishna in Bava Kama (118a). The mishna claims that everyone (including Rav Nachman) would concur that bari ve-shema is effective, since the defendant admits a chezkat chiyuv. He agrees that he, at some point, owed the money. Given this agreement, the comparative strengths of the claims – which favors the tovei'a - would be effective. This might prove an additional instance in which Rav Nachman concedes effectiveness for bari ve-shema.

This is the basic understanding of the halakha of eini yodei'a im peratikha. The Ri"f, however, offers a completely different reading of the gemara, one which prevents any conclusions from being drawn about the nature of bari ve-shema according to Rav Nachman.

A third application of this question pertains to our gemara. The mishna describes a dispute between the husband and wife about her physical status at the point of marriage with the consequences being the amount of ketuba owed. Rabban Gamilel trusts the woman to testify about her status and ultimately awards her the full ketuba. By contrast, Rebbi Yehoshua does not rely upon

the woman and in protecting the chezkat mammon of the husband (who is in current possession of his money), forces the woman to muster more convincing proof to her claims. Initially, the gemara wanted to link Rav Gamliel's shitta with Rav Huna, and Rebbi Yehoshua's position with Rav Nachman's. Inasmuch as the woman can testify with certainty to her physical status at the time of engagement and the husband can only speculate, this serves as a classic case of bari ve-shema to the advantage of the woman. Rabban Gamliel, who favors the woman, must accept Rav Huna's position that bari ve-shema is sufficient to override chezkat mammon, and hence the woman triumphs, whereas Rebbi Yehoshua must agree to Rav Nachman that bari ve-shema does not defeat chezkat mammon; hence, the husband, in possession of his funds, triumphs. The gemara rebuffs this approach by claiming that Rabban Gamliel could even adopt Rav Nachman's stance. Even though in general Rav Nachman does not endorse bari ve-shema, our situation is different in that there are other factors working in favor of the woman. The gemara lists both migu and chezkat ha-guf (an assumed physical status) as factors supporting the woman's claim that she was a betula at the point of engagement.

One way to read this gemara is to assume that Rabban Gamliel's position ends up being based solely upon migu or solely upon chezkat ha-guf, and in no way supported by the bari ve-shema. As the gemara is attempting to analyze Rabban Gamliel through the lenses of Rav Nachman, no support can be expected from bari ve-shema – a concept Rav Nachman denies. This approach invites certain problems. Can these forces which the gemara introduces independently overcome chezkat mammon? Migu in particular is a force which, at least according to several Tosafotim in shas (Bava Metzia 2a, Bava Batra 32b), is insufficient to independently overcome chezkat mammon. Similar reservations can be raised regarding chezkat ha-guf's ability to overcome chezkat mammon.

In response to these concerns, a different approach might be taken: Though Rav Nachman claims that bari ve-shema cannot independently overcome chezkat mammon, when coupled with additional/accessory forces, it does possess sufficient strength to defeat a chezkat mammon. Migu alone cannot defeat chezkat mammon, nor, for that matter, can bari ve-shema, but taken together they possess sufficient strength to overcome the chezkat mammon. This view would be consistent with the aforementioned position that Rav Nachman does not outright reject the concept of bari ve-shema. Rather, he views it as inadequate when facing off against chezkat mammon. Applying it in the absence of chezkat mammon, or teaming it with other forces, would each yield a situation in which even Rav Nachman accepts bari ve-shema.

Sources for the next shiur:

1. 13a. "Ra'uha medaberet...tzerikha."
2. 13b Tosafot s.v. heishavtanu.
3. Ritva 13a s.v. leze'iri.
4. 13b "de'amar R. Yehoshua ben Levi...be-rov kesherim;" Shitta Mekubetzet 13b "ve-zeh leshono shita yeshana heishavtanu...ad kan."

Questions:
1. In what respect does the debate between R. Gamliel and R. Yehoshua, which appears in our mishna, differ from their argument found in the previous mishnayot?
2. Why is the woman not permitted according to R. Yehoshua by virtue of her chezkat kashrut?
3. Is. R. Gamliel's lenient ruling based on the woman's chezkat kashrut or on her definitive claim?
4. Why does R. Gamliel permit the woman?