**YESHIVAT HAR ETZION**

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

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #17: The Principle of *Mitokh*:**

**Monetary Payments when an Oath is Defaulted**

The Torah imposes oaths in three situations: 1) If a claim was partially confessed to, the confessed part is rendered as payment and the defendant (*nitva*) must swear regarding the denied sum. 2) If a fully denied claim is supported by a lone *eid*, the defendant/*nitva* must take an oath about the entire sum. 3) A *shomer* who failed to guard the item must swear that the item was damaged in the alleged manner that he claims. If any of these defendants/*nitva* cannot take an oath, they must render payment instead, based on the principle, “*mitokh she-eino yakhol li-shava meshaleim*.” Classically, this principle applies to someone who does not possess certain knowledge about the disputed monies. Since there is a *shevua* obligation but the person cannot take the *shevua* because he does not possess definite knowledge, the defendant is obligated to pay.

One view of this rule suggests that the payment is an autonomous requirement unrelated to the actual oath. Perhaps the uncertainty of the *nitva* raises alarms about his veracity and creates a new monetary payment obligation, or perhaps his complicity in the malfunctioning of the oath and hence the legal proceeding demands monetary compensation. Maybe the specter of payment will coax the real information out of the defendant. Defined this way in one of these manners, the payment is unrelated to the actual oath. In the event of legal failure based on his inability to swear, a defendant must render payment.

Alternatively, the payment of *mitokh* may be viewed as **integral** to the actual oath. Every oath obligation contains a latent **monetary** obligation as well. Since the defendant’s claim was weakened by the partial confession or the opposing lone *eid*, he may be partially responsible to pay. Since convincing or definitive testimony to this potential obligation has not been gathered, that monetary obligation can be voided by an oath. If, for whatever reason, the oath cannot be taken, the defendant assumes the full burden of the original latent monetary obligation that was not annulled by an oath.

According to this view, the payment in a situation of *mitokh* or defaulting on an oath is not external, as in a fine for the legal malfunction or some “introduced” payment because of newly aroused suspicion. Instead, the monetary obligation is **intrinsic** to every oath situation. In other words, every oath obligation cloaks an accompanying monetary obligation. Since definitive evidence of two witnesses has not been produced, that monetary obligation can be canceled with a successful oath, but failure to take that oath dictates that the original payment is now mandatory.

There are many distinctions that may arise from this fundamental question. The most central ramification is whether an actual source for the *mitokh* clause is necessary. The *gemara* in *Shevuot* (47a) cites a source for the suspension of the *mitokh* rule for orphans. Perhaps this *pasuk* serves as a dual source – to obligate *mitokh* payment for ordinary defendants who default on an oath as well as to excuse orphans who default. Alternatively, R. Elchanan Wasserman (*Kovetz Shiurim* 2:7:2) claims that the base rule of *mitokh* does not require a Biblical source, as it can be intuited; the cited verse merely acquits orphans from this rule. Clearly, if *mitokh* presents a new monetary obligation in the absence of an oath, it would require a source. (In fact, there is one opinion cited by the *Ketzot Ha-Choshen* [92] that views the **entire** concept of *mitokh* as Rabbinic.) If, however, every oath is accompanied by a monetary debt that becomes mandatory if the oath is not taken, it is highly likely that no source is necessary. By obligating oaths, the Torah is inherently obligating potential monetary obligations that become compulsory in the absence of an oath.

Perhaps the most reflective *nafka mina* to this question surrounds the application of *mitokh* to defendants who cannot be blamed for the failure to take an oath. One example is a defendant who is uncertain about his defense claim but does not have the ability to acquire definitive information – or, as Tosafot refer to such a defendant, “*lo hava* *lei le-meida*.” Tosafot (*Bava Kama* 46a; *Bava Metzia* 97b) claim that such defendants are excused from *mitokh*, and this position is adopted by the Ra’avad (comments on the Rambam, *Hilkhot She’eilah* *U-Pikadon* 5:6). Viewing *mitokh* monetary obligations as a form of a “fine” for the legal malfunctioning of non-certain claims would support Tosafot’s exception. Defendants who had no manner of acquiring clear information, cannot be penalized for the malfunction.

By contrast, the Rambam (ibid. and in *Hilkhot* *Malveh Ve-Loveh* 5:6) extends *mitokh* to any and all situations in which a defendant cannot render an oath, without gauging the role of the defendant in the malfunction. Perhaps the Rambam believed that *mitokh* reflects the emergence of an inherent monetary obligation that underlies every oath. Regardless of the complicity of the defendant, the absence of an oath **naturally** entails the obligation of monetary payments.

A second example of a scenario of failed *shevua* that may not entail *mitokh* surrounds someone who is suspected of lying based on previously being apprehended falsifying legal information - a “*chashud*.” Since he cannot take an oath, does he classify as a *mitokh* candidate? This question is complicated by the fact that the *mishna* in *Shevuot* (44b) enables the *tovei’a* (claimant) who opposes a *chashud* to take an oath and proceed with collection. Tosafot (*Bava Metzia* 5a, s.v. *she-kenegdo*) present two opinions as to whether this ability is a derivative of *mitokh*. Tosafot essentially debate whether *mitokh* applies to a “*chashud*” person who is personally prepared to swear but is not allowed to because of past legal involvement. Unlike someone who does not have sufficient information, the lack of an oath in this case is not due to his uncertainty, but possibly to *beit din*’s unwillingness to accept his suspicious oath. If *mitokh* is based upon penalizing the defendant for the malfunction, perhaps the principle should not apply to someone who is willing to swear but cannot. On the other hand, if *mitokh* reflects the emergence of a monetary debt that was not responded to with an oath, the principle should apply broadly to any scenario in which an oath was not executed, regardless of the reason it was not taken and unrelated to the complicity of the defendant in the malfunction.

A separate issue may surround the status of someone in a *mitokh* scenario. Would his predicament be defined as a monetary debt or an oath? If *mitokh* is the imposition of a separate fine for non-oaths, the person is essentially obligated to take an oath; failure to execute that oath will ultimately **result** in the imposition of an unrelated financial obligation. If, however, *mitokh* reflects the emergence of an inherent monetary obligation, every oath essentially carries a monetary obligation until and unless the “nullifying” oath is rendered. This abstract question may affect several *halakhot*. For example, can the process of *gilgul* arise from a *mitokh* scenario? *Gilgul* allows expanding a base oath into additional topics that must be sworn to by the defendant. If the defendant is obligated to an oath that he cannot take (and must pay for) but he is defined as someone who is obligated to an oath, he may be subject to the application of secondary oaths. By contrast, if the person is fundamentally obligated to pay money, it would be difficult to expand a monetary obligation into additional oaths. The Rosh (*Teshuva* 8:3) rejects the notion of *gilgul* in *mitokh* scenarios, while it appears that the *Shulchan Arukh* (CM 75:15) cites two opinions.

A similar question surrounds the ability of a lone *eid* to acquit the oath that the defendant cannot execute. Many opinions claim that a lone *eid* who supports the claim of the defendant can release the oath obligation (see shiur “*[Shevuat Eid Echad](http://etzion.org.il/en/shevuat-eid-echad)”* for an expansion of this claim). It appears that the Ramban (*Milchamot Hashem*, beginning of *Bava Metzia*) and Rosh (*Bava Metzia* 1:3) debated this issue as part of their overall debate surrounding the parameters of a lone *eid* and his acquittal of a *shevua*. The Ramban’s logic suggests that a lone *eid* **can** acquit a *shevua* that has reached the malfunctioning scenario of *mitokh*, while the Rosh apparently believed that it would not. This debate once again revolves around the aforementioned issue. The Ramban may have maintained that a *mitokh* defendant is essentially obligated to an oath, with the potential to be penalized for non-execution. He therefore should be acquitted by a lone *eid* (if indeed we adopt the doctrine that a lone *eid mesayei’a* can exempt *shevuot*). The Rosh, on the other hand, believed that a *mitokh* situation is defined as a monetary obligation and is not a candidate for acquittal through one *eid*.