

YESHIVAT HAR ETZION
VIRTUAL BEIT MIDRASH PROJECT(VBM)

TALMUDIC METHODOLOGY
BY: RABBI MOSHE TARAGIN

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AFKA INHU RABANAN PART II

Last week we assessed the various stances regarding the mechanism of afka inhu. We studied these various approaches based upon the manner in which the gemara's hava amina and maskana were explained. To summarize: we detected three distinct understandings of the process of afka inhu. Rashi's Rebbe assumed that the Rabanan have the unilateral right to retroactively nullify kiddushin. Tosafot, on the other hand, assumed that they must handicap the ma'aseh kiddushin by redefining one of its components. The Ritva opted for a more extreme position that all kiddushin is pitched around the constant approval of Chazal. If and when they disapprove, the kiddushin falls in on itself - much like the disapproval of a father in a case where the kiddushin was set around his approval.

This article will explore several other viewpoints adopted by the Rishonim to help explain this phenomena. The common denominator is that all these Rishonim detected an inherent problem in authorizing Chakhamim with the license to unilaterally and retroactively void kiddushin. Somehow the halakha must be REINTERPRETED. (Note: to a certain degree the Ritva's reinterpretation of this halakha into a more 'universal' variety, might reflect his similar ambivalence to unilateral annulment.) What we will study is the degree to which the various reinterpretations alter the definition of afka inhu possibly rendering it as totally different manner from that of our initial impressions. We will begin with the position of Tosafot in Bava Batra (48b). Tosafot (as is their custom) begin with a setira. The gemara in Ketubot ascribes the right of the Chakhamim to conduct afka inhu to the fact that "kal di-mekadesh a'da'ata de-rabanan mekadesh" (whoever marries, bases it upon the approval of Chazal - kedat Moshe ve-Yisrael). The gemara in Bava Batra, however, addresses a case of afka inhu and bases it upon a completely different factor. The case refers to a man who coerces a woman to marry him ; he persecutes her until she consents (talyuhu ve-kadish - literally he hung her on a tree until she agreed to marry). Strictly speaking this marriage is sound as his pressure

brought her to the point of legal consent. However, Chazal invoke afka inhu to nullify this marriage. The gemara justifies this action based upon the principle "hu asa shelo ke-hogen lefikakh na'aseh lo shelo ke-hogen. (he acted unethically and therefore we will reciprocate). In this instance the gemara does not base afka inhu upon the principle of kal di-mekadesh. In fact this immoral husband, by torturing the woman has not conformed to Chazal's standards. Alternatively, the gemara in Ketubot does not require immoral conduct as incentive for afka inhu!!

Tosafot discriminates between the two cases. In truth, any implementation of retroactive annulment of the kiddushin requires direct empowerment of the Chakhamim. Mentioning "ke-dat Moshe ve-Yisrael" is the manner by which the individual - who fundamentally controls his own challut kiddushin - entitles the Chakhamim with the ability to cancel the kiddushin. Lacking this empowerment the Chakhamim have no license to retroactively annul kiddushin. One who coerces a woman to marry inherently is not marrying according to Chakhamim's will. Had he taken "ke-dat Moshe ve-Yisrael" into account he would stop brutalizing the woman. Lacking this direct empowerment the Chakhamim have no right in this instance to retroactively void the marriage. In THIS instance they declare the marriage void from its very inception. Indeed, mi-deoraita, the only requirement for halakhic kiddushin is the consent of the woman - whether it is voluntary or pressured and coerced. The Rabanan added a condition to the definition of ma'aseh kiddushin; its da'at must be volitional. Lacking this higher grade of da'at the kiddushin is invalid right off the bat. This does not reflect Chakhamim's unilateral control over the state of kiddushin but rather their appending an additional requirement to kiddushin. This is tantamount to the Rabanan adding a requirement of berakha to the kiddushin process. Berakha, however, isn't meakev in a situation in which it was omitted. This requirement of voluntary da'at is meakev. Fundamentally, though, the Rabanan, are not annulling marriages and cannot annul this marriage. They are merely setting additional criteria for what constitutes proper marriages.

In a general sense, Tosafot recognizes that the authority to perform retroactive nullification can only be conferred upon the Chakhamim by the individuals involved. In standard cases this authority is granted. In exceptional cases, where the kiddushin wasn't performed with Chakhamim's approval, and license was not granted them, authentic afka inhu cannot be implemented. Instead, Rabanan establish certain clauses which invalidate the kiddushin from its very inception. Tosafot has thereby limited the halakha of afka inhu - theoretically as well as practically. In a theoretical sense the authority stems from the husband and wife. In a practical sense it can only be implemented when this jurisdiction has actually been conferred.

Several other Rishonim, in their attempt to limit the halakha of afka inhu, actually redefine the halakha - some of them in quite extreme fashion. We will address three options - all linked by one common theme.

The Rashba begins his comments with an intriguing and pressing question. This sweeping authority of the Chakhamim should solve all cases of 'aguna'. In any situation in which a woman is trapped in a marriage - either because her recalcitrant husband refuses to grant her a 'get' or because he has disappeared without a trace - the Chakhamim, aiming to assist her, should unilaterally declare her initial marriage void. The Rashba responds to this by rejecting the thought that the Chakhamim have such sweeping power. Instead, they merely have the right to repair and reconstruct a 'get'

which is basically valid save for a minor defect. For example in the case of a 'get' which was issued surrounding a condition which wasn't deliberately fulfilled (Ketubot 3a). Essentially the 'get' is legitimate but the t'nai wasn't met in the truest sense. The Chakhamim can redefine the stipulation of the original t'nai. Even though in a standard sense fulfillment of the condition usually requires intentional fulfillment, the Chakhamim can enact 'halakhic fiction' and assume that the husband meant ANY FORM of fulfillment. This represents a minor change to the dynamic of the 'get'. What is terminating the marriage, however, is not the Chakhamim's annulment, but instead the actual 'get'. Afka inhu can only be employed when a 'serach get' has been issued - a basic, fundamentally sound 'get' exists with some minor detail which impedes its validity. In THIS case the Chakhamim can validate the 'get' and allow IT to terminate the marriage. Effectively, the Chakhamim aren't tampering with kiddushin. They are merely repairing a 'get' which is invalid mi-deoraita and allowing it to discontinue the marriage. Of course, the major shift according to the Rashba is that afka inhu no longer 'retroactively' voids a marriage. Instead, it validates a 'questionable' or slightly defective 'get' allowing it to interrupt the marriage. In his desire to redefine afka inhu, in a manner which would not grant Chakhamim license to tamper with marriages, the Rashba effected a major change in the meaning of afka inhu. It is not retroactive as a simple reading of the gemara might suggest (See afterword for additional parallels to this concept whereby the Chakhamim repair an apparatus which itself terminates the marriage). Two other Rishonim present similar concepts to that of the Rashba. In each case afka inhu does not retroactively annul the marriage. In this respect the approaches parallel that of the Rashba. In each case the 'get' is validated by Chakhamim despite the 'defect' that the condition wasn't willfully fulfilled. The only difference between these opinions (and indeed between the two opinions and the Rashba) is the manner in which the condition and therefore the 'get' is redefined and repaired. The Tosafot Ri Ha-lavan asserts that divorces as well as marriages are performed ke-dat Moshe ve-Yisrael. Whereas according to Tosafot this consciousness authorizes the Chakhamim with sweeping powers, according to Tosafot Ri Ha-lavan it merely establishes a new standard by which all extraneous conditions are to be measured. In FACT he stipulated that the 'get' should only be valid if the condition is met, and in general fulfillment (kiyum ha-t'nai) entails willful compliance. This is the 'independent' or 'intrinsic' standard for defining 't'nai' and 'kiyum ha-t'nai'. However, the Chakhamim establish in these cases a competing standard. Chakhamim in their desire to see this 'get' validated (to avoid the confusion or abuse mentioned in the previous article) erect a different standard for 'kiyum ha-t'nai'. According to their standard ANY form of fulfillment constitutes 'kiyum ha-t'nai' even accidental. By tacitly issuing his 'get' 'ke-dat Moshe ve-Yisrael', the husband preprograms his "t'nai" to be gauged by the standards of Chakhamim. Hence, once the condition is met - regardless of the exact circumstances of its fulfillment - it is considered 'kiyum ha-t'nai' and the 'get' is valid. Like the Rashba, the Tosafot Ri Ha-lavan assumes the marriage is not retroactively annulled. Like the Rashba he does not grant the Chakhamim the license to manipulate kiddushin. According to the Rashba the Chakhamim have the authority to arbitrarily redefine his original t'nai through a halakhic fiction, and ASSUME that despite his expression he REALLY meant so and so. According to the Tosafot Ri Ha-lavan they cannot even perform this. They merely establish their own independent criteria and the

husband himself, by issuing the 'get' - 'ke-dat Moshe ve-Yisrael' - is effectively subscribing to their new standards. He subscribes even though he did not actually stipulate the condition according to those standards. Merely mentioning ke-dat Moshe ve-Yisrael automatically formats the 'get' according to Chazal's standards.

The Ra'ah embarks upon a slightly different approach - one which is also slightly enigmatic. He quotes an opinion which suggests that the husband himself intended to modify the original t'nai. Even though he didn't elaborate the 't'nai' and we generally assume that in the absence of elaboration or clarification he intends that only willful compliance with the 't'nai' should constitute 'kiyum ha-t'nai' he TRULY desires to have this condition reformatted. The impetus behind this desire is the knowledge that if his 't'nai' will not be reconfigured, and the 'get' will be invalid, the Chakhamim will have the sweeping right to retroactively nullify his kiddushin and define all his bi'ah as zenut. This fear encourages and inspires him to intend his t'nai in the broadest sense possible - allowing the greatest chance for its self-validation, in order to avoid the interference of the Chakhamim (an annulment which for him will carry dire consequences). Hence, there is never the need for Chakhamim to ACTUALLY void a marriage retroactively. Instead, once they appropriate the authority, the fear of its implementation will cause husbands to 'repair' the 'get' on their very own without subscribing to the Chakhamim. The enigma within this shita is as follows. In truth afka inhu is limited and centered around the husband not Chazal. In theory, however, what created this change of focus was the sweeping authority which Chazal actually maintained in reserve. In a sense, this shita is hybrid - it grants the Chakhamim the sweeping authority which some of the earlier positions did. In practice the Chakhamim are never forced to use this authority and all afka inhus are conducted by the husband himself.

To summarize: we have addressed three basic approaches to the halakha known as afka inhu Rabanan le-kiddushin minei. The first group of Rishonim take the gemara at face value - the Chakhamim have the arbitrary right to retroactively annul marriages without employing any particular 'get' or other device. With a sweep of their hand they can void a marriage and categorize all the bi'ah as zenut. This represents the most extreme, unmoderated position and also represents a bit of a shift or transformation from the halakhic norm which fixes the people involved - and only those people - with the authority to alter the halakhic 'challut. On the opposite end of the spectrum several positions redefined afka inhu in a manner which greatly limits Chakhamim's role. According to the Ritva the 'get' was pitched around their approval in the same manner as it can be pitched around a parent's approval. By disapproving, Chazal are merely providing the necessary information to determine the intrinsic validity of the 'get'. The husband has already preprogrammed this validity to be contingent upon their approval. According to several other Rishonim, afka inhu represents the manner in which a 'get' is slightly modified and repaired. According to the Rashba the Chakhamim have the license to perform this minor repair. According to the Tosafot Ri Ha-lavan and the Ra'ah the husband himself performs the repair. Either he subscribes to the standards which Chazal erected or he labors to validate the 'get' in fear of the alternate situation where Chakhamim will interfere. The middle position is expressed by Tosafot. The Chakhamim do end up with sweeping authority to actually nullify a kiddushin. They have to be explicitly granted this permission by the husband, through the utterance of "ke-dat Moshe ve-Yisrael.

AFTERWARD:

1. The Rashba applies afka inhu to the case of one eid who testifies to the death of a husband. The gemara in Yevamot informs us that if a lone eid testifies that the husband died we accept his eidut and allow the wife to remarry. Indeed, in general, we only accept the testimony of two eidim when it comes to marital issues. Here we assume the woman will be cautious and thoroughly investigate the situation. The Rashba maintains that this license and flexibility is also based upon afka inhu. Just like we can repair a slightly defective 'get' we can also 'upgrade' insufficiently strong eidut. Again the Chakhamim are not disrupting the marriage. They merely repair the halakhic mechanism which can terminate the marriage. METHODOLOGICAL POINTS:

1. Whenever there exists a variety of different positions regarding a halakha attempt to establish a spectrum of the different opinions. This will assist in grouping together similar positions and will allow an appreciation of the major differences as well as the subtle differences.

2. Oftentimes there is a conflict of interest between text and logic. Several Rishonim logically opposed granting Chakhamim sweeping authority to retroactively annul marriages. To this end they redefined afka inhu. DO these redefinitions accord with the simple reading of afka inhu in the gemara? Here are some comments from one of our readers Rabbi Michael Broyde (relmb@emuv1.cc.emory.edu) regarding last week's shiur:

R. Neuberger, in his dissertation (192?, Berlin) notes that while Rambam in Sefer ha-mitzvot is unclear about how this term is used, in all but this case and one other, the term divrei sofrim in the Mishneh Torah means derabanan. I think he states that there are 47 occasions, 45 of which are derabanan, two of which are unclear (my numbers might be off, but I will look it up.) My gut is that Rambam held like Rashi's rebbeim that kedushei kesef is derabanan, rejected the limud in the beginning of kiddushin as coming from the savoraim and not the amoraim (see Ritva who notes this tradition) and that is that. Best wishes, Michael Broyde.

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