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**TALMUDIC METHODOLOGY**  
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**AFKA INHU RABANAN LE-KIDDUSHIN**

One of the characteristic features of the halakhic system is that, generally, Man controls the halakhic status of particular items. Ironically, this is particularly true in the realm of 'kedusha'. With rare exception, all kedusha - which commonly is associated with transcendent properties - is installed by Man. Humans are 'mekadesh' chagim just as they confer kedushat korban to an animal through ma'aseh hafrasha, and remove it through pidyon. This control extends to several other areas of halakha. In the realm of personal affairs the human being has the authority to create marriage and terminate marriage through the halakhic tools at his disposal. Only the man and woman determine that they are to be married and only the man has the authority to discontinue. There doesn't exist, within the main fabric of halakha, institutional control over marriage. The mesader kiddushin doesn't perform the marriage but rather presides over it and assures proper procedure. The same is true of the mesader gittin. Unlike other religions in which a religious institution creates the marriage and annuls it, Judaism and halakha transfer full control to the parties involved. Except for one interesting case: The gemara in two locations details a 'get' which is invalid according to strict Biblical law. In one case (Ketubot 2b) the condition (t'nai) upon which the 'get' hinges was fulfilled but through oness - an accident - which doesn't constitute halakhic fulfillment of the clause; in this case since the condition wasn't willfully fulfilled the 'get' is pasul. In the second case the ba'al appointed a shaliach to deliver a 'get' to his wife and during the shaliach's trip canceled his shlichut. In theory, once the shlichut is nullified the 'get' which is delivered is invalid. In each of these cases, though the 'get' is biblically invalid, the Chachamim, to prevent confusion and abuse (the woman who receives the 'get'

from the disqualified shaliach will erroneously assume that the 'get' is valid - not knowing that he had been disqualified) disband the marriage. They perform this annulment through the halakhic principle of afka inhu Rabanan le-kiddushin miney - which means that instead of reconstituting the present 'get' and thereby terminating the marriage, they retroactively invalidate the marriage by voiding it from its inception. This represents a radical departure from the general rule of the halakhic system as stated above. Apparently, even halakha allows for occasional unilateral annulment of the marriage. This series of two articles (parashat Mishpatim and parashat Teruma) will investigate this principle.

Our first stage concerns an intriguing hava amina and maskana in the gemara. As the first mishna in Kiddushin states, the process of kiddushin can be enacted through three different means - kesef, shtar, or bi'ah. Initially, the gemara believes (in its hava amina) that this retroactive abrogation would only be legitimate in cases where the initial kiddushin were performed through kesef. If, however, the kiddushin had been performed through bi'ah, the device of afka inhu would not apply. The hava amina seeks to discriminate between kiddushei kesef and kiddushei bi'ah in terms of the applicability of afka inhu. In the language of the gemara - teinach de-kaddish be-kaspa, kaddish be-bi'ah mai ikka le-meimar?

Ultimately, the gemara concludes that kiddushei bi'ah is equivalent to kiddushei kesef vis-a-vis afka inhu; in either case we can retroactively void the kiddushin since as the gemara asserts - shavyuhu Rabanan le-bi'ato be'ilat zenut (the Rabanan render the original bi'ah as a non-marital one). While the hava amina seeks to differentiate between the two forms of kiddushin the maskana equates the two. How are we to chart the change from hava amina to maskana? What changed from the gemara's initial impression to its final conclusion? Most importantly, what does this demonstrate regarding the mechanism of afka inhu?

We begin, of course, with the hava amina - what was the gemara thinking? Why should afka inhu not be applicable to kiddushei bi'ah? In general, whenever a halakha collapses it can fail internally or externally. It can break down because the necessary mechanism is broken - the halakha cannot be applied - or it may fail because some external factor limits it. In our case as well, the suggested failure of afka inhu in cases of kiddushei kesef can be attributed to one of these two phenomena. Either the 'tools' by which we apply afka inhu fail or the overall application causes additional unwanted repercussions. By and large, the Rishonim who addressed this gemara chose one of these two approaches. We will begin with those who chose the first option: the internal mechanism of afka inhu breaks down in the case of kiddushei kesef.

Rashi in Ketubot (3a) Dibbur Hamatchil Shavyuhu quotes a position in the name of his Rebbeeim that of the three modes of kiddushin, kesef is only mi-derabanan. Since it is not derived from an explicit pasuk its effectiveness is only rabbinic. Indeed, the Rabbenu Gershom in Bava Batra (48b) cites this same position. Rashi's Rebbeeim explained the hava amina in this fashion. The Chachamim only have the authority to annul a kiddushin de-rabanan, not a kiddushin which was performed through deoraita mechanisms. Such a kiddushin is too secure and grounded for the Chachamim to unilaterally annul. This position viewed the inapplicability of afka inhu to kiddushei bi'ah as stemming from its deoraita status - one which makes the kiddushin too potent to be annulled. Of course, while this position provides a reasonable description of the hava amina, it does not address the gemara's conclusion. If indeed, afka inhu is limited to de-rabanan why should it ultimately apply as well to kiddushei bi'ah. The gemara, in its maskana, does not seem to withdraw from this stance - that afka inhu is inapplicable when it comes to deoraita. If so, there is no plausible reason that it should apply to kiddushei bi'ah. Very often, we encounter a situation whereby such a sound and sensible theory is suggested to support the hava amina that one is left wondering how to justify the rejection of this principle in the maskana. Even if a potential reason for this rejection is located, one has to inspect whether the language of the maskana reflects this explanation. The glaring weakness in the above approach is its inability to properly explain the maskana in a manner consistent with the language which the gemara employs in the maskana.

Tosafot (Dibbur Hamatchil Teinach) offers a different explanation to the gemara's initial discrimination. In order for the Chachamim to void the marriage, an unilateral decree is insufficient. They must address the instruments of the original kiddushin and negate them as well. Chachamim don't have the right to arbitrarily invalidate the effects of the kiddushin. As stated in the introduction this would run contrary to the very basis of the halakhic system. Instead, they dissect the original instruments by which the kiddushin was generated and seek to cancel the kiddushin by altering these tools. In the case of kiddushei kesef, the gemara suggests that such translation is possible. Kesef is a universal, objective medium lacking any special relationship to kiddushin proper. It can be considered kesef matana (gift money), kesef kinyan (money used to purchase an item), or kesef kiddushin. The ba'al had defined the money as kesef kiddushin through his original intent and his proclamation of 'harei at mekudeshet'. The Rabanan, through the authority invested in them, can redefine this money retroactively as kesef matana. This sweeping authority is known as 'hefker Beit Din hefker' - the Rabanan are placed in absolute control over monetary transactions. Though the ba'al

originally defined the money as 'kiddushin money' the Rabanan have the license to redefine it as pure 'gift money' thereby handicapping the original kiddushin. By contrast, if the kiddushin were generated through bi'ah, the Rabanan, have no corresponding authority to control and regulate marital affairs. This leaves them unable to retard the original kiddushin and unable to revoke it through afka inhu. According to Tosafot the mechanism of afka inhu - sabotaging the kiddushin itself - is unavailable in kiddushei bi'ah.

Of course, Tosafot is left with a similar problem as Rashi's Rebbeeim. How are we then to explain the reversal in the maskana. Indeed, Tosafot explains that our gemara innovates the concept that Chachamim have an authority in marital affairs which is parallel to their hefker Beit Din jurisdiction in financial matters. This is labeled by the gemara as "shavyuhu Rabanan le-be'ilato be'ilat zenut" - the Rabanan have the license to redefine bi'ah which was initially performed under the sanction of marriage into a non-marital bi'ah. What is somewhat startling is that we have never witnessed this authority being exerted in other contexts. This unheard of power is being introduced for the first time by our gemara. Yet the gemara doesn't cite any source but rather mentions it matter-of-factly. Indeed, the gemara does mention that all Jews marry based upon the approval of the Chachamim - kal di-mekadesh a'da'ata de-rabanan mekadesh. This state of affairs might effectively empower the Chachamim with such authority. However, we might expect the gemara to be a little more deliberate in its introducing a completely new and somewhat revolutionary concept. The maskana seems to mention something which we already take for granted but had failed to realize.

#### SUMMARY:

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We have so far inspected two approaches, each of which explains the hava amina's distinction based upon the inherent inapplicability of afka inhu to kiddushei bi'ah. Each approach developed a rational and even compelling explanation of the hava amina. In each case, however, the conclusion is now somewhat arguable and somewhat dubious.

A contrasting approach is developed by the Ritva. He sees little reason to differentiate between kesef and bi'ah in terms of the effectiveness of afka inhu. He grasps the mechanism of afka inhu as something so comprehensive and effective that it would certainly apply, fundamentally, in both kesef and bi'ah. He bases the mechanism of afka inhu on a well-known halakha from the gemara Kiddushin (63a). The gemara declares that a halakhic transaction can be conditioned upon the approval of another, just like it can be made contingent upon objective events. If someone sells you an item

contingent upon its raining tomorrow and tomorrow is dry, the transaction falls through. Similarly, the gemara states, if a man marries a woman contingent upon the approval of her father and the latter disapproves, the kiddushin fails. According to the Ritva every Jewish marriage is conditioned upon the approval of Chachamim; when and if they disapprove, the original condition is not met and the kiddushin fails. For this reason, states the Ritva, the gemara in Ketubot (3a) when discussing afka inhu underscored the fact that all kiddushin are performed - a'da'at de-rabanan - contingent upon their will. Without this decision and empowerment, the Rabanan would have no absolute objective right to annul marriages. Of course, the Ritva makes a bit of a leap. In general, if a marriage is based upon another's approval, that other has the power to approve or disapprove and determine the fate of the challot kiddushin. Once he grants his initial approval, however, the kiddushin takes effect and no subsequent disapproval on his part can invalidate the marriage. In our instance the Chachamim have the abiding right to disapprove of the kiddushin and render it invalid. Evidently, all kiddushin are preprogrammed to be valid only if they enjoy the CONTINUING approval of the Chachamim. Once this approval is withdrawn the kiddushin fails retroactively. In a certain sense the Ritva has stated something extremely radical. In another sense he doesn't empower the Chachamim with any PARTICULAR AUTHORITY to abrogate marriages. They play the same role as the father, upon whose approval the marriage was pitched. In this sense the Ritva, by translating afka inhu into this well-known halakha has remained more faithful to the halakhic model stated earlier - the chachamim NEVER have the ability to unilaterally and arbitrarily annul marriages.

In terms of the hava amina and maskana, it cannot revolve around the inherent applicability of afka inhu. The Ritva's form of afka inhu is so basic that it would have comprehensive applicability. Instead, the gemara was concerned with the REPERCUSSIONS of afka inhu. In the case of kiddushei kesef, states the hava amina, the consequences of disapproving and thereby 'annulling' the marriage are harmless - the money which served as the kesef kiddushin will now be considered kesef matana. In the case of kiddushei bi'ah, however, the consequences are dramatic and awful. The Chachamim by their direct decision are defining a marital bi'ah as prostitution. Should the Chachamim apply their 'veto-right' of afka inhu under such a specter, where the price is so steep. What concerns the gemara is not whether afka inhu CAN apply, but whether it SHOULD apply and SHOULD be implemented. Of course, the gemara responds that these consequences, though dire, are acceptable given the Rabanan's overall intention. Indeed, Shavyuhu Rabanan li-be'ilato be'ilat zenut - the repercussions

which we originally thought were too high a price to pay, ultimately are deemed acceptable.

According to the Ritva the gemara's debate centers not around the internal issue of whether afka inhu is applicable, but around the peripheral one, whether it is discretionary to apply it in this instance.

#### AFTERWORD:

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1. Quite often the Rambam is cited as holding that kiddushei kesef is only de-rabanan. Indeed, in Hilkhot Ishut 1:2 he differentiates between kesef and the other two mechanisms of kiddushin. However, he claims that kesef is not de-rabanan but what he refers to as "divrei Sofrim". In the second shoresh of his Sefer Ha-mitzvot the Rambam designates this category as referring to any halakha which is biblical and not derived from an explicit pasuk but rather through one of the derashot Chazal (the thirteen exegetical tools by which Chazal interpret the Torah: e.g. kal va-chomer, binyan av , gezeira shava etc.). There are some differences within halakha between explicit deoraitas and divrei Sofrim but that doesn't mean that the latter is de-rabanan. See the Maggid Mishneh on the Rambam.

#### METHODOLOGICAL POINTS:

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1. Hava aminos and subsequent maskanot are fertile ground for Talmudic analysis. The premise maintains that most hava aminos are based upon some reasonable understanding of the relevant halakha. The maskana reverses the direction but each is presumed to be based upon a sensible logic. Ideally, there should exist some symmetry, whereby each stage represents a different approach to the halakha, but either approach is mutually acceptable. In this case both the hava amina and maskana make good sense. Oftentimes, the logic behind a hava amina is somewhat strained. This isn't as disturbing as a situation where the hava amina seems reasonable but the ensuing maskana seems forced. Our gemara might be just such a case.

2. Whenever a halakhic process fails it may fail internally or externally. In our instance the hava amina that afka inhu might fail in a case of kiddushei bi'ah, could be based upon either approach. Most Rishonim questioned the applicability of the very mechanism of afka inhu to kiddushei bi'ah. This investigation, in turn, allowed us to more closely inspect this afka inhu mechanism. Alternatively, the Ritva adopted such a comprehensive mechanism that he was forced to base the hava amina's hesitation

upon 'peripheral' factors. Afka inhu CAN apply but we might DECIDE not to implement it in a case of kiddushei bi'ah because of the steep costs. Next week I" H we will consider additional ways in which this halakha was reinterpreted based upon the ideological ambivalence which Chazal felt toward this unilateral form of annulment. Shabbat Shalom, Moshe Taragin

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