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TALMUDIC METHODOLOGY

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GILGUL SHEVUA

Only certain unique circumstances mandate a litigational oath (*shevua to'en ve-nitan*), and many litigations conclude without the imposition of oath. An interesting *halakha* known as *gilgul shevua* allows a litigant to expand a current oath to include additional litigations that did not legally conclude with an oath obligation. This *halakha* greatly empowers a *tovei'a* to resurrect past litigations and generate an obligation to swear. In this *shiur*, we will explore the nature of this *halakha*.

The *gemara* in *Kiddushin* (27) derives the concept of *gilgul shevua* from the experience of a *sota*. When eliciting an oath from the woman that she hasn't committed adultery with the suspected man, the *Kohen* can probe unrelated cases of possible adultery. Although her present *shevua* concerns the specific man with whom she had private interactions, the *Kohen* can insist that she swear that she hasn't committed adultery with other men or compromised other states of marriage (*arusa*, or while committed to *yibum* potential). The possibility of expanding the base *shevua* to include other uncertainties serves a source for *gilgul shevua*. For example, if a defendant is obligated to take an oath in a *modeh be-miktzat* situation, he can be required to swear regarding past litigations of *kofer ba-kol* (full denial) that did not independently obligate a *shevua*.

If the derivation from *sota* is direct, it would appear that litigational *gilgul* is structured similarly to *sota gilgul*. In each instance, the base *shevua* is **expanded** to include additional topics that do not independently obligate an oath. *Gilgul* allows a base *shevua* to be flexed to include a broad range of issues within the current *shevua*.

A different view of litigational *gilgul* would suggest that the base *shevua* is not being expanded, but instead entirely new *shevuot* are being initiated. Once a defendant is obligated to swear, he must address a full range of situations for which he is not obligated to swear. Once a person has been put under oath by a *tovei'a*, his position is legally weakened. Previous claims which terminated without a *shevua* can be relaunched and now evolve into a *shevua*, and even if claims were not previously launched, they can be currently initiated to yield a *shevua* obligation. This implies that *gilgul* does not broaden the original *shevua*, but rather creates new obligations.

This model of litigational *gilgul* as enabling the launching of entirely new litigations would be discrepant with *gilgul* for *sota*, and the derivation would thus be less direct. This may influence the question of whether the derivation from *sota* is a direct extrapolation or a less **direct** form of *gezeira shaveh* (as claimed by Tosafot, *Bava Metzia* 97b, s.v. *ba-yom*).

A range of *nafka minot* evolve from this fundamental question about the structure of *gilgul shevua*. Perhaps the most reflective issue surrounds a scenario in which the base *shevua* was annulled. Would the *gilgul* be able to exist independently without the anchor of the original *shevua*, which has now dissipated? For example, if a *shomer* elects to pay instead of swearing, he can avoid the oath normally demanded from every *shomer*. Once his *shevua* obligation has already germinated *gilgul shevuot*, would these derivatives exist even once he annuls the base *shevua* by electing to pay full compensation?

The Yerushalmi (*Bava Metzia*, *perek* 3) seems to establish a *machloket* about this case. The dispute presumably surrounds the autonomy of the *gilgul shevua* derivative. If *gilgul* is a broadening of the original *shevua*, the derivative *gilgul* cannot exist autonomously of the base; once the base *shevua* is cancelled, all derivatives are meaningless. However, if *gilgul* allows a *tovei'a* to generate independent **new** cases of *shevua*, they may certainly outlast any cancellation of the original oath, as they constitute new and independent litigations.

A second example of removing the base *shevua* surrounds a situation in which the defendant cannot swear and therefore must pay based on the rule of *mitokh she-eino yakhol li-shava meshalem* (see the *shiur* [The Principle of Mitokh: Monetary Payments when an Oath is Defaulted](#), for a fuller elaboration of this principle). This *mitokh* doctrine may cancel the original *shevua* and render a monetary payment in its place. As such, perhaps no *gilgul* extensions can be pursued. If, however, *gilgul* generates completely independent *shevua* obligations, the newly established *shevua* may exist even though the base *shevua* has been eliminated through the doctrine of *mitokh*.

A second gauge about the possible dependency between the base *shevua* and the *gilgul* derivatives may be the required symmetry between the two. If *gilgul* expands the original oath to include additional claims and *shevua* oaths, we may demand some proportion between the base oath and the derivative. For example, we may be able to expand a defensive oath, which is taken to protect current financial holdings (*nishba'in ve-eino meshalem*), to include a second defensive statement. For example, a base *modeh be-miktzat shevua* can possibly be expanded through *gilgul* to include *kofer ba-kol* full denials. However, we may not employ *gilgul* to expand a proactive *shevua* of *nishba ve-notel* to include defensive *shevuot*. For example, if a plaintiff is litigating against a person suspected of lying or *chashud*, he has the right to proactively take an oath and leverage his own *shevua* to allow collection. If *gilgul* simply expands the sweep of the base *shevua*,

we may not be able to expand such a proactive *shevua* to include a defensive *shevua*.

Alternatively, if *gilgul* entails generating separate and independent oaths, perhaps a *nishba ve-notel shevua* can trigger autonomous oaths that are dissimilar to the base oath in function. Rashi (*Shevuot* 48b, s.v. *mahu*) implies that this uneven *gilgul* is possible, whereas the Yerushalmi (*Shevuot* 7:1) suggests that it is not.

There is a debate as to whether litigational *gilgul* allows expansion to hypothetical cases that have not yet occurred at the point of the base *shevuah*. The Ohr Same'ach (2:2) discusses this question and rules that it cannot. Since these scenarios have not yet emerged, no oath can be generated. This stance implies that *gilgul* generates independent oaths, and it only applies to current litigations that warrant stand-alone oaths. However, if *gilgul* merely adds adjunct information to an already extant base *shevua*, it can be expanded to include litigational issues which may not entail classic material for oaths, and perhaps hypothetical future scenarios can be included as well.

Finally, the structure of *gilgul* will heavily influence the degree of initiative necessary on behalf of the *tovei'a*. Must the *tovei'a* assert his rights for *gilgul* by lodging definite claims (*bari*) regarding the derivative cases? The Rambam (*To'en Ve-nitan* 1:12) appears to require initiative through a *bari* claim, whereas the Rosh (*Bava Metzia siman 4*) allows *gilgul* to emerge through the initiative of *beit din*, even without a proactive *bari* claim of the *tovei'a*. Presumably, the Rosh viewed *gilgul* as an expansion of the original *shevua*, and this expansion can be executed by *beit din*. The Rambam, in contrast, may have viewed *gilgul* as the ability of a *tovei'a* to spawn additional oaths in other cases. This can only be accomplished by lodging halakhically valid claims of *bari* about each of those independent situations.