**YESHIVAT HAR ETZION**

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

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**IN LOVING MEMORY OF**

**Jeffrey Paul Friedman z"l**

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**לע"נ**

**ז"ל יהודה פנחס בן הרב שרגא פייוועל**

**כ"ב אב תשכ"ח – י' אב תשע"ב**

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**Shiur #20: Disqualification of a *Chashud* from Taking a *Shevua***

A person who has been caught swearing falsely or has violated infractions that disqualify for *eidut* is considered a *chasud* - a suspicious person who cannot take a litigational oath. How does this disqualification compare to the disqualification of witnesses?

By committing various *aveirot* (including some that do not necessarily compromise personal legal reliability), a person can be disqualified from serving as a witness. The status of *kasher le-eidut* can be suspended due to prohibited activities even if those activities do not suggest possible future falsified testimony. Is the status of *chashud* for *shevuah* similar in that it compromises a person’s “identity” as a potential swearer? Alternatively, perhaps swearing falsely and becoming a *chashud* is different than providing false testimony. Unlike someone who must maintain a legal status as a candidate for testimony or *kasher le-eidut*, there is no halakhic category of candidate to take oaths or *kasher le-shevua*: Instead, the disqualification of a *shevua* from a *chashud* is extrinsic; *beit* *din* will not accept this oath because we suspect that it is not accurate.

In other words, is a *chashud* inherently disqualified from *shevua* oaths because of his compromised legal status, or is he merely “procedurally” prevented from offering his suspicious oath as testimony?

One indication that a *chashud* is not inherently disqualified, but merely procedurally prevented, is provided by Tosafot (*Bava Kama*, 108a), who claim that the *shevua* of a *chashud* is only invalid *mi-derabbanan*. A second question which might emerge is the status of a *chashud* oath that was already proffered. If *beit din* incorrectly imposed an oath upon someone known to be *chashud*, would the oath be accepted *bedieved*? Similarly, if the *chashud* initiated his own *shevua* (a situation of *kafatz ve-nishba*), would it be legally accepted? If a *chashud* is inherently disqualified, his *shevua* would carry no meaning regardless of the situation. If, however, legal procedure warrants against imposing an oath, perhaps the oath is legally valid if it has already been taken.

A related question concerns someone who was identified as suspicious only **after** he took an oath. The Rambam (*Hilkhot To’en Ve-Nitan* 2:9) claims that the oath is retroactively annulled since it was determined to be an oath of a *chashud*. This implies a fundamental dismissal of *chashud* oaths. By contrast, some claim that this oath is accepted since at the point of issue the suspicions were not known. This may reflect a logic that the oath of a *chashud* is inherently valid but procedurally unacceptable. If at the point of issue suspicions were not known and procedural issues were not violated, the oath is ultimately actionable.

An interesting question surrounds the ability of the opposing litigant to unilaterally accept the oath of a *chashud*. Halakha usually allows litigants to accept testimony that would otherwise be unacceptable. This process, known as *ne’eman alai*, acknowledges certain objective “global” standards of testimony, but also allows for personal tailoring and adjustments. If a *chashud* is inherently disqualified, perhaps the opposing litigant can validate his oath. This position is cited by the Mordechai (*Shevuot*, *siman* 769). By contrast, most *Rishonim* (including the Rambam, *HIlkhot To’en Ve-Nitan* 2:11) do not allow this adjustment. It is possible that these *Rishonim* maintain that a *chashud* is indeed intrinsically disqualified, but the opposing litigant cannot alter this reality. Alternatively, these *Rishonim* may maintain that the unacceptability of a *chashud* oath is procedural and surrounds *beit din’s* ability to accept an oath that they are uncertain about, in which case the procedural limitation exists independently of the litigants and cannot be adjusted by them. The *Ketzot* *Ha-Choshen* (92:2) argues the latter; *beit din* cannot rely on this suspicious oath, because it would entail a desecration of *Hashem*’s name, which is perpetrated by a fake oath. The inadmissibility of this oath is therefore not subject to the personal preferences of the litigants.

Interestingly, this question may affect a larger issue of awarding payment to the plaintiff who is prosecuting the *chashud*. The *mishna* in *Shevuot* (48) awards the disputed monies to the *tovei’a* provided that **he** takes an oath that monies are owed. One approach suggest that this monetary award to the plaintiff is based upon the doctrine of *mitokh*, which obligates a defendant to pay monies that he could not swear about because his oath was unsuitable. Since the oath of a *chashud* is disqualified, he is subject to *mitokh* payments, which happen to include an oath on the part of his opposing litigant. This is the position of Tosafot (*Bava Metzia* 5a) in their initial comments.

Alternatively, a *chashud* may not be subject to *mitokh*, since his oath is not inherently disqualified and he is merely “procedurally” prevented from issuing his oath. Perhaps his obligation to pay is based on a completely different principle unrelated to *mitokh*, a concept which only applies to those who are intrinsically unable to swear. This is the second position of Tosafot and reflects the view that a *chashud* is only practically unable to issue his oath.

Finally, the nature of the *chashud* disqualification may affect which **types** of people are defined as *chashud*. This is a very extensive question, but two particular situations may be informative. Would someone caught swearing falsely about a *heset* situation be considered *chashud*? As discussed in a previous *shiur* (*shiur* #18: *Shevuat Heset*), the *heset* oath may not be an actual litigational oath, but rather an oath instituted to placate lingering worries of the plaintiff. Perhaps violating this non-litigational oath is insufficient to render someone an oath-violator. If, however, a *chashud* is merely procedurally inhibited, perhaps we would impugn **anyone** who violated any type of oath. The Rambam (*Hilkhot To’en Ve-Nit’an* 2:11) claims that this person would be considered a *chashud*, whereas the Me’iri (introductory comments to *Shevuot*, ch. 6) claims that he may not be considered a *chashud*.

A reverse question would surround someone who took a personal oath or *shevuat bituy* to perform some future activity, such as eating bread. If he does not fulfill his oath, would he be considered *chashud*? In a purely legal sense, he has violated an oath and may be defined as an oath-violator. This is indeed the position of Rashi and the Ramban (*Shevuot* 46a). Alternatively, one could argue that at the point of the issue of the oath, this person did not lie; he possibly had full intention to fulfill his forward-obligating oath. From a procedural perspective, perhaps we would accept his oath since he has not been caught falsifying oaths in a manner that arouses undue suspicion. The Rosh and the Mordechai cite Rabbenu Tam as disqualifying a forward-*shevua* violator based on the designation of *chashud al hashevua.*