

**YESHIVAT HAR ETZION
VIRTUAL BEIT MIDRASH PROJECT (VBM)**

TALMUDIC METHODOLOGY

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- JAY AND SHARI GOLD AND FAMILY

**SHIUR #28: SHAVYEI ANAFSHEI CHATIKHA DE-ISSURA:
SUBJECTIVE ESTABLISHMENT OF PROHIBITIONS**

Introduction

Like any judicial system, halakha establishes specific guidelines that define legally acceptable evidence. Ideally, two witnesses should testify about a particular event. In the absence of such witnesses we must seek alternate sources of information. For example, to require the defendant to take an oath one witness is sufficient. In cases of issur (ritual prohibitions), even in the absence of ANY witness we may apply probabilities (rov), proximity (karov) or simply maintain the status quo (chazaka). The area of erva (determining a person's identity vis-a-vis marriage and divorce), however, is generally an inflexible domain where nothing less than two eidim (witnesses) are granted authority and reliability - ein davar she-be'erva pachot mi-shnayim. In this light it is indeed surprising to discover that an individual is granted 'personal authority' to, in a limited manner, unilaterally testify and prohibit himself upon his wife. Our particular example (Kiddushin 65a) allows a man to claim 'This woman and I have been married' a statement which prohibits him from marrying her relatives. This principle known as 'shavyei anafshei chaticha de-issura' applies in cases of erva as well, and would seem to defy the 'two eid minimum' principle. This article will explore the dynamics of this intriguing halakha.

Shavyei versus Eidut

Obviously, we cannot regard this personal statement in the same manner as we do objective testimony offered by two eidim. Not only is the man testifying one person but he is also a 'noge'i'a be-davar' one who has a vested interest in the outcome of the case, someone who is generally excluded from giving acceptable testimony. Possibly, the best indicator of the disparity between standard two-person eidut (testimony) and shavyei anafshei is the limited scope of his testimony. After testifying to his marriage to this woman, the mishna declares that he may not marry her relatives. SHE, however,

can nevertheless marry anyone she chooses even without receiving a 'get' (divorce). The validity of his testimony is not universal; it only pertains to him and to halakhot which affect him directly. Our gemara in fact considers the possibility that his testimony should ban her from his relatives but asserts that ultimately the issur is limited to him only. It is evident that some discrepancy exists between this personal testimony and standard eidut.

The question then becomes: How much of a DISCREPANCY? Do we say that shavyei basically is patterned upon eidut - in some more limited manner? Possibly, two objective eidim are required to establish objective truth which will dictate halakhot to all involved. In personal matters, however, to determine halakhot which will only affect oneself, individual testimony suffices. After all, we do notice two examples of this form of personal testimony. Firstly, the principle of hoda'at ba'al din ke-mei'a eidim dami (the admission of the obligated party is like 100 witnesses) allows an individual to attest to his own liability even in the absence of eidim. A similar theme may be discerned from the position of Rabanan in Keritut (11b-12a). If eidim testify to a person's having performed a sin unintentionally (which normally mandates the offering of a korban chatat (sin offering)) but the subject himself contradicts them, Rabanan claim that HE and not THEY are believed. This revolutionary principle (normally no one may contradict two witnesses - except two other witnesses) is justified by the gemara on the basis that "a person is trusted about his own affairs like 100 eidim." Possibly, shavyei might express a similar theme; regarding your own status within this overall equation your testimony is accepted and granted reliability. Apparently, this is the position of the Rabbenu Yona in his commentary to Ketubot (22a) (cited by the Shitta Mekubetzet) who equates shavyei with the halakha that monetary obligations can be created unilaterally even in the absence of eidim.

By contrast we might disassociate shavyei entirely from the world of eidut. As a lone witness with a vested interest, he cannot offer anything even resembling eidut. However, he does have a right to unilaterally establish or declare his status even in the absence of eidim. If a person affirms his status as a married man/woman, a nidda, or any other identity which causes a prohibition, though we may not lend objective credibility to this lone testimony, we do COMPEL the person to personally live by the standards he set for himself. The process is not evidentiary but instead arbitrary or arbitrational. A person has the right even in the absence of eidim to arbitrate his own status - (in one direction, to create issurim). Not only does he have this right, we enforce this responsibility - to live by the standards of your claim. Such an option is suggested by the Mahari Lev (quoted by the Ketzot Ha-choshen 34;4). He likens this process to the optional generation of issur in the world of neder. Though many have questioned the parallel to neder (see Noda Bi-yehuda Even Ha-ezer second volume 53) one thing is clear: the Mahari parallels shavyei to neder in that each can arbitrarily establish a new prohibition in the absence of objective formal issur.

In this case the question regarding the status of shavyei would appear to be addressed by the gemara itself. The gemara (ketubot 9a) cites a beraita which lists several forms of evidence. At the end of this list appears shavyei which is "LIKE TWO EIDIM." Are we to take this equation in the strict sense - that shavyei is a personal form

of eidut? Or, are we to read the statement as confirming that shavyei is AS EFFECTIVE as eidim in establishing the issur - at least on a personal level?

SUMMARY:

We have questioned the efficacy of shavyei - personal testimony in the absence of formal witnesses. Is this a limited form of eidut or does it generate an issur even though no objective evidence has been presented? Personal accountability might force a person to accept the issurim he testified about.

The Scope of Shavyei

One avenue for examining this question might be to look at the strength of the claim which he offers in beit din. What if his claim is undermined by objective considerations? Obviously, if eidim testify to the contrary we should discard his statement, having categorically established otherwise. People are not allowed to establish personal halakhic MYTHS or FICTIONS about themselves. What if, however, his claim merely suffered in its credibility because of other considerations? Viewing his statement as a form of eidut might force us to accept his statement only when his claim appears legitimate but lacks two witnesses to substantiate it. Only in such a case might we grant him personal believability. The gemara in Ketubot considers a newlywed husband who testifies that his wife was not a betula (virgin) and hence is prohibited to her (assuming she betrayed him during their engagement). Though shavyei certainly allows a man to claim he was married, the gemara considers rejecting this claim because the husband may be mistaken in assuming that his wife was not a betula. The gemara considers rejecting shavyei when the man's claim is dubious, although his integrity is not challenged. This would certainly suggest a more evidentiary-based view of shavyei. If shavyei entailed unilateral establishment of issur we might apply it anytime HE is convinced even if we doubt the accuracy of his claim.

Ultimately, in the maskana (conclusion), the gemara accepts shavyei in this case as well but the foundation for this broadening of shavyei is not clear. Upon what basis does it apply shavyei to this case of the alleged cheating wife? Does the gemara ultimately determine that his claim has gathered credibility and can be viewed as pseudo eidut? Does the gemara ultimately trust his ability to accurately discern his wife's state? Or does the gemara impose shavyei even though his ability to accurately gauge this delicate matter remains uncertain simply because the gemara now views shavyei not as testimony but as subjective acceptance of issur? The Ritva comments that ultimately the gemara does feel safe relying upon his judgment. The Shitta Mekubetzet (inferring from Rashi), however, claims that even though we don't grant this claim more credibility we nevertheless accept his words. These two opinions seem to express the two divergent visions of shavyei.

Another factor is raised by the Ritva. He questions the woman's response to the husband's accusation. If indeed she categorically contradicts the husband then we enforce shavyei; he is certain of his position and she of hers. If she, however, agrees to

his claim about her physical condition but attributes it to some other factor (such as an accident or medical procedure) shavyei no longer applies. In this case their levels of certainty about the questionable issue are discrepant. He can't have positive knowledge about these past events. Being that her claim is 'DEFINITE' (bari) and his 'POSSIBLE' (shema) we reject his claim. Apparently, because we treat his statements as a form of testimony, they have to be lodged in a definite manner. If his claim (relative to hers) is thrown into doubt, we necessarily have a harder time envisioning this as eidut and applying shavyei.

SUMMARY:

The definition of shavyei might influence the scope of its application. By insisting on shavyei's similarities to eidut we might only apply it when the claim is lodged in a certain manner which is not contradicted by external factors. If, however, shavyei generates a new issur we might accept in all cases.

Enforcement of Shavyei

A second issue which might shed light upon the nature of shavyei might be the degree to which we enforce the law when it is based solely on shavyei. Would beit din enforce shavyei or merely suggest acting on its ramifications as a preferable form of behavior? Conventionally, we view shavyei as enforceable, as the Ritva himself asserts in Ketubot (9a). The Rambam, however, in Hilkhos Ishut 24:17 comments in a manner which led many to suggest that he introduces a non-enforceable form of shavyei (see for example the Chatam Sofer Even Ha-ezer 1:28, Responsa of R. Akiva Eiger I:88 and the Pitchei Teshuva Even Ha-ezer 115:7). Certainly such a position would stem from a non-evidentiary view of shavyei, viewing it instead as an issue of personal mores which are unenforceable.

It must be stated, however, that most positions reject this stance outright and claim that shavyei is imposed even against the will of the subject. Does, however, shavyei carry a punishment if its terms are violated? The ability to penalize based on shavyei would suggest that his claim is being treated as evidence - at least as far as he is concerned. An absence of punishment would confirm that no knowledge of any sort has been established and a merely personal standard of behavior has been imposed; no penalty, however, can be administered for its violation. Interestingly enough, the Rambam (Hilkhos Issurei Bi'a 20:13) is the only position which suggests malkot for violation of shavyei. This creates an inner contradiction because the Rambam also claimed that shavyei is not enforced; it would seem paradoxical not to enforce the terms dictated by shavyei but to administer malkot if they are contravened. Evidently, according to the Rambam we must establish two models of shavyei - one which is enforceable and carries a penalty of malkot and one which isn't even enforceable.

Ability to Reverse Shavyei

A third area of inquiry would surround the ability to recant a position staked upon the basis of shavyei. The gemara in Ketubot (22a) addresses the case of a woman who claimed she was married and later recants claiming that she lied in order to ward off undesirable marriage proposals. By offering an amtala - an alibi of sorts - she can nullify her shavyei. Does this ease of cancellation reflect shavyei's non-evidentiary nature? Since we never established objective evidence but only a personal moral program, it can later be adjusted if properly explained. Or do we allow even the evidentiary form of shavyei to be overturned if some good reason is offered for the reversal? This question, local for our purposes, has monumental ramifications for the entire world of halakhic testimony. What other forms of evidence allow reversal in cases of amtala? This issue, clearly beyond the context of this shiur, does, however, stem from one's view of shavyei as evidentiary or purely arbitrary.

SUMMARY:

Levels of enforcement, penalty and ability to reverse positions might all indicate the essence of shavyei.

An interesting question regarding the syntax of this claim in court is raised by the Shitta Mekubetzet in Ketubot. Does the husband merely have to state the facts, or actually petition on behalf of an issur by explicitly saying 'such and such occurred and therefore I am assur?' When eidim offer testimony they don't direct beit din to rule in a certain direction. Their role is to relate the facts as best they can so that beit din can arrive at a decision. If shavyei is a form of evidence there is no reason to demand that he offer testimony as well as direct the beit din to impose an issur. If, however, we view shavyei as a manner of subjectively accepting a personal issur in the absence of testimony, we might demand that the person actually dictate the issur by translating his evidence into a petition or demand of issur. We might require that he declare 'the following happened and therefore I should be assur.'

CONCLUSION:

We have charted two different perspectives upon this intriguing halakha. Lacking two objective witnesses halakha accepts the individual testimony of the person himself. Have Chazal streamlined a form of personal testimony which has objective validity, albeit only regarding the person himself? Or have they merely empowered him with deciding his own fate and status, enabling him to determine a personal program, without actually creating anything which resembles testimony? We saw that the questions of enforcement, penalty and the ability to reverse positions, might all indicate the essence of shavyei.

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