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**TALMUDIC METHODOLOGY**

By: Rabbi Moshe Taragin

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**MEKADESH BE-MILVEH**

The first mishna in Kiddushin describes three options for being mekadesh a woman: Kesef (money), shtar (marriage contract), and bia (conjugal relations). The gemara in the first perek delineates several methods of kiddushei kesef ('ba-kesef keitzad') and several different forms which the money transfers can take. It is generally assumed, however, that some form of money - either hard currency or something which has monetary value (clothing jewelry etc.) - has to be transferred. What about the money of a loan? Can a creditor (malveh) marry a woman using the loan he has already given her? What is the case if the original moneys, or part thereof, are still intact and he marries her with these moneys? This question of 'mekadesh be-milveh' will form the subject matter of this week's article.

The gemara in Kiddushin (6b) states that one CANNOT be mekadesh with a milveh. Further on in the masekhta, the gemara adumbrates this halakha and provides an apparent rationale: "Amar Rav: Ha-mekadesh be-milveh eina mekudeshet - milveh le-hotza'a nitena (One who marries a woman with a loan does not perform a valid kiddushin since the very design of a loan is to be spent)." Evidently, the key to understanding the failure of kiddushei milveh lies in deciphering this somewhat cryptic phrase of Rav on 47a. What exactly did he mean that a loan is 'meant to be spent' and why does this situation automatically invalidate kiddushei milveh? Theoretically, the chisaron of kiddushei milveh can be attributed to three factors - the three necessary elements of a halakhically valid kiddushin. In general, kiddushei kesef entails the transfer of a monetary item previously owned by the ba'al, in a manner that the woman derives pleasure. To properly judge kiddushei milveh we must scrutinize these three issues: Does the kesef belong to the ba'al? Has there been a proper transfer? Has the woman derived hana'a? Exploring these three fronts will help us better analyze the failure of kiddushei milveh.

This article will consider the possibility of being mekadesh the woman with the original money transferred at the time of the loan, assuming some or all of it still exists; see the afterword for a discussion on being mekadesh her with the abstract 'worth' of the

loan. The first fact which must be established is the ownership over the moneys. Who owns the moneys prior to their being spent - the malveh or the loveh? Indeed, the loveh has the right to spend the money at his will, but does this determine that prior to his spending, the money belongs to him? Or do we maintain that despite his 'rights', before he actually spends the cash it still belongs to the malveh based upon the model of a pikadon which, though located in the house of the shomer, is halakhically considered to belong to the mafkid (the depositor). If prior to its being spent the money of the loan already belongs to the loveh we might arrive at the first problem - the money doesn't belong to the ba'al/malveh and therefore he cannot be mekadesh her with it. It would be the equivalent of being mekadesh a woman with someone else's money - or worse her own money!

In truth, this question is debated by the Tana'im in a Tosefta cited by the gemara in 47a. R. Meir equates milveh to pikadon while the Tana Kama discriminates between the two. Rav himself cannot be referring to this issue, else he would have cited this machloket as precedent. Possibly, Rav is COMMENTING on this debate. R. Meir and the Tana Kama might dispute the state of the money PRIOR to its being spent. Rav, however, asserts that everyone admits that once some the money is spent, ALL OF IT transfers to the ownership of the loveh; hence the kiddushin fails because the money no longer belongs to the ba'al/malveh. Even R. Meir who regarded the money as the malveh's agrees that the initial spending radically changes the status of these funds. Once the funds transfer possession the malveh can no longer utilize them to be mekadesh this woman. Rav is merely 'updating' the machloket Tana'im by isolating a case in which everyone agrees that the malveh no longer retains any rights to the moneys. Rashi on 47b and to a lesser extent Tosafot (in their comments to 47b dibbur ha-matchil ela) articulate this position. Similarly, the Ritva (6b) attributes the failure of kiddushei kesef to the fact that the money no longer belongs to the ba'al. There is one problem with this approach: Rav's syntax. He disqualified kiddushei kesef because 'milveh le-hotza'a' - a loan is intended to be spent. Evidently, the very RIGHT OR ABILITY to spend the money affects some character of the loan even BEFORE the money or some of it is actually spent. Rashi and Tosafot each explained that Rav was referring to the state of the loan AFTER some of it was spent. Rav's language suggests otherwise.

Even if we are to consider the money as that of the malveh a second problem emerges - the form and style of the actual transfer. Can the transfer of money in kiddushei KESEF be ENTIRELY abstract? Or does there need be some physical 'netina' which conveys the money to the woman? Even if, by receiving the loan money as her kiddushin, she has acquired something which previously was not yet hers, she did not receive these funds as the direct result of a physical ma'ase netina. In the absence of this concrete act can kiddushin be validated? Rashi, in his comments on 6b indicates that this might be the problem when he writes "We derive kiddushei kesef from sedei Efron (see Kiddushin 2a) which requires that something actually be given." Of course, these statements would have to be reconciled with his comments subsequently on 47b which attribute the failure to another reason.

This second approach - attributing the failure to the lack of ma'ase netina is plagued by three possible problems. First of all, again, Rav's language doesn't accommodate this approach. What does the potential for spending the money have to do with the lack of ma'ase netina? Instead of attributing the problem to the loveh's ability

to spend the funds Rav should have simply mentioned that she has received the money already at the time of the loan and the kiddushin doesn't include a new concrete transfer. Once again we encounter a inconsistency between a logical possibility (sevara) and the actual language (lashon ha-gemara) employed by the gemara.

A second problems concerns the very necessity of this physical netina. Several cases cited by the gemara suggest that an actual physical delivery of money is NOT vital to Kiddushin. The gemara details a case of "sechok lefanai rekod lefanai" in which the husband provides benefit to the woman through these 'diversions' (dancing or making her laugh) and thereby is mekadesh her without physically delivering something of value; the delivery can be completely abstract. In addition, the mishna (63a) records that a man may marry a woman by intervening on her behalf to the local authorities - thereby delivering service and benefit without any physical netina. Though not all Rishonim adopt these cases, their mere presence confirms that the need for netina is by no means unanimous or universal.

The third problem concerns a distinction drawn by the gemara on 6b. After disqualifying kiddushei milveh the gemara notes by way of contrast that one who is mekadesh with 'HANA'AT MILVEH' does perform a successful kiddushin. The gemara elaborates that the second case refers to one who extends the due date of a loan, effectively granting the woman extra time to meet payment. Whatever the differences between the cases may be, neither contains a physical act of netina. If kiddushin requires this act and milveh is disqualified because of the absence of this netina, why is kiddushin with hana'at milveh successful? Indeed, there is one Rishon who apparently adopted this position and to defend his view was forced to radically redefine the case of hana'at milveh. According to Rabbenu Chananel the malveh does not merely extend the loan. He actually RECEIVES payment of the loan and REISSUES the money to the woman for an additional period. The benefit she receives from this additional issuance of the loan constitutes her kesef kiddushin. As she received this benefit through a physical transfer of funds the kiddushin is valid. Though the gemara does not mention anything about the receipt of payment and subsequent reissuing, Rabbenu Chananel was compelled to reinterpret the case to support his demand for a physical netina. The simple reading, however, of the gemara opposes this stance.

#### SUMMARY:

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Two options to explain the failure of kiddushei milveh have been raised. It fails either because it lacks an ample ma'ase netina or because the money, though still tangible, is already considered the possession of the loveh.

A third possibility to explain this failure emerges in the comments of the Tosafot Ri Hazaken (47a). Possibly, this approach best accommodates both the language Rav employed and the dichotomy of the gemara on 6b. Even if we maintain that the tangible money still belongs to the malveh/ba'al and that no physical transfer is necessary, we might question whether the woman derived any benefit from this kiddushin transaction. She has already received the loan and though she hasn't spent it - she certainly has that right - milveh le-hotza'a nitna - each loan is designated for spending. She possesses that right already, even if she hasn't actually begun to spend the money and even if, legally, that money still belongs to the malveh. Hence, she accrues no new benefit at the time of

kiddushin. A kiddushin which lacks hana'a, even if there is an actual transfer of money is defective. Note, for example, the case of 'matana al menat lehachazir' which the gemara (6b) invalidates. In such a case money was actually transferred, but the transfer only validated on condition that the money be returned. Even though a halakhic transaction occurred and the woman achieved legal possession of money, she derives no net benefit and the kiddushin fails. Our case would be similar; since she already enjoyed the right to spend the money the ba'al hasn't effectively conferred to her any new benefit. In the absence of this hana'a, kiddushin cannot be valid. The contrasting case in the gemara (6b) represents an instance in which some benefit is actually derived. In the latter case he doesn't just reissue the initial loan but extends the payment date. In this case the woman has actually been awarded some new benefit and is mekudeshet.

#### METHODOLOGICAL POINTS:

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1. Understanding why something fails entails first inspecting how that halakhic ideal works in a standard case. By isolating the various ingredients or components of a valid kiddushin we map the possible reasons for its failure.
2. An approach always has to be tested in light of its inner coherence, its accommodation of parallel sugyot and its proximity to the language of the gemara.

#### AFTERWORD:

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1. The Rambam in Hilkhos Kiddushin (Perek 5) explains that Rav was referring to the prospect of being mekadesh a woman with the abstract loan after all the initial money was completely spent. See also the Ra'avad, quoted by the Rashba on 6b.2. This article assumed absolute parallel between the two sugyot - 47a and 6b - each of which invalidated kiddushei kesef. Kiddushin 47a is Rav's statement while 6b is Abaye's. Could they possibly differ as to why kiddushei kesef is invalid? Do we have a machloket Amora'im?

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