

**YESHIVAT HAR ETZION  
VIRTUAL BEIT MIDRASH PROJECT(VBM)**

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**TALMUDIC METHODOLOGY  
BY: RABBI MOSHE TARAGIN**

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**THE ROLE OF AMIRA WITHIN KIDDUSHIN**

The gemara in Kiddushin (5b) cites a beraita delineating the procedure of halakhic kiddushei kesef. The husband should give the woman the money or the item of value and then pronounce the formula of harei AT mekudeshet li. If, the beraita continues, she gives the money and recites the 'harei at', the kiddushin fails, for obvious reasons. Kiddushin entails the man performing a kinyan on the woman. Hence he has to transfer some money or something of value as is standard in all transactions where the person acquiring pays money. What the beraita does not clarify is what happens if the man actually gives the money but the woman pronounces 'harei at' (or in this case some derivative such as 'harei ani'). Is this kiddushin valid? The first position of the gemara rules that this procedure is invalid while the second position maintains that mi-derabbanan we are 'choshesh' for this kiddushin. This is known as a case of natan hu (he provided the money) ve-amra hi (she pronounced the amira). This article will investigate this case.

As we have grown accustomed, whenever we reach a dispute or two opposing standpoints or even a question, it sometimes helps to isolate the simple intuitive approach. In this case, we begin by adopting the position that in the above mentioned case kiddushin should be valid. After all, as long as the man the 'purchaser' gave the money who cares if the woman pronounced the amira. What, after all, could justify why natan hu ve-amra hi is invalid. An initial explanation, a 'practical' consideration, is suggested by the mishna le-melekh (Ishut 3:2). If the man does not announce the 'harei at' we are uncertain as to his true intention; his gemirat da'at isn't apparent. We have no idea whether he actually intended to be mekadesh her or only intended to present her with a gift. The kiddushin cannot be valid unless we uncover his true intentions. In fact, the Tur quotes a Rama who maintains that if the ba'al assents to the woman's statement by saying 'Yes' or 'I agree', the kiddushin is valid. Her amira doesn't represent a fundamental invalidation. Rather, lacking his statement, we cannot determine his intention through hers alone. If, however, he affirms, the kiddushin is valid.

This position, though logical, is somewhat problematic. After all, kiddushin requires the consent of the woman as well, but yet, conventionally, we don't require her ACTUAL amira. Evidently, her silence during her husband's pronouncement and

presentation suffices to indicate her acquiescence. Why shouldn't the same reality be in place when the woman is announcing the kiddushin and the husband is silently approving. Evidently, there is something more fundamentally problematic with a kiddushin where the woman performs the amira.

The Rashba provides an additional explanation. The Torah employed the following lashon when describing the mechanism of ma'aseh kiddushin - 'ish ki yikach isha' - if a man acquires a woman - suggesting that it is incumbent upon the man to enact the ENTIRE process of kiddushin. If he doesn't, but depends upon the contribution of his wife, his ma'aseh kiddushin is inadequate. Hence, in this case, even though he enacted the primary component - the delivery of money, if she issued the pronouncement, it is considered as if he has conducted a deficient act of kiddushin - he has fallen short of the mark. The Rosh in his Tosafot seemingly adopts a similar tone. He justifies the requirement that a man perform the COMPLETE act of kiddushin 'just like someone who purchases a commodity, sets the price and then pays the wage.' To the Rosh, the requirement is based upon the need to parallel kiddushin as closely as possible with standard sales. To the Rashba it is a narrower concern to accord with the semantics of the pasuk. Either way, the problem with the woman uttering the 'harei at' is that the man has not performed all which is incumbent upon him and hence HIS ma'aseh kiddushin is incomplete.

The above explanation is based upon the assumption that the amira is part and parcel of the process of kiddushin. This issue is not entirely clear. One might have suggested that the true essence of a ma'aseh kiddushin is the actual transfer of money/shtar. The amira plays an ancillary role, such as designating the common agreement of the two parties involved - what in halakha is referred to as "gemirat da'at" - the mutual agreement vital to any halakhic transaction between two parties. The amira of 'harei at' might just be the way for the two parties to communicate to one another their mutual consent. If so, then it doesn't entail an integral part of the MECHANISM of kiddushin and does not have to be performed by the man to complete his ma'aseh kiddushin; it isn't part of the actual ma'aseh kiddushin but rather a qualifier. This understanding of amira is raised by the Ramban in the sugya and supported by the gemara (6a) which presents the case of 'assukin be-oto inyan.' If the two parties were planning the wedding (i.e. meeting with the caterer, going through a dress rehearsal) and the chatan gave the woman some money they are 'mekudeshet' even without the husband uttering the amira. Evidently, the primary role of the amira is to establish the intention of the parties. Where their intention is unmistakable because of the setting, (the atmosphere in which the money was delivered indicates the nature of this delivery - it was almost certainly intended as kiddushin), we can suspend the requirement of amira.

There is, however, some support for the alternate position - that amira doesn't merely confirm their mutual agreement but actually serves as an integral part of the ma'aseh kiddushin. Rashi in his explanation to the gemara does not require amira when a shtar is employed for the kiddushin. This position is logical since the shtar enunciates its own purpose leaving no room for error. Indeed, amira's primary role is to confirm their mutual agreement and when their intentions are conveyed through some alternate media

we can omit the amira. This understanding is in line with our original viewpoint of amira. In his explanation to the Rif, however, Rashi says something startling. Even if the husband chooses shtar as his apparatus for kiddushin he still must utter this formula. In the case of kiddushin through shtar there can be no doubt about the will of the two parties involved. The shtar clearly communicates their intention. If the function of amira were purely utilitarian - to announce their intention, kiddushei shtar would not require amira. Obviously, according to Rashi, the amira is part of the formal process of kiddushin and is necessary even if the intentions are clear.

If we accept this latter view, we can justify the gemara's concern with a condition in which the woman uttered the 'harei at'. The ma'aseh kiddushin is a hybrid, composed of two dimensions - one physical act of transferring money and one verbal act of pronouncement. In order for the husband to be considered as having performed an entire ma'aseh kiddushin (a requirement of 'ki yikach' according to the Rashba) he must execute each. Executing the delivery of money without articulating the formula of kiddushin is a deficient act of kiddushin on the husband's part, doesn't qualify as 'yikach' and constitutes an invalid kiddushin.

Alternatively, if we reject this stance and the amira is merely ancillary, assuring us of their mutual consent our question returns: why should her amira disqualify the kiddushin if it doesn't constitute an inherent part of the kiddushin? By not performing the kiddushin we cannot view the ba'al's execution as deficient. It is considered 'yikach', a complete performance, even without actually communicating the da'at.

We are then forced to locate an alternative understanding for the possible invalidation of "amra hi" a case where she says "harei at". Here we come to a second perspective upon the sugya which represents a very popular and frequently employed methodology (see Methodological points after the article). Quite possibly, her involvement invalidates the case not because it prevents the husband from capably completing his requirement. Rashi derives a different principle from 'ki yikach'. According to Rashi the Torah warrants the man's involvement and NOT the woman's. If a woman participates in ANY manner in the process of kiddushin it is invalidated, not merely because she performed a task which the man is required to perform. 'Ki yikach ve-lo ki tilakach' mandates two distinct 'roles' within the halakhic process of kiddushin - one active - the male role, and one passive - the female role. Amira on her part disqualifies the kiddushin because she becomes an active, rather than passive participant in the process of kiddushin. This kiddushin does not accord with the Torah's ideal of how the ma'aseh kiddushin should be enacted. Even if amira is peripheral and not an absolute requirement of the husband's, her participation, disqualifies the kiddushin because it upsets the balance the Torah established in terms of the formal act of kiddushin.

## SUMMARY II:

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Natan hu ve-amra hi - where the woman and not the man articulates amira is either a problem of insufficient ma'aseh kiddushin on the part of the husband - he hasn't

performed the requisite halakhic act - or an invalidation because the woman has adopted a role which is contrary to the halakhic portrait presented by the phrase "ki yikach'.

The *nafka mina* to this question is basic and standard. What would happen in a case where the husband theoretically isn't required to perform *amira* and the woman articulates the *harei at*. In such a case we might not disqualify the *kiddushin* based upon the husband's insufficient *ma'aseh kiddushin*. In this instance he executed all that he was required. However, if we view the woman's active participation as a violation of the ideal *ma'aseh kiddushin* we might invalidate such a case. This brings us to an interesting *machloket* regarding the case of "assukin be-oto inyan". I mentioned earlier the scenario where both parties were involved in wedding preparations and the husband gives the woman some money without stipulating his intention. In this case the *gemara* does not require an *amira* - the *kiddushin* is valid. What would happen in such a case if the woman would pronounce 'harei at". The *Rosh* in his *tosafot* validates such a case - the *ba'al* has performed everything which is required from him in this case. By contrast, the *Tosafot Rid* invalidates this case - even though the *ba'al* does not have to perform *amira* in this setting, the woman's pronouncement positively invalidates the case since she isn't conforming to the required role. Possibly, these *Rishonim* argue about the reason her *amira* generally invalidates. Does it, in general, reflect an insufficient *ma'aseh* in the part of the *ba'al*? This case is then exceptional because he performed all that was required. Who cares if she adds an *amira*. If, however, in general, her *amira* disqualifies because it represents her active involvement in the *kiddushin*, this case would also be invalid since she continues to play an active role.

A second scenario is where the husband has already exercised his requisite *kiddushin* and now the woman duplicates what he has already performed. In theory, such a case might present us with a similar *nafka mina*. The husband is fulfilling his role but the woman is still playing an active one. Such an instance of double-*amira* is not mentioned in the *Rishonim* but a similar case of double *netina* does appear. The *gemara* in *Kiddushin* (7a) remarks that if the husband is an important and respected person the *kiddushin* can take the following form: the woman gives him money and the honor he pays her (as a respected person) in accepting her gift is itself worth money. In this case it is considered as if he actually gave her money. This is the case of "adam chashuv". How does this case interact with ours of *natan hu ve-amra hi*? Here she doesn't perform *amira* but has performed a *netina* - transfer of money. This, however, is an instance of double *netina* since she gave him something of value and he (by honoring her) gave her something of value; would it be valid or not? The *Rashba* requires the husband to repeat his *amira* after he receives the money and to stipulate that the honor he showed her by accepting the gift and NOT the money she gave him is the *kesef kiddushin*. We require his subsequent *amira* to exclude her *netina* because her active participation can disqualify the *kiddushin* even in a case where the husband has completely performed his role. Alternatively, *Tosafot* (5b) do not require a second *amira* on the part of the *ba'al* to disqualify her *netina*. We aren't particularly concerned with her *netina* since he has performed his own *netina* and thus has fulfilled his requirements for *ma'aseh kiddushin*.

## Methodological Points:

I. Quite often, we encounter this type of question. Is something invalid because it lacks a requisite ingredient or because there is an abnormal element which actively disables. In classic jargon the question is "Is it a 'chissaron (a deficiency)' or a 'pesul (a positive disqualification based upon the introduction of disqualifying elements.)'". Particularly in reciprocal cases - actions which are interactive - between two people, this question becomes meaningful. The woman's amira either prevents the man from performing his necessary role or it disqualifies because the woman adopts a non-halakhic posture. To elucidate this question.....

II. Locate cases where you have both elements. Seek to establish cases where there is no 'chissaron' because the required party is performing that which is obligated, but nonetheless might exhibit a 'pesul' because the other party has still interfered.

III. Whenever two factors are necessary to catalyze one effect we must analyze whether each are integral or whether one is merely peripheral. In this case, we require netina and amira to effect a halakhic kiddushin. Are both integral parts of the process (IKKAR), or is the amira merely a peripheral ancillary qualifier (TAFEL) assuring da'at and the successful enactment of kiddushin through the transfer of money.

## AFTERWARD/MACHSHAVA:

I] I mentioned several times the halakhic role of a woman within the kiddushin as passive rather than active. This HALAKHIC issue is indisputable. This doesn't necessarily reflect the overall role and posture of a woman within society. The article does not address this issue. This in itself of course is an important question. Primarily one has to determine, to what extent halakhic realities influence existential ones. The issue itself is worthy of its own treatment and is not addressed in the article.

II] Please do not misconstrue this sugyatic discussion as a sanction of 'double ceremony' weddings. First of all, we pasken that her involvement invalidates the marriage mi-deoraita and only mi-derabbanan do we recognize the kiddushin - in terms of forcing a get to cover our tracks. More significantly, there are a host of additional problems concerning a double ceremony, many of which can be circumvented if absolutely necessary be-di'eved. This article is not intended to serve as an exhaustive treatment of the halakha le-ma'aseh issues involved.

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