**YESHIVAT HAR ETZION**

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #16: Validating Disqualified Witnesses and Judges
Part 1**

The *mishna* in *Sanhedrin* (24a) introduces a fascinating halakha known as “*ne’eman alai*.” Two litigants in a monetary dispute have the right to mutually validate people who are otherwise disqualified from serving as judges or witnesses. For example, they can mutually agree that a father of one of the litigants can serve as *dayan* or witness, even though he would be invalid to serve as either under ordinary circumstances due to his relationship with the *ba’al din* (litigant). Historically, this ability has proven crucial in enabling otherwise invalid witnesses and courts to process monetary disputes in situations that don’t allow for a classically valid *beit din*.

When discussing this ability in his comments to *Bava Batra* (128a), the Rashbam draws an interesting analogy that reveals his view of this halakha. He claims that “*ne’eman* *alai*” works similarly to “*hoda’ah*,” the process through which a person unilaterally enters *beit din* and admits to owing money. It seems that the Rashbam assumes that under certain conditions, a confession in front of *beit din* can GENERATEan obligation even when one did not already exist. Similarly, by agreeing to accept otherwise invalid witnesses, the two parties are agreeing to generate obligations based on how the invalid witness will testify or the invalid judge will rule. They are not reconstituting *beit din* or *eidim*, but rather **independently** agreeing to abide by the statements/conclusions of the designated people. This autonomous agreement generates *hitchayvut* to fulfill the decisions and transfer funds. Effectively, the litigants have opted for extra-legal arbitration.

A well-known statement of the Rambam (*Mechira* 11:15) allows creating *hitchayvut* even without the performance of an actual *ma’aseh kinyan*. Perhaps the two litigants in this case are enacting a similar process by mutually agreeing to transfer money based on the statements of the newly validated witnesses or judges.

An interesting question raised by the Ravya (*Teshuvot* 151) implies a very different understanding of the *ne’eman alai* capacity. He questions why this allowance does not violate the principle of *matneh al ma* *shekatuv baTorah*, which forbids creating changes which contradict the Torah’s halakhic system. For example, a person cannot lend money on the condition that *shemitta* will not cancel the debt. Similarly, the two litigants should not be able to agree to litigation with unfit witnesses or judges. If the Rashbam were correct and the two parties were **independently**agreeing to transfer monies based on non-legal arbitration, they would not be violating halakha, but rather circumventing it! Evidently, the Ravya maintains that the litigants are doing more than extra-legal arbitration. Instead, they possess the ability to recalibrate default levels of suitability for their witnesses and judges. When the Torah outlines qualifications for witnesses and judges, they are merely recommendations and defaults. The two litigants can mutually adjust these profiles and validate otherwise unqualified people. Once the witnesses are validated, *beit din* proceeds based on standard methods and adjudicates the case, and the litigants are obligated to adhere to the formal verdict of their newly minted *beit din*. They are not independently contracting to transfer monies based on statements of non-legal arbitrators.

As a result of this understanding, the Ravya was concerned with how this ability reconciles with the general concern of not creating mechanisms which that contradict the Torah’s outlines. Some have suggested answers to the Ravya’s question (see R. Yosef Engel in his *Sefer Gilyonei Hashas*), but the very question indicates an understanding that differs from the aforementioned position of the Rashbam.

This question can potentially yield interesting contrasts in how the halakha of *ne’eman alai* is implemented. For example, are these newly accepted witnesses subject to the classic laws of *eidim*? The Yerushalmi (*Shavuot*, *perek* 4) questions whether these witnesses can be subpoenaed through the process of *shavuot ha-edut*, which allows litigants to force uncooperative witnesses to swear in court that they don’t possess relevant testimony. The Yerushalmi rules that these newly validated *eidim* cannot be subpoenaed, and the Ramban (*Shavuot* 35b) cites this position. Similarly, R. Akiva Eiger (1:171) questions whether these *eidim* would be treated as *eidim zommemin* if they were caught lying, and he rules that they would not be treated as classic *eidim*.

On the surface, it appears that these opinions would side with the Rashbam in viewing this process as an autonomous arbitration. Since these unqualified witnesses are not functioning as ACTUAL *eidim*, they are not subject to the laws that govern *eidim*. By contrast, according to the Ravya, it is entirely conceivable that these newly minted *eidim* CAN be subpoenaed and would be candidates for possible *hazama*.

An interesting question surrounds the ability of the litigants to alter otheraspects of classic halakhic litigation. For example, can they mutually agree to adjudicate at night? The Rashba (*Teshuvot* 6:200) claims that they may and the Ravya himself is uncertain. Perhaps this question stems in part from the manner of understanding the rule of *ne’eman alai*. If the litigants are creating a parallel track of arbitration, they should be able to implement this at night as well. Just as they can choose arbitration with unqualified witnesses or judges, they should be able to enact arbitration at night, even though *beit din* does not usually accept testimony at night. By contrast, if the *ne’eman alai* rule allows them to recalibrate the qualifications of otherwise disqualified witnesses or judges, perhaps they cannot alter the PROCEDURES of *beit din* proper*.*  They may be able to adjust legal profiles of PEOPLE, but they cannot change the manner in which the COURT operates. Inability to accept testimony at night is an internal condition of *beit din* that cannot be tinkered with!

The Minchat Chinukh (234) raises two related questions which reflect the original query of the Rashba and Ravya about mutually agreeing to a night trial. Typically, the two litigants must stand in front of a sitting panel of judges, at least as the verdict is being delivered. Would these procedures apply to scenarios in which otherwise unqualified witnesses or judges were mutually ratified? The Minchat Chinukh debates this question, and the answer would presumably be affected by the nature of *ne’eman alai*. If these *eidim* or judges have been adjusted to be valid and *beit din* proceeds under normal guidelines, the posture of the litigants and judges would have to be maintained. If *ne’eman alai* represents an independent form of arbitration, however, none of the typical procedures of *beit din* would apply.

A final question that emerges surrounds the SCOPEof this apparatus. Can non-valid witnesses or judges be validated for GENERAL litigation, or only monetary litigation? If *ne’eman alai* constitutes independent contracting to arbitrate through non-legal means, it would only apply to monetary situations. Two litigants can agree to transfer monies based on the testimony or ruling of the selected parties. This in no way extends beyond monetary situations. However, if this rule represents a paradigm of validating those who are disqualified by default, perhaps the model can be implemented in general circumstances.

The Tashbatz (2:63) states clearly that the rule is limited to monetary situations, but interesting comments of both the Rosh in *Yevamot* (101b) and a Tosafot in *Nidda* (49b) indicate otherwise. The *gemara* cites a *gezeirat ha-katuv* disqualifying converts as judges for *chalitza*. The Rosh and Tosafot question this since converts are disqualified from serving as judges in general cases; a special *gezeirat ha-katuv* invalidating them for *chalitza* is therefore unnecessary. They each respond that the *gemara* refers to situations in which the litigants **accepted**the converts as judges. This setup implies that converts accepted by litigants **would** be valid in non-*chalitza* situations, in which no unique *gezeirat ha-katuv* disqualifies them.