**YESHIVAT HAR ETZION**

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #17**: **Validating Disqualified Witnesses and Judges – Part 2**

***Ne’eman Alai Abba***

In the previous *shiur*, we addressed the underlying mechanism of *ne’eman alai abba*, the ability of two litigants to validate ordinarily invalid witnesses or judges. Perhaps this is an extralegal form of arbitration; they cannot appoint invalid judges, but they can mutually agree to abide by the instructions of this third party arbitrator. Alternatively, this halakha may empower litigants to mutually adjust halakhic profiles of witnesses or judges. In this view, the Torah does not ABSOLUTELY disqualify judges and witnesses, but rather establishes a default, which can be recalibrated by the litigants. We also addressed several broader questions that would be impacted by this issue.

The Talmudic discussion surrounding the *mishna* (Sanhedrin24) raises several issues that possibly stem from this question. Chief among them is the question of scope. What types of invalid witnesses and judges can be authorized?

First, the *gemara* ponders the possibility of limiting this rule to accepting sub-par *shavuot* (oaths) from one of the litigants. One litigant can offer the other to take an informal *shevua* (as opposed to an official oath mentioning Hashem’s name). Although this scenario is obviously acceptable, perhaps qualifying invalid witnesses and judges is not possible. In the former case, the conclusion will be based entirely on the decisions and actions of the litigants. This may be more *attractive* to the litigants than empowering others to render a decision, in which case the conclusion is taken out of their hands (*tole* *be-da’at acheirim)*. The *gemara*’s premise is best understood assuming the mechanism of *ne’eman alai abba* is based on extralegal *hitchayvut*. This commitment may only exist if the two parties **control**the situation. Once the “verdict” is transferred to another person, the two litigants may not generate sufficient commitment to create an extra-legal obligation to abide by the arbitrator.

To debunk this possibility the *mishna* (24a) explicitly mentions the *ne’eman alai abba* option EVEN for validating third party witnesses and judges. One approach argues that by **expanding**the scope to include EVEN this scenario, the *mishna* is illustrating that *ne’eman alai abba* actually works by recalibrating halakhic validity. As such, it applies both to offering *shvua* options to a co-litigant AS WELL as validating third party witnesses and judges. A second approach claims that by expanding the scope to include validating third party witnesses and judges, the *mishna* is merely stressing that extralegal commitment exists EVEN when the litigants’ commitment is dependent upon third party participants. Thus, the expanded scope of *ne’eman alai abba* dictated by the *mishna*’s broad category can be understood based on EITHER mechanism of *ne’eman alai abba.*

Alongside the consideration of whether *ne’eman alai abba* operates, even for third-party witnesses there is an additional uncertainty. Can the two parties jointly agree to empower ONE *eid* to testify in place of two? This is obviously more ambitious than validating a relative as a witness or judge. In that scenario, the validated witness is qualified in general cases, but unsuited to this specific case because of familial relationships. It is easier to validate such a person than to upgrade one *eid* to have the legal force of two *eideim*, as one *eid* NEVER enjoys a “two *eid*” status.

Without question, if *ne’eman alai abba* works as an independent arbitration, there should be little difference between validating personally disqualified witnesses and validating universally disqualified witnesses. If, however, *ne’eman* *alai aba* works by authorizing otherwise invalid witnesses, we can easily appreciate a more limited scope. It may be one thing to validate a relative who enjoys universal halakhic validity but is unsuited to adjudicate a relative, while it is quite another issue to deliver legal force to a lone witness who would otherwise NEVER enjoy that status.

The first *mishna* in the third *perek* of *Sanhedrin* (23a)specifically ratifies this additional scenario of granting one *eid* the force of two witnesses. What is the message about *ne’eman alai abba* that the *mishna* intends to transmit by extending the procedure EVEN to this situation? Does it intend to cast *ne’eman* *alai abba* as arbitration, in which case it enjoys a naturally unlimited scope? Or does the *mishna* maintain that although *ne’eman alai abba* works by authorizing witnesses, even dramatic authorization is valid? The logical conclusion from the expanded scope is uncertain.

Tosafot raise an additional interesting *nafka mina* between the different approaches to *ne'eman alai abba*. (*Sanhedrin* 24a). Can the litigants accept the ruling of someone with a double disqualification? For example, can they accept the ruling of a relative who is also a *rasha* (someone who has been invalidated because of halakhic infraction)? Tosafot claim that they cannot, whereas many believe that Rashi allows EVEN this scenario. Perhaps Tosafot and Rashi dispute the manner in which *ne’eman alai abba* operates. If it operates through extra-legal arbitration, it should not be limited in any fashion. The two litigants are not recalibrating a halakhic process, but rather choosing to mediate independent of the laws of *beit din*. If they mutually agree to abide by the ruling of a third party, they are obligated, regardless of the DEPTH of that third party’s disqualification. Alternatively, if the process empowers them to validate unqualified witnesses or judges, although they can validate an illegal witness or boost the strength of one witness to the level of two, they cannot legalize someone who is “doubly disqualified” from a halakhic court since he is both a relative and a *rasha*.

A second issue that the *gemara* raises concerns the type of offer rendered. Is a litigant offering to actually **transfer**monies based on the decision of an invalid witness or judge? Or is someone merely offering to **waive** a debt if the invalid judge/witness issues a verdict or renders testimony? R. Yochanan maintains that the Chakhamim who allow this *ne’eman alai abba* procedure would endorse it even to transfer money. Shmuel, on the other hand, maintains that the Rabbanan only endorse this method in order to waive an extant debt, but not to transfer new monies.

If the process allows validation of invalid witnesses or judges, no distinction can be drawn between transfer of funds and renunciation of debt. Once the legal ingredients (witnesses or judges) have been rendered acceptable, the halakhic process continues in a conventional manner. This newly authenticated *beit din* is empowered to both facilitate debt cancellation as well as appropriate new funds for payment. The most compelling way to understand the opinion of those who limit this procedure to debt cancellation is to view the process as extra-legal arbitration. Since the two parties are instituting an autonomous transfer of authority, it is only be halakhically binding if debt is cancelled. For some reason, the logistics of debt renunciation (*mechila*) are less demanding than the logistics of money transfer. Perhaps debt cancellation is easier because it does not require a separate act of *kinyan* or because it requires a lower level of *da’at* commitment, since people are more readily acquiesce to cancel a debt than they do to transfer monies. Thus, if the two parties are constructing an independent mechanism, they may only be capable of *mechila* and not of actual *kinyan*; if they are building a new court, their resultant court issues verdicts and compels compliance and there should be no distinction between *mechila* and *kinyan*.

The last issue that the *gemara* introduces is the role of *gemar din*,an actual VERDICT administered by *beit din*. The *gemara* debates whether this agreement is binding (according to the *Chakhamim* ) even before *beit din* actually issues the verdict. In other words, can either party renege prior to the issuance of the verdict? Reish Lakish claims that according to the *Chakhamim*, they cannot renege even PRIOR to *gemar din*, whereas R. Yochanan claims that only AFTER *gemar din* does this agreement become binding.

*Gemar din* may act as a coercing force regardless of how we choose to understand the mechanism of *ne’eman alai abba.* If the litigants are validating otherwise improper judges, the issuance of a verdict may consolidate the newly assigned status. Alternatively, if they are arranging an autonomous arbitration, perhaps the *gemar* *din* locks in their mental commitment or serves in place of an actual act of *kinyan* to facilitate the ultimate transfer of funds. Thus, the fact that R. Yochanan demands a *gemar din* does not necessarily reflect his understanding of this mechanism.

However, secondary questions about *gemar din* may reveal the function of *gemar din* as an obligating force. For example, what level of *gemar din* is necessary? If the *gemar din* is crucial in consolidating the status of the newly minted judges, the actual verdict should be sufficient. If, however, *gemar din* is necessary to replace a *kinyan* apparatus, perhaps a more advanced stage of *gemar din* would be necessary. The Rambam (*Sanhedrin1*:2) claims that only after *beit din* begins the appropriation process (typically by announcing “*tzei ten lo*,” instructing the delivery of the awarded monies) will this agreement become binding according to R. Yochanan. Evidently, the *gemar din* is not important in that it allows the new status to **settle**,but is rather necessary in order to approximate an act of *kinyan*. Only by initiating the appropriation has a *gemar din* of this type occurred. The delayed *gemar din* suggested by the Rambam may indicate that its function is not merely to consolidate the nominations, but instead to forge halakhically binding arbitration.

An additional insight regarding the function of *gemar din* can be drawn from a statement of the Maharam MiRotenberg quoted by the Mordechai. Is *gemar din* necessary in situations in which *eidim* were validated? He claims that it is not necessary; once the *eidim* have delivered their testimony and it has been formally processed by *beit* *din*, the agreement is irreversible. Evidently, in his view, *gemar din* functions as a consolidating force, locking in the status of the judges. When *eidim* are being validated, their status is consolidated at an earlier stage, when their testimony is processed, and no *gemar din* is necessary.

Finally, an interesting debate emerges about the need for *gemar din* in the case in which the two litigants mutually agree to allow subpar oaths instead of official oaths. Perhaps the oath itself “locks in the status” of validated oath-taking (even without classic oath syntax) and *gemar din* is not necessary. The Rosh and Nimukei Yosef each claim that an actual *gemar din* is not necessary; the agreement becomes irreversible once an oath is taken and possibly even earlier, when a litigant agrees to take the “offered” oath (see Nimukei Yosef, who infers this from the Rif).

Evidently, these positions also understand that *gemar din* is not an apparatus for cementing an extra legal arbitration. If this were the case, *gemar din* would be necessary in ALL THREE SCENARIOS. It seems that the Maharam MiRotenberg, Rosh and Nimukei Yosef all maintain that *gemar din* functions to consolidate the newly awarded status. The status of *eidim* may be consolidated earlier according to the Maharam. Similarly, the status of a validated oath may be authenticated even before *gemar din*.