**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #15: The *Shevua* of *Modeh Be-Miktzat* and the Reliability of the Claims**

Three oaths are imposed by the Torah: 1) A *shomer* (watchman) must swear as to the circumstances surrounding the item he was watching. The obligation to take this oath seems be rooted to the original agreement contracted at the point of deposit. 2) An *eid echad* (lone witness) whose testimony supports the claim of the prosecution/tovei’a cannot obligate monetary payments, but he reinforces the prosecution’s claim enough to necessitate a *shevua* on the part of the defendant/*nitva*. 3) If a defendant/*nitva* is *modeh be-miktzat*, confessing to part of the prosecution’s claim, he has reinforced the original claim and must swear to defend his position regarding the remaining monies. Unlike the first type of *shevua*, the latter two oaths are not based on any prior agreement between the two parties. These oaths presumably stem from the fact that the claim of the *tovei’a* has been partially substantiated by the ensuing developments.

However, an interesting comment of Tosafot suggests a very different source for the *modeh be-miktzat* oath. Tosafot write (*Bava Metzia* 4a) that the partial confession has created *raglayim le-davar* (literally, grounds for the litigation). One way of interpreting this phrase is that the partial confession or corroborating witness has created **suspicion** surrounding the veracity of the defendant and his claims. Accordingly, perhaps the *shevua* does not emerge from the fact that the legal claim has been reinforced by corroborating evidence, but rather from newfound suspicions regarding the defendant. In this *shiur*, we will explore various *halakhot* that can be explained based on this view of the *shevua*.

The *gemara* (*Bava Metzia* 4a) introduces a situation in which a partial confessor (*modeh* *be*-*miktzat*) immediately renders payment for his confession – *helakh* (see <http://etzion.org.il/en/exemption-helakh> for an elaboration of this exclusion to *modeh be-miktzat*). For some reason, the immediate payment cancels the typical oath that is necessary in this situation. The Meiri cites one explanation that justifies this cancellation of the oath. By offering immediate payment, the defendant/*nitva* proves that his intent in his partial confession is not simply to procrastinate and hinder collection due to of insufficient funds. Typically, we suspect a *modeh be-miktzat* defendant of obstructing justice by partially confessing to a larger debt whose monies he does not yet possess; In this context an oath is imposed to compel the nitva to be more honest and thorough in his confession. The immediate payment in a *helakh* situation removes any suspicion, and thus no oath obligation emerges. This is a rather intuitive manner of explaining *helakh*, and it may reflect that the conventional obligation of *modeh be-miktzat* stems from the suspicion that a partial confession arouses.

Evidence for this explanation of the *helakh* exclusion (and consequently the attribution of *modeh be-miktzat* to the aroused suspicion) may be found in an interesting exception to *helakh* discussed by the *Sefer HaTerumot*. If the immediate *helakh* payment seems suspicious (the defendant is not “sincerely” paying quickly, but rather trying to “play the system” by offering payment merely to exonerate his oath through the dispensation of *helakh*), the *modeh be-miktzat shevua* is indeed installed. This exception may indicate that the general *helakh* exemption stems from the **sincerity** indicated by immediate payment, in contrast to the suspicion that a typical partial confession arouses. If the immediate payment is itself suspicious, we can easily envision the installment of the original *modeh be-miktzat shevua*.

The obligation of a *modeh be-miktzat shevua* in situations of suspicious claims may account for an interesting *gemara* in *Shevuot* (40b) regarding a litigation that does not present as *modeh be-miktzat* but nonetheless arouses suspicion. If a litigant insists that the defendant owes 100 shekels of wheat and the defendant partially confesses to owing 50 shekels of barley, no *modeh be-miktzat shevua* entails. The confession must be “*mi-min ha-ta’ana*,” the same content as the original claim. However, if the defendant/*nitva* interjects his partial confession –“*ke-ma’arim*,” as if he is merely manipulating the claims – he **does** take a *modeh be-miktzat* oath. It appears that his interjection was merely timed to prevent further expansion of the original prosecution claim which may have yielded legal complications including a possible *shevu’a*. Even though this litigation does not have the structure of *modeh be-miktzat*, a *shevua* is taken.

This is a remarkable *gemara.* Even though the formal structure of *modeh be-miktzat* does not emerge, a *modeh be-miktzat shevua* is taken because his quick interruption raises suspicion, implying that the entire *modeh be-miktzat* model is built on the premise of suspicion surrounding the defendant. If that suspicion is aroused even without the formal partial confession of *modeh be-miktzat*, a *shevua* is taken.

This view of the *modeh be-mikzat shevua* may also explain the potential exemption known as *meishiv aveida.* Several *gemarot* imply an exemption for someone who volunteers a confession about money that he could have easily denied. A volitional confession may not obligate a *shevua* simply because the *nitva* appears to be altruistic and not limitational or filibustering. For example, according to R. Akiva (4b), if a litigation was lodged about 5 shekels surrounding a contract that implies a debt of 2 and the defendant freely admits to 3, he is not obligated to swear about the remaining 2 shekels. He could have easily admitted to 2 shekels with the support of the contract. By freely confessing to 3, he appears to be cooperative and honest, and he is thus excused from the oath. Many opinions interpret this as a general and classic *migu* that augments the position of a defendant/*nitva* based on potential alternate claims. As such, it would not reflect upon the specific nature of *shevua*, since *migu* is employed in a very broad range of situations. However, Rashi views this as a unique *shevua* exemption known as *meishiv aveida*: The appearance of honesty and volunteerism cancels any potential *shevua*. Perhaps R. Akiva viewed a *shevua* as a product of suspicious behavior; if the partial claim appears to be altruistic, no oath is required.

This potential exemption of *meishiv aveida* appears to be Rabbinic in origin. The *mishna* in *Gittin* (48b) introduces this exemption to protect returners of lost objects from possible *modeh be-miktzat* scenarios and the consequential obligation of *shevua*. Nevertheless, although the concept may be Rabbinic it may only be possible by viewing the origins of the *modeh* *be-miktzat shevua* as based upon suspicious claims.

Finally, this view of *shevua* may account for *shevua* exemptions based on any corroborating evidence. Several *gemarot* imply that an oath can be cancelled if even moderate evidence supports the position of the defendant who is obligated in the oath. For example, the *gemara* (4b) claims that a contract that obscurely supports the defendant only in very general terms is sufficient to exonerate the *shevua*. This type of evidence may not be effective in typical situations, but it nevertheless exempts the oath. Similarly, Rabbeinu Tam claims that a lone witness (*eid* *mesayei’a*) can exempt a *shevua* even though his testimony is not sufficient to obligate monies. Additionally, various *gemarot* imply that a *migu* can cancel an oath. If an oath stems from the suspicious nature of the defendant, it is more reasonable that **any** evidence that affirms his honesty may exempt the *shevua*. If the *shevua* stems from the legal claims that have been reinforced by the partial confession, it would be far more complicated to cancel the *shevua* based on second level forms of evidence that do not operate in other fields of Halakha.