

**YESHIVAT HAR ETZION
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TALMUDIC METHODOLOGY

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KIDDUSHIN AS A KINYAN

The first mishna in Kiddushin, in describing the process of effecting kiddushin, employs the term 'nikneit', which literally means that the bride is 'acquired' or 'obtained' (Ha-isha nikneit beshalosh derakhim - 'a woman is acquired in one of three ways'). In fact, this term is reiterated several times throughout the masekhta. The gemara (3a) rejects the validity of a kiddushin in which a man offers a woman something of trivial value (pachot mi-shaveh peruta) because 'in exchange for this meager amount a woman will refuse to allow herself to be acquired.' Several additional gemarot (7a and 46a) echo this same concept - a woman is acquired during the process of halakhic kiddushin. These blatant references, indeed, present the process of effecting marriage as akin to standard kinyan - the acquisition of portable items (metaltelin) or land (karka). In fact, the subsequent mishnayot towards the end of the first perek, actually discuss kinyan on karka and metaltelin. Are we to accept this conclusion - that kiddushin entails acquisition of a woman similar to the purchase of inanimate objects? We would like to probe even further into kinyan kiddushin and ask a second question. Even if the process of effecting marriage includes some degree of acquisition of the bride by the groom, is this process at all balanced by a complementary motif? Is there another component of the kiddushin process besides acquisition, one which is unique to marriage?

Kinyan:

We will begin by tackling the first question. Clearly, the process of kiddushin entails some sort of kinyan (acquisition). This much is clear from the wording of the first mishna and the subsequent iterations stated above. In fact, according to Rambam at least, this novelty - to acquire a woman before actually marrying her (at the time of the Nisu'in) - was innovated by the Torah. He writes in the first halakha of Hilkhos Ishut that although the institution of marriage predated Har Sinai, once we received the Torah we were instructed to first acquire a woman and only later to marry her. Evidently, some form of kinyan characterizes the kiddushin process. What is not clear, however, is the nature of this kinyan and the degree of ownership it creates, in comparison to standard ownership of inanimate objects.

The gemara in Ketubot (56a) addresses the eligibility of a woman who has become 'engaged' to a Kohen to begin eating Teruma. [Engagement (eirusin) is the state consequent on kiddushin and prior to nisu'in. Although an 'engaged' woman cannot yet live with her fiance, she may still eat his

priestly gifts if he is a Kohen.] The gemara asserts that since she is considered 'KINYAN kasp'o' (his purchase) she may begin partaking of this teruma. The gemara apparently thinks that this term taken from Vayikra 22:11, which denotes monetary acquisition, applies to kiddushin as well. The gemara, therefore, designates the bride as the kinyan of the husband, a state which allows her to eat teruma along with her spouse, who is a Kohen.

The Rishon who most clearly articulates this position - that the kinyan the husband performs to marry his wife is comparable to standard kinyan - is Tosafot Rosh in Ketubot. The gemara in Ketubot (2a-b) considers a relatively unrelated issue: who is to be blamed if the wedding was delayed due to the wife's ill health? On the one hand she is sick, and so, responsible; but on the other hand, maybe the husband's poor 'luck' struck his wife. The gemara draws a casual parallel between this instance and a case where someone's animal cannot work due to its failing health - in each case the cause of the conflict can be attributed to another party. The Rosh, however, reads this statement literally claiming that a woman is the POSSESSION of the man in the exact same manner that an inanimate object is owned by its owner. If the Rosh's language seems striking, remember that this view emerges from the simple reading of our mishna in Kiddushin, and from the terminology of the gemara in Ketubot (56b).

SUMMARY: The presence of kinyan as a defining feature of kiddushin is almost incontrovertible. The Rosh, based loosely upon the gemara in Ketubot (2b) equates this kinyan with standard acquisitions of inanimate objects.

By contrast, several gemarot appear to carefully delimit the scope of the ownership which a man has of his wife. The gemara in Kiddushin (6b) compares the respective texts of a 'get' (divorce contract) and a 'shtar shichrur' (a contract which liberates a slave) and states: "If [inconclusive language] is sufficient to free the slave, whose body the master owns, it should certainly suffice to divorce a wife which the husband doesn't really own." This gemara discriminates between the depth of ownership enjoyed by the master of his slave and the extent of the kinyan of a husband of his wife. Similar regulation of this kinyan emerges from the gemara in Gittin (77b) which addresses the riddle of giving a 'get' to a wife. To effect the divorce she must receive possession of the 'get;' however, as long as she is married, all her possessions transfer automatically to the husband. Though the gemara itself takes this as a serious problem, Ravina challenges the very premise of the question. Since the husband does not literally own HER, but rather her INCOME, there should be no problem in her directly acquiring her 'get'.

The spirit of these two gemarot is aptly captured by a statement of the Ramban. In his comments to Gittin (9a - in many volumes of the Ramban this commentary can be found in the Hashmatot) he addresses a disparity between a 'get' and a regular monetary shtar (document). Generally, as the shtar effects a transfer of money, we must always double check its validity and issue a thorough notarization before allowing it as evidence. This conforms to the general principle that when extracting money the highest

standards of testimony are applied - "ha-motzi mi-chavero alav ha-re'aya" (the one who seeks to extract money from another, must provide the proof). As a 'get' does not involve this transfer of ownership [because the woman, even when married was not owned by anyone] these high standards do not have to be enforced. Unless the husband explicitly questions the validity of a 'get' we will not concern ourselves with double-checking its authenticity, and instead we will just assume it. Again, as in the comments of the Rosh cited earlier, what is arresting is not only WHAT the Ramban says but HOW he says it.

SUMMARY: We have isolated two distinct positions in the Rishonim. One views the nature of kinyan kiddushin as tantamount to standard kinyanim; the other deliberately discriminates between them. Each position is buttressed to some degree by a statement of the gemara. It bears repeating that each position recognizes some aspect of kinyan, ownership, that exists within the state of eirusin; they only dispute its proportion. Can this kinyan between two people in any way be compared in its intensity to a standard kinyan on an inanimate object?

Kinyan versus Ishut:

Turning now to the second question we posed at the outset, we must recognize that whatever degree of kinyan exists in marriage, it surely interacts with another factor. Nothing from the world of kinyan can express the essence of kiddushin, which is basically an interpersonal relationship of husband and wife which, among other things, permits intimate relations. Alongside any kinyan exists a factor unique to the process of kiddushin, one which might be labeled 'ishut' - the creation of an interpersonal relationship between Man and Wife. Possibly the gemara which most clearly emphasizes this factor can be found in Nedarim (28a). The gemara examines an interesting phenomenon whereby the state of kedusha (consecration for the Temple) within trees donated to the Temple automatically dissipates after they are cut. Seeking to refute this halakha the gemara posits that such halakhic states cannot automatically disappear without active absolution [such as pidyon (redemption) or me'ila (embezzlement)]. To support its contention the gemara cites the case of ishut which cannot merely dissolve on its own. Responding to this question the gemara discriminates between trees which are merely the monetary possession of hekdesh (the Temple treasury), and a woman who possesses what the gemara refers to as 'kedushat ha-guf,' a personal status of designation to her husband. Whatever form of kinyan the husband does or does not enjoy, she is much more than a possession - she is also his wife (and he her husband). Tellingly, these halakhic labels engender substantive halakhic nafka minot (ramifications) which in no way stem from the kinyan. This second factor - ishut - affects both her prohibition to others and the couple's mutual marital obligation. Ishut, then, is an additional aspect of kiddushin, that goes beyond the kinyan discussed earlier.

Having established the necessity of each of these factors (kinyan and ishut) our next question must be - which is primary within the process of effecting kiddushin. Although, ULTIMATELY, each of these dimensions emerge, we might define the process of kiddushin as DIRECTLY creating one

particular aspect. The complementary aspect might subsequently evolve ON ITS OWN. Often within halakha we discern this phenomenon whereby one aspect of the situation is directly caused while its related factor evolves automatically. Is kiddushin primarily a process of kinyan (which later spurs ishut), or is it primarily a process meant to trigger a dynamic of ishut (which then assumes a form of kinyan).

In many respects this question revolves around a semantic problem. When the Torah describes the kiddushin process "ki yikach" (when a man takes a wife) how does it intend the word 'yikach'? Does it refer to 'transaction' (as in the case of Efron's field), or does it intend some other form of taking. Throughout the Torah "yikach" or "kach" refers to many different actions - from sexual engagement to verbal persuasion. In this instance, does it mean perhaps, the taking of a woman to become one's wife? The Biblical ambiguity is perpetuated in the gemara itself. The mishna couches kiddushin in the language of kinyan "ha-isha nikneit". The second perek announces "ha-ish mekadesh" - 'a man can marry' - utilizing a very different image or model for kiddushin. The gemara itself (2b) considers this issue and recognizes that 'mekadesh' is a language established by the Chakhamim to reflect kiddushin and its similarity to the world of hekdesch. Clearly, this term (and the implicit reference to the world of hekdesch) underlines the more interpersonal dynamic of ishut and not the standard kinyan of monetary transactions. When someone dedicates a sacrifice he is, first and foremost conferring a STATUS of hekdesch on the animal, which enables various prohibitions and commandments unrelated to ownership. Similarly, then kiddushin might entail the conferring of status rather than the transfer of ownership. How we choose to view the process of kiddushin (kinyan or ishut) might very well be based upon the term we use to define kiddushin (kinyan or kiddushin).

This prospect might help explain a startling consideration raised in the Yerushalmi (Kiddushin 1:1). The gemara goes out of its way to assure us that each one of the three techniques of effecting kiddushin listed in the mishna is sufficient. One can perform kiddushin through money, or shtar (document), or biah (relations); all three are not necessary. Why might we have thought otherwise? Why would we have required more than one trigger for kiddushin? Could this prospect reflect the dual nature of kiddushin as both a kinyan and ishut? Since kiddushin is multidimensional, we might have thought that in order to establish each facet of kiddushin, a SEPARATE process is necessary. We might have reasoned that money is necessary to enact the monetary dimension of kiddushin, while biah creates a personal relationship of man and wife. Shtar installs her status as a married woman and the accompanying prohibition to others (much as a 'get' removes that status. Quite possibly, the Yerushalmi's hava amina (original thought) reflects the multi-dimensional quality of kiddushin.

Even though this possibility is ultimately rejected, the underlying theme still remains. The state of kiddushin continues to be a multi-faceted entity. However the process of effecting kiddushin only actively triggers one aspect, while the complementary aspect evolves on its own. What is not exactly clear

is which aspect is actively created and which emerges on its own. This question will surface again and again throughout Massekhet Kiddushin: Does the process aim to create a kinyan or to establish the terms of ishut? It is important to note that this question might have multiple answers based upon the selected process (kesef, shtar, or biah) or based upon which verbal declaration is used (harei at...). As this shiur is introductory in nature I will leave the question unanswered and hope that it will be addressed in future shiurim.

FURTHER RESEARCH:

1. Regarding the definition of 'kinyan kaspo' and the ability to begin eating teruma - see Avnei Milu'im in his Teshuvot #17.
2. Regarding the differences between the gentile slave and a wife see Tosafot Kiddushin (24a) d"h Ve-rebbi Eli'ezer (from the words "VeRi omerle-matana).
3. See Rashba Yevamot (70a) who addresses the kinyan which exists after kiddushin.
4. Ran in his comments to Kiddushin (5b) rules that in cases of safek (doubtful) kiddushin, we rule based upon chazaka (previously established status) just as we do in questions pertaining to money matters where we follow the chezkat mammon (established ownership). Is this an implicit association of kiddushin with kinyan?
5. See Rashba's comments to Kiddushin (6b) and the gemara which discusses 'ribit' in the case of kiddushin.

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