YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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Dedicated in memory of

Matt Eisenfeld *z"l* and Sara Duker *z"l* on their 20th yahrzeit.

Though their lives were tragically cut short in the bombing of Bus 18 in Jerusalem, their memory continues to inspire.

*Am Yisrael* would have benefitted so much from their contributions.

*Yehi zikhram barukh*. –

Yael and Reuven Ziegler

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**Shiur #16: Three Debates Regarding the Nature of *Muchzak***

The first *perek* of *Bava Metzia* is one of the “busiest” *perakim* in *Shas*. The *mishna* introduces a dispute about a mutually seized item and determines that the contested item is split, with each party taking an oath. This *mishna* and the ensuing ones yield debates about a range of *Choshen Mishpat* topics. It is difficult to identify another *perek* in *Shas* that is so replete with central topics of *to’en ve-nit’an* (the laws of monetary litigation).

Three different *sugyot* in this *perek* address one common theme – the halakha of *ha-motzi mei-chaveiro alav ha-ra’aya*. In this *shiur*, we will address the nature of this rule through the prism of these three *sugyot*.

The initial question about *ha-motzi mei-chaveiro* and the one presented directly in the *mishna* – concerns the status of a contested *tallit*. Does Halakha view each disputant as partially *muchzak* in the part of the *tallit* that they are grasping? Does the split of the *tallit* reflect the fact that each is considered a “*muchzak*” (halakhic possessor) on the part he clutches? Or is this mutual seizure rendered halakhically irrelevant, so that neither is considered *muchzak*? If that is the case, the *tallit* is split procedurally because it is disputed. How does Halakha apply the status of *muchzak* to a jointly held *tallit*?

This question affects many secondary questions, including HOW the *tallit* is split. The *gemara* (7a) introduces an alternative strategy to the 50/50 split of the *mishna*. If the ACTUAL *tallit* is jointly held (as opposed to the *mishna*’s scenario, in which each disputant is clutching the fringes), each person receives the part that they are actually holding, and the REMAINDER is split evenly. This may reflect the fact that the two parties are each considered *muchzak* in that part of the *tallit* they are physically clutching and are therefore awarded that part, at least when they are actually holding the *tallit*. Only the unclutched part is divided evenly.

Additionally, this question may impact the nature of the *shevua* that the *mishna* imposes. If the two parties are each considered completely *muchzak* in the part that they are grasping, the rule of *ha-motzi mei-chaveiro alav ha-ra’aya* should award that section WITHOUT the need for a *shevua*. Just as a defendant is awarded claimed money without need for *shevua*, each disputant in the case of the *tallit* should receive his share without a *shevua*. In fact, the Rambam lodges this claim, (demanding an oath only about the part of the *tallit* which isn’t physically clutched) perhaps signaling that he views each party as a partial *muchzak*. If a *shevua* is still required (as Tosafot claim), one of two possibilities is feasible:

1. Their joint hold cancels any notion of a *muchzak*. Since neither is considered *muchzak,* *beit* *din* can only awards the *tallit* to a non-*muchzak*, if *shevua* is taken.
2. Even though they are each considered a partial *muchzak*, the *shevua* is still required. As the *gemara* twice comments (3a, 5b), the *shevua* described in the mishna was imposed to prevent further instigated aggression. If each disputant were awarded his share of the *tallit* without a *shevua*, people would be encouraged to grab other people’s items, expecting to receive at least a part of the item without the threat of a *shevua*. Accordingly, the *shevua* is not necessary to JUSTIFY the award of the *tallit* to each disputant; they are each considered *muchzak* and deserve their share. Rather, the *shevua* is imposed on the two parties to deter FUTURE aggression.

This question of how to understand or map the case of the jointly held *tallit* may depend on the nature of *muchzak* and *ha-motzi mei-chaveiro alav ha-ra’aya*. Classically, *muchzak* is understood as a baseline PROOF of ownership in the absence of more concrete or compelling proof. Obviously, more convincing proof overcomes this default proof, but in the absence of solid proof, the *muchzak* enjoys a built-in *ra’aya* of ownership. By contrast, the principle of *ha-motzi mei-chaveiro* may operate not as PROOF, but as a default STATUS QUO, which remains unaltered in the absence of convincing evidence. The *muchzak* is awarded the disputed item or money not because of proof, but because *beit* *din* maintains the status quo when there is no proof.

Perhaps the status of a jointly seized garment depends upon which aspect of the *muchzak* is the primary force. Neither of the disputants holding the garment has any proof of ownership. Typically, exclusive possession suggests that the person purchased or manufactured the item, but in this scenario, we KNOW how the item came into the joint possession of the parties – it was “found” and lifted by one of the disputants prior to the lifting of the other disputant. If *ha-motzi* *mei-chaveiro* is a baseline PROOF, the situation of *shenayim ochazin* would yield no *muchzak*. If, however, the concept of *muchzak* simply maintains a status quo, we can view a jointly seized garment as reflecting a split *muchzak*. The status quo whereby each is holding half can be preserved. Each is holding on to half the garment, and we can apply the *muchzak* principle to each person respectively. Thus, the decision as to which aspect of *ha-motzi* *mei-chaveiro* is dominant may affect our evaluation of the jointly held garment, which in turn may dictate both the extent of the ruling of *yachaloku* as well as the nature of the *shevua*.

A second question about *ha-motzi mei-chaveiro* emerges from a question that Tosafot (2a) pose about the use of *migu*. The second clause of the *mishna* discusses a distribution in which – based on their different claims – one party receives 75% of the disputed garment and the other receives 25%. Tosafot assert that the receiver of 25% should receive 50% and not 25%, since he could have registered a more ambitious claim that would have netted a 50/50 distribution. This is a *migu* scenario, the ability to triumph based on the potential to register an alternate claim that would have more easily attained a legal victory.

Tosafot reject this ability since it would be employing a *migu* to extract 50% of the garment from the other disputant, and typically (at least according to Tosafot) *migu* cannot be used to extract possessed items from *muchzak* defendants. Interestingly, Tosafot assume that each party is a *muchzak* over the entire *tallit* – NOT MERELY over the 50% that they are physically grasping, but of the ENTIRE garment. Attempting to legally secure 50% of the *tallit* from a disputant would be employing *migu* to OPPOSE a *muchzak* and extract something from his possession.

This represents a third option in addition to the two aforementioned alternatives. We previously considered the possibilities that NO ONE is considered a *muchzak* and that they are EACH considered *muchzak* upon the PART they are clutching. We now have a third possibility – that they are EACH considered *muchzak* upon the ENTIRE item.

Tosafot’s position that *migu* cannot overcome a *muchzak* and extract money is by no means universally accepted. The Ramban raises strong objections. Perhaps their debate surrounds the nature of *muchzak* and which element fundamentally drives the rule of *ha-motzi* *mei-chaveiro* *alav ha-ra’aya*. Perhaps Tosafot believe that the rule of *ha-motzi* preserves the status quo until actual evidence has been introduced. *Migu* is an attempt to “psychoanalyze” the litigant based on his failure to assert a more convenient claim. This analysis may establish his truthfulness, but no ACTUAL evidence has been introduced. In the absence of evidence, the status quo is maintained even if *migu* proves his honesty.

Perhaps the Ramban, in contrast, believes that the rule of *ha-motzi mei-chaveiro* acknowledges a baseline PROOF suggesting that the possessor actually owns the item. In theory, this baseline proof may be overridden by the *migu* indicating the veracity of the *tovei’a*’s claim and counteracting the low-level default proof that we normally use to award the possessor. The decision about whether to employ a *migu le-hotzi* may thus be dependent upon which factor of the *muchzak* is the primary force.

It is possible that Tosafot’s view disqualifying a *migu le-hotzi* would apply even if *muchzak* reflects proof. As stated above, it is conceivable that the status quo remains unchanged until new evidence has been introduced, and *migu* does not represent the introduction of new evidence. But one could argue that even if *ha-motzi mei-chaveiro* constitutes a low-level proof of ownership, *migu* is not strong enough to overcome that proof. Thus, the debate about which element of *muchzak* is primary may not influence the question of applying *migu le-hotzi*. We may rule unilaterally that *migu* cannot be applied to extract money; depending of which aspect of *ha-motzi mei-chaveiro* is at play, we may understand the failure of *migu le-hotzi* differently.

In other words, is *migu* not STRONG ENOUGH to extract money, or is it IRRELEVANT to the process of monetary extraction? If the *muchzak* default is based on preserving the status quo, we may render *migu* IRRELEVANT, since it does not represent the introduction of evidence. By contrast, if *muchzak* is primarily a proof, *migu* is a suitable tool, but is insufficiently strong to overcome the proof of possession.

This question – not WHETHER *migu* overcomes *muchzak*, but WHY it DOESN’T– may have an interesting ramification. If *migu* is rendered irrelevant by the status quo, it would not overcome the *muchzak* even when coupled with additional forces. If, however, a *migu* is RELEVANT to extracting money from a *muchzak* but is insufficiently strong to do so, perhaps a *migu* COUPLED with an additional force would be successful in overcoming the *muchzak*. Tosafot in *Bava* *Metzia* identify *migu* in conjunction with a contract as one instance in which a *migu* CAN extract monies. Similarly, several *Rishonim* interpret a *gemara* in *Ketuvot* (12b) as validating a *migu* in conjunction with other forces to overcome a *muchzak*.

A third issue in the first *perek* of *Bava Metzia* that revolves around the understanding of *ha-motzi mei-chaveiro* is the halakha of *tefissa*, unilateral seizure of disputed items. In a [previous *shiur*](http://etzion.org.il/en/cases-successful-tefisa), we investigated the manner in which the success or failure of *tefissa* may be dependent upon the primary factor driving the halakha of *ha-motzi mei-chaveiro alav ha-ra’aya*.