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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #08: *Migu Le-Hotzi***

One of the most widespread *halakhot* is the legal device known as *migu*. If a litigant possesses a claim with which he could have triumphed, he is believed even if he lodges an alternate claim that in and of itself is not legally convincing. The mere **potential** to win a case with an alternate claim grants that litigant legal victory.

This halakha is discussed in countless *gemarot*, as well as extensively by the *Rishonim*. The *gemara* notes very few limitations to the application of *migu*, but one interesting limitation is raised by several of the *Ba’alei* *Ha-Tosafot*: *migu le-hotzi lo amrinan* – *migu* cannot be utilized to extract monies from a defendant. According to these positions, a *migu* can only be applied to protect the defendant, not to obtain money.

The issue of whether *migu* can be applied *le-hotzi* is the subject of great debate. Although Tosafot (*Bava Metzia* 2a; *Bava Batra* 32b) claim that *migu* cannot be utilized for extraction, several *gemarot* imply that it can. Based on these *gemarot*, the Ramban (*Bava Batra* 32) claims that the issue is inconclusive.

For those who disqualify *migu le-hotzi*, two possible logics can be applied. One possibility is that a *migu* is **weaker**than a *chezkat* *mammon*, and therefore cannot overcome the evidence implicit in possession. Every Jew is assumed to be honest; if he is in possession of an item, tacit proof exists that he acquired that item legally. Although the principle of *migu* also provides moderate indication that the litigant is honest (as if he were lying, he would have raised a more brazen lie), its forensic potency cannot overpower the tacit proof of possession which the *muchzak* enjoys.

An alternate logic would suggest that *migu* is not **weaker** than the “opposing” evidence implicit in possession, but is instead completely **irrelevant**for proactive extraction of monies. *Migu* is inherently a defensive tool employed to reinforce the legal position of the defendant/possessor. It is fundamentally incompatible with the extraction of monies.

In developing this idea, R. Lichtenstein would cite a parallel example of halakhic device that is solely intended as a defensive measure, rather than for proactive extraction of money: *ta’aninan*. *Ta’aninan* is a defense measure intended to protect orphans. If orphans are litigated against, a *beit din* will intervene and defend their inheritance with every possible claim that the deceased parent might have lodged. The orphans are too innocent of their parent’s financial details to adequately defend themselves, and they therefore require legal intervention. Obviously, *ta’aninan* is a defense measure; the prospect of *beit* *din* launching litigation on behalf of orphans against potential third parties defendants is absurd. It cannot be used to initiate litigation toward prosecution of funds. In a similar vein, *migu* may solely be a defense measure; its inability to extract funds is not (only) due to its being weaker than the opposing proof.

There are several potential consequences to these different logics. Foremost is the question of *tzeirufim*. Can *migu* be employed *le-hotzi* if it combines with other halakhic forces, which independently cannot overcome *chezkat* *mammon*? Perhaps, when coupled with *migu*, those forces may be potent enough to allow extraction.

Three *gemarot* (*Ketuvot* 12b; *Shavuot* 42a; *Bava Metzia* 110a) describe scenarios in which *migu* is employed to extract monies from defendants. Indeed, the Ramban cites these sources in his dispute of Tosafot’s position that *migu* *le-hotzi lo amrinan*. Yet in each scenario, *migu* is joined by an additional force: in *Ketuvot*, by a *bari ve-shema* (whereby the prosecution’s claim is lodged with certainty and the defendant merely speculates), and in the latter two *gemarot* there is the presence of an inconclusive *shetar*. In fact, Tosafot (*Bava Batra* 32b) who disqualifies *migu le-hotzi* deflect the question from *Shavuot* 42a by highlighting the cumulative force of **both** *migu* and *shetar* as justifying the possibility of extraction, and the Mordechai in the beginning of *Bava Metzia* raises a similar claim. Clearly, Tosafot view *migu* as **insufficient** to allow extraction of funds, and therefore allow *migu* to **combine** with other forces to overcome the potency of *chezkat* *mammon* and effect extraction. Had Tosafot regarded *migu* as completely unsuitable for *hotza’ah*, they would not have allowed *migu* to combine with other factors.

A second question surrounds the issue of how to define cases of *migu le-hotzi*. What would happen if the *migu* did not **oppose** a *chezkat* *mammon*, but was being utilized in an aggressive manner to extract money? *Shavuot* 42a presents such a case: The *malveh* claims money from the *loveh*/defendant, who claims that he repaid the debt at an earlier stage. The *malveh* retorts that the earlier payment was in lieu of a different debt; the currently litigated debt must still be paid. The *malveh* asserts his honesty, since he could have entirely denied the alleged earlier payment entirely (as no one witnessed it). In this instance, the actual dispute surrounds the monies **previously** paid to the *malveh*. These monies are already in possession of the *malveh*; he is applying his *migu* in support of his **possession** of these monies, so that there is absolutely no legal clash between the *migu* and the *chezkat mammon* regarding the disputed monies. However, the *malveh* **is** utilizing a *migu* to extract new funds from the defendant during the current litigation. Thus, this situation describes a scenario in which there is no legal clash between a *migu* and a *chezkat* *mammon*, but a *migu* is being employed to extract funds.

Presumably, if *migu* is weaker than a *chezkat* *mammon*, it would only fail in situations in which it **directly** clashes over disputed money with a *chezkat* *mammon*, as *migu’s* statement about disputed money cannot overcome the statement of the *chezkat mammon*. In our instance, *migu* **should** operate even according to those who claim *migu le-hotzi lo amrinan*, since there is no direct clash. Perhaps, Tosafot were not perturbed by this *gemara* in *Shavuot* 42a precisely because they viewed the failure of *migu le-hotzi* to be based on *migu*’s weakness vis a vis a *chezkat* *mammon*, and that issue is only relevant in situations of direct clashes.

If, however, *migu* is purely a defensive tool that can **never** be employed for proactive extraction, *migu* would fail in this scenario as well, since ultimately the *malveh* is wielding a *migu* for the overall purposes of *hotza’ah* of money from the *loveh*. Through the *migu*, he wants to be believed that the monies he collected earlier were independent of the current litigation, so that he can continue prosecuting the collection/extraction of new funds. *Migu* is being employed aggressively and should therefore fail.

The previous *nafka mina* discussed a scenario in which no clash exists between the *migu* and *chezkat* *mammon*, but the *migu* is nevertheless applied aggressively. What about an inverse situation, in which the *migu* is not applied for extraction, but a clash exists between the *migu* and *chezkat* *mammon*? Such a scenario arises in the first case of *Bava Batra* (32b), in which an alleged squatter of land defends his squatting against the previous owner through a *migu*. It appears (from the position of Tosafot) that the *gemara* is inclined to permit this *migu* because the squatter is currently **resident** upon the land, even though it disallows an identical *migu* for someone who is prosecuting collection of funds from a defendant. Legally, the two cases are not much different; in each instance, an identical *migu* combats a *chezkat* *mammon* of the opponent. From a purely halakhic standpoint, standing on land has no meaning; legally, the land is still in the possession of the last known owner (the *mara kama*). Yet the *gemara* justifies application of this *migu* because the squatter who is lodging it is already on the land. This is a situation in which *migu* is clashing with an opposing *chezkat* *mammon*, but is not being employed in an aggressive fashion, since the *migu* beneficiary is already physically on the land and seeks to remain. Although the *migu* would change his legal status and although it opposes a *chezkat* *mammon*, it is not being employed as an agent for **empirical** change. This scenario is the opposite from *shavuot* in which there was no clash between the *migu* and the *chezkat mammon* but *migu* was being employed aggressively. In this instance *migu* is being utilized defensively but it does clash with an opposing *chezkat* *mammon*.

If *migu* is weaker than an opposing *chezkat* *mammon*, it should fail against this *chezkat mammon* and should not be applied. If, however, *migu* is simply not suited for transforming situations, it may be applied in this context, since the situation is not being transformed.

A parallel to this scenario – legal clash without actual change – may be detected in the *gemara* in *Bava Metzia* (2a). Two people arrive in *beit din* jointly clutching a garment. Tosafot debate applying a *migu* to one of the parties. The Rivam (cited in Tosafot) disqualifies the *migu*, since it is employed to extract part of the jointly-held garment on behalf of the *migu-*proposer. Since the Rivam maintains that *migu le-hotzi lo amrinan*, he rejects this *migu*. Tosafot Ha-Rid disagrees (and ultimately provides a different reason to disqualify this *migu*). Since the *migu* candidate is also clutching the *tallit*,he is hoping to extract, but also to maintain (*le-hachazik*). This situation cannot be deemed *migu le-hotzi*. Indeed, legally the *migu* is clashing with the *chezkat* *mammon* (since each party is in full possession of the entire garment, part of which is being awarded to the *migu* party). However, in an overall sense, the *migu* party is not extracting items not previously possessed, since he too was in full possession of the garment. This resembles the situation in *Bava Batra*, where *migu* reinforces a squatter’s position. Legally, the *migu* clashes, but no change is being wrought.