**YESHIVAT HAR ETZION**
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**TALMUDIC METHODOLOGY**

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# KEIVAN SHE-HIGID

The gemara in Sanhedrin (44b) introduces us to a halakha which governs the manner in which eidim - two witnesses - offer their testimony. "Keivan she-higid shuv eino chozer u-maggid" - once they have spoken they cannot speak again - which prevents them from recanting their original testimony and offering an alternative. Interestingly enough, though, this appears to be a fundamental halakha the gemara does not cite any pasuk. It is left to the Rishonim to provide us with the source and the logical essence of this halakha.

Rashi in Sanhedrin asserts that when they voice their second testimony "we don't even suspect [that the second testimony is the accurate one and the first is false] rather we assume their original testimony was accurate and they are trying to nullify their testimony because they are reluctant to have the case actually prosecuted and a punishment sentenced based upon their testimony". Rashi provides us with a rational reason for keivan she-higid. After seeing their retraction we begin to suspect that their new story is spurious and merely a front to back out of their real evidence. Hence the second testimony is unacceptable become of 'concerns of veracity' - chashash sheker.

The Ritva in Ketubot (18b) offers a differing explanation. He bases the halakha upon the pasuk in Vayikra perek 5 which discusses the right of a litigant to subpoena witnesses to court. The pasuk writes that if witnesses falsely deny their knowledge of evidence they must bear this sin - "Im lo yagid ve-nasa avono". The Ritva comments: "This concept is similar to one by yibbum - If a brother chooses chalitza he relinquishes his right to perform yibbum. This is inferred from a similar pasuk "im lo yivneh et beit achiv" - kivan shelo bana shuv lo yivneh. [Just like the brother of the deceased husband has one chance to perform yibbum so too witnesses have one chance to offer testimony.] The Ritva bases our halakha upon a formal concept- the protocols and formalities which

govern the halakhic legal process. Eidim have but one chance to offer their testimony not because their second installment will arouse suspicion but because of a formal convention about the way in which Beit Din operates. See also Rashi in Ketubot who seems to agree with the Ritva (against Rashi in Sanhedrin) when he writes "degavei edut chada hagada ketiva" - with regard to edut the Torah writes and allows for only one testimony. One strike and you are out.

Apparently we may view the restriction of keivan she-higid in one of two manners. We might reject their second attempt because aroused fear of perjuring. Alternatively we might be facing a formal legal halakha about the procedures and protocols of Beit Din. This issue is extremely significant and surfaces many times - especially in the judicial context. For example there are some witnesses who are invalid because we fear they will falsify their testimony. Such an individual might be a huchzak kafran - a known fibber. Alternatively there are many who are disqualified for testimony for purely formal reasons. A glaring example is a king who cannot offer his testimony because the Torah dictates that eidim must be standing in front of judges who are sitting at the time of their testimony. Such a predicament is unsuitable for a king - whose presence demands all others rise, and hence his testimony is unacceptable - again for purely formal reasons. Women are invalid witnesses not because we suspect them of telling untruth but for formal reasons - in this case a gezeirat ha-katuv which disqualifies them - a pesul gavra. Still other invalid witnesses can be viewed in both manners. For example a nogeya be-davar - someone who has a vested interest in the case cannot testify. The Acharonim are split as to whether we suspect his lying or whether by dint of his pertinence to the case is invalid on purely formal grounds. In general, then, when we disqualify someone (or in this case something - recanted testimony) in court we want to know whether we fear the accuracy and therefore dismiss, or we reject on formal grounds. (By the way the reverse is also true- when we strengthen a legal position or person do we increase their credibility or de we augment their position on formal grounds).

The possible repercussions of this question are vast. To take one side of the equation: What would happen if we could liberate the eidim of formal constraints. Would these emancipated eidim be allowed to contradict their original testimony. Here we note two varieties of this concept. The Ran in his Teshuvot (47) affirms that if the first testimony was offered out of court (recorded by two other witnesses) he original eidim may enter court the next day and recant. R. Akiva Eiger agrees to this position in his teshuvot (Pesakim 85) and the Hafla'a (a Rebbi of the Chatam Sofer) deliberates this issue in his

commentary to Ketubot (22a). Ostensibly, this position may only be defended according to the Ritva - eidim are given only one chance to testify IN COURT; if the first testimony was outside they haven't utilized their one opportunity. If, however, a recanted statement is suspected of false it might make little difference where the first testimony was uttered. There is an additional scenario where legal constraints might be lifted. Though in general we only adhere to the testimony of two witnesses, there are several instances in which individuals are granted full reliability because of their unique relevance to the case. For example a father has special reliability to testify which of his children is a firstborn. Similarly he has special dependability to testify which man his daughter is married to. A midwife has special authority to testify which child belongs to which family. These are just some examples of individuals who don't appear to be eidim who are believed nonetheless due to extenuating circumstances (who else can confirm the family of newborns). May these people reject their testimony. The Ramban in his Milchamot Hashem in Kiddushin (27b in pagination of the Rif) maintains that anyone who is trusted to offer testimony - whether two witnesses in the standard case or one in these instances - may not recant based upon keivan she-higid. This position isn't universally accepted. The Shev Shmatta (6:8) elaborates and cites several dissenting opinions. If keivan she-higid is based upon our suspicion of a recanted testimony - it should make little difference if actual eidim recanted or these empowered individuals. If, however, keivan she-higid reflects a legal standard - eidim have only one chance to testify - based upon a pasuk which qualified the manner in which they must testify, one can envision the rule not applying to anyone who isn't considered eidim (See Afterword for elaboration of this theme.).

In this vein we might suggest an additional scenario where the one-chance formal law would not apply but suspicions would be just as acute. What happens if the first time around the refuse to offer any testimony at all, and subsequently they wish to submit eidut. The Hagahot Ha'ashri in Shevu'ot (4; chapter 15 in the Rosh) contends that the law of keivan she-higid would still apply. Apparently we still have cause to suspect monkey business; why did they decline to testify during the first round and all of a sudden want to testify. It could very well be that they will be lying. Conversely the Ran in Shavuot (14b in pagination of the Rif) maintains that in this case since they have yet to formally testify they still can enter their testimony. Evidently since keivan she-higid is a formal notion limiting them to one chance at testifying, in this case their second appearance marks their first actual testimony.

SUMMARY:

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By devising cases in which formal limitations are inapplicable we can test whether keivan she-higid applies and draw a sense of whether it is formal or based on our assessment of their verity.

What about the inverse situation? What would happen in a case where formal constraints are relevant - eidim in front of Beit Din - but we can be assured that despite their retracting they aren't lying. Would keivan she-higid apply in these cases. The gemara in Sanhedrin (44b) raises the possibility that eidim who offer reasons for their retraction might not be restricted by keivan she-higid. Apparently by justifying their actions they escape our suspicion and hence the restraint. This, however, is rejected by the gemara. The idea itself - of recanting testimony by explaining the confusion does appear in several fascinating scenarios.

The Ran in the aforementioned responsa mentions that when testifying about an issue in which mistakes are prevalent, eidim retain the right to reverse their testimony. The Ba'al Hama'or in the beginning of Rosh Hashana (1a in pagination of Rif) applies this principle to eidut ha-chodesh - testimony pertaining the new moon. Very often the sighting of the new moon (the sighting of no moon) is confusing and is oftentimes unknowingly, inaccurately represented in court. Eidim then retain the right to recant or change their testimony. Does this not indicate that the limitation of keivan she-higid is based on our suspicions of their second testimony - suspicions which are allayed in these cases where mistakes are prevalent? If from a formal perspective eidim are given one chance to testify what in this case allows them a second chance?

There is however a reply to this proof. Possibly, in areas where errors are so frequent the Beit Din takes a relative stance regarding its acceptance of testimony. Generally a testimony is complete after is has been carefully cross-examined by the Beit Din and has been duly accepted. In the area of kiddush ha-chodesh where meticulous accuracy cannot be assured, Beit Din might accept eidut - tentatively - pending further clarification. In truth when the eidim reverse their testimony they aren't adding a second installment after the first has already been dispensed, but merely clarifying a testimony which is still in process. Therefore even if keivan she-higid prevents them from a repeat opportunity - this is considered one long provision of testimony.

The gemara in Babba Metzia (28b) discusses the need for one who claims a lost item to first produce witnesses that he is in general a trustworthy fellow. Rav Pappa's father who lost his item did produce eidim. Upon being questioned by the Judge "Is R. Pappa's father a liar" they responded "Yes he is". Aghast at this sabotage R. Pappa's father demanded an explanation. The eidim explained that they thought the tone of the inquiring judge was sarcastic and rhetorical. They thought he was saying "R. Pappa's father is a liar??!!! No way!!!" and therefore they confirmed the judge's innate trust in the subject by saying "Yes". The gemara concludes that we can assume that litigants produce witnesses for their own advantage and hence R. Pappa's witnesses probably intended to defend rather than smear R. Pappa. We notice, then, the ability to retract eidut if a reasonable excuse can be given as to why the first testimony is being altered. Seemingly, then, as long as the eidim can prove their reliability they have as many chances as they need. Alternatively one might claim that the circumstances of their testimony (the fact that they were introduced to Beit Din by R. Pappa) so overwhelmingly contradicted their first testimony, that it was never fully accepted as valid testimony and in effect they are merely qualifying their statements by elucidating their original intentions and their initial mistake. Even if keivan she-higid allows eidim one chance to testify in this case we don't consider it two testimonies but rather a subsequent clarification of a testimony which at first glance seemed quite peculiar and hence was only accepted pending clarification. This would be parallel to a case of kiddush ha-chodesh where the testimony isn't finalized until the eidim receive a chance to clarify their statements.

The gemara in Babba Batra cites the case of Rav Yirmiya who signed a contact which attested to a woman having received her ketuba. The woman confronted R. Yirmiya claiming he had witnessed a different woman receiving her ketuba and mistakenly wrote the shtar about the wrong woman. R. Yirmiya concurred that he too suspected that the shtar was written about the wrong woman. He then reversed himself and remembered having been told by his fellow witnesses at the time of the signing that the woman refered to in the shtar was the same woman who received payment. His inability to identify her at the time of the signing was caused by a natural change in her voice. In this instance R. Yirmiya first agreed with the woman that the shtar didn't refer to her and subsequently altered his testimony based upon his recollections. The gemara answers that despite the general rule of keivan she-higid we can accept R. Yirmiya's final affirmation. Talmidei chakhamim aren't frequently involved in studying female voice modulation and hence the grounds for his reversal seem reasonable; he was confused because of the change in her voice. Here we arrive at a case where we allow reversal of a completed testimony

because the eidim can justify their reasons for recanting. This gemara demonstrates that keivan she-higid might be a restraint imposed because we suspect the accuracy of a recanted testimony. When we can be assured there is no foul play - we can accept a second installment.

Summary:

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The fundamental question of how to comprehend keivan she-higid can be tested by examining the scope of its application. Does it apply in cases where formal protocols aren't operative? Alternatively, does it apply when we don't suspect the eidim of foul play?

Methodological Points:

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1. The quickest way to test a halakha is by investigating its scope - in how many cases does it apply? The easiest form of this query is to attempt to discover exceptions to the rule. By studying the exception we hope to isolate what factor causes these cases to be exceptions. The absence of the factor makes it an exception. The presence makes it part of the rule. Hence the factor is the driving force behind the rule and lies at the essence of its mechanics. In our case we located exceptions to the rule of keivan she-higid - for example outside of Beit Din or people who aren't eidim. They are exceptions because, as they aren't formal scenarios of eidim in front of Beit Din, they lack the formal requirements. If keivan she-higid doesn't apply it's because the driving force of the halakha of keivan she-higid - formal requirements is absent in these cases. Hence we can stipulate that keivan she-higid is based upon formal requirements.

2. Whenever dealing with a halakha - search for the mekor of the halakha. Especially if it is derived from a pasuk, the manner in which Chazal draw it from the pasuk can indicate the nature of the halakha. The Ritva's comparison to yibbum in this case alerted us to his understanding of keivan she-higid.. On this note .....

3. See on the lookout for peculiar comparisons. At first glance the halakha of keivan she-higid which governs testimony in court, and yibbum have little in common. If the Ritva compares the two he probably tailors keivan she-higid in a manner which does create an affinity. In this case each represents a single opportunity which, if forfeited, can never be exercised.

For further research:

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1. When eidim initially maintain they don't know any eidut - do we consider that passing up the opportunity to testify or actually testifying to lack of knowledge. Read the Ran and the Haga'ot Ha'ashri carefully in this regard.

2. Is a nogeya be-davar - one who has vested interest in the case - invalid because we suspect a liar or for formal reasons. See Choshen Mishpat Siman 37 and the Ketzot se'if katan 1. Would a miguy validate him?

3. How do we treat specially empowered individuals such as a father about his son or a midwife about the newly born babies. Do they have the halakhic status of eidim even though they are one person, or are they believed even though we don't afford them the status of eidim. See Shev Shmatta section 6. Do they have to say their testimony in court? See Chavot Da'at Yoreh Dea 125.