

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY
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This week's *shiurim* are dedicated by Mr Joseph Eisenman

NATAN HU AMAR HI

To effect a complete *kiddushin*, a husband must both deliver money or money equivalent as well as declare a marriage "statement." Since the husband is conferring the *kiddushin* status upon a woman, his execution of the *kiddushin* ceremony is crucial. In fact, the gemara in *Kiddushin* (4b) asserts that the *pasuk*, "*Ki yikach ish isha...*," (which serves as the basis of *kiddushin* through *kessef*), indicates the fact that the husband is installing the *kiddushin* status for the woman and that he should therefore be the primary "executor" of the *kiddushin* ceremony. After all, there is an additional source establishing the efficacy of money for *kiddushin* (see *Kiddushin* 3b, which derives *kiddushin* through *kessef* from a *pasuk* in *Mishpatim*). The verse of "*ki yikach*" is nonetheless written primarily to introduce the concept of the husband as the primary executor.

What is unclear, however, is HOW MUCH of the *kiddushin* ceremony must be performed by the husband. This question is addressed by a *gemara* in *Kiddushin* (5b), which describes a split *kiddushin* process. The specific case discusses a man who delivered money but whose wife declared the *kiddushin* formula – "*Natan hu ve-amra hi.*" The *gemara* debates whether this scenario DEFINITELY fails or if it remains a *safek* (thus requiring a *get* just in case), but one thing is clear – something about this process is flawed. Since the husband did not articulate the formula of *kiddushin*, the process is defective. Does this defect reflect the scope of the *ma'aseh kiddushin* (act of *kiddushin*) and what aspects the husband must personally perform?

Some offer an unrelated reason for the failure of this *kiddushin*. If the husband does not verbalize the *kiddushin* formula, we cannot assume he AGREES to the *kiddushin*. Even if he delivers the money based upon the prior verbalization of the *kiddushin* formula by the woman, we cannot assume that he intends marriage, and without his INTENT, the *kiddushin* fails. The

Mishnah La-Melech suggests this approach to explain the position of the Yad Rama, who claims that if, upon hearing the woman's articulation of the *kiddushin* formula, the husband exclaims, "Yes" (or the equivalent), the *kiddushin* is valid despite the absence of a formal declaration by the husband. Presumably, the Rama maintains that the ONLY concern with the woman's articulation is the uncertainty of the husband's intent. If he conveys acquiescence, the *kiddushin* is valid.

In fact, a subsequent *gemara* describes a situation in which the husband is COMPLETELY silent but CLEARLY intends the marriage, and the *gemara* validates this form of *kiddushin*. This case is known as "*asukin be-oto inyan*." The *gemara* describes a situation in which the two parties were attending to various details of the *kiddushin* and suddenly the husband silently offered money to the woman. Since it is obvious that he intends *kiddushin*, the *ma'aseh kiddushin* succeeds despite the absence of a formal declaration. Evidently, no formal declaration is necessary and the only concern about a *kiddushin* in which the woman verbalized the declaration surrounds the unclear intent of the man.

However, in his explanation of the flaw of *natan hu ve-amar hi*, Rashi cites the verse of "*ki yikach*" and the associated *derasha* disqualifying "*ki tikach*." Evidently, independent of the empirical concerns as to whether the husband intends the *kiddushin*, this type of ceremony exhibits structural problems. Perhaps the declaration of marriage is an inherent element of the *kiddushin* ceremony or of the *ma'aseh kichah* (the act by which marriage is affected). Accordingly, the declaration is not merely an indicator of the intent of the parties, but has legal impact as well. By writing *ki yikach* the Torah mandates that the husband execute the *ma'aseh kiddushin*. Since the declaration is an integral part of the act of *kiddushin* it must be performed by the husband. If the woman preempts him, his act of *kiddushin* is flawed.

This notion is reflected by an interesting position stated by "Rashi" in his explanation of the Rif. (Although this commentary is titled as "Rashi," it is traditionally assumed to be authored by a later commentary.) He writes that even a husband who employs a *shetar* as *kiddushin* must declare the *kiddushin* formula. The mechanism of a *shetar* certainly conveys the husband's intent through its written content, and no ADDITIONAL declaration should be necessary to complete the *kiddushin*. If a declaration IS required EVEN in the scenario of a *shetar*, perhaps it is because the declaration has an

INDEPENDENT FORMAL function. If this is true, perhaps the situation of *natan hu ve-amar hi* is flawed because the husband has not COMPLETED the entire act of *ki yikach*, which entails delivering money as well as making a declaration.

Interestingly, the Behag claims that the reverse case – in which the woman delivered the money and the husband articulated the *kiddushin* formula – is identical to *natan hu ve-amar hi* a scenario in which the man delivered money and the woman verbalized the declaration. Presumably, the Behag maintains that the flaw common to both consists of the husband performing an INCOMPLETE act of *kiddushin*, which typically entails BOTH delivering money and declaring the *kiddushin* formula.

If this position is correct and the flaw of the *natan hu ve-amar hi* is due to an INCOMPLETE *kiddushin* package, we would expect this disqualification to be suspended in instances in which the husband performed the ENTIRE package AND the woman participated. Indeed, several *Rishonim* adopt this approach.

For example, several *Ba'alei Ha-Tosafot* (Rosh and Ri Ha-Zaken) discuss a scenario in which the husband delivered money in an *asukin be-oto inyan* context (the parties were involved in arranging the marriage) and the woman ADDITIONALLY articulated a *kiddushin* declaration. Since that the husband executed a COMPLETE *kiddushin*, (the CONTEXT of planning the marriage substitutes the actual declaration), the woman's extraneous declaration does not invalidate the process. The disqualification of *natan hu ve-amar hi* is based upon an incomplete *kiddushin* act on the part of the husband. In this instance, DESPITE and UNRELATED to the woman's declaration, the husband's participation is complete.

Yet several *Rishonim* disagree with this position, forcing a very different view of the *natan hu ve-amar hi* flaw. For example, the Tosafot Rid rules that DESPITE the fact that the husband has performed a complete *ma'aseh kichah*, and despite the fact that if the woman had been silent the *kiddushin* would have succeeded, if she verbalizes the *kiddushin* declaration, the process becomes invalid. Evidently, the Rid maintains that the underlying reason that *natan hu ve-amar hi* is invalid is NOT the incomplete nature of the husband's activity, but rather the intervention of the woman. By writing "*Ki yikach*" in the male form (with the associated *derasha* of "*Ve-lo ki tikach*"), the

Torah instructs that the woman must be inactive. Any halakhic assertiveness on her part – for example, her articulating a *kiddushin* declaration – invalidates the *kiddushin*, even if the husband has performed a COMPLETE *kiddushin*.

This third option – that a woman's verbalization disqualifies the *kiddushin* – invites some very important questions. What "other" activities can potentially ruin the *kiddushin* by converting the woman into an ACTIVE author of the *kiddushin*? If the woman's activity does not disqualify the *kiddushin* but rather preempts the man and renders his *ma'aseh kiddushin* incomplete, halakhic concerns would only surround the act of delivering the money and potentially the act of verbalizing the declaration. As long as the husband executes these activities, her PERIPHERAL activities are of no concern. However, if her assertive activities disqualify the *kiddushin*, perhaps even her involvement in secondary activities would be problematic.

There are several examples that suggest that even a woman's peripheral assertiveness disqualifies the *kiddushin*. One example is cited by the Rashba (*Kiddushin* 7a). The *gemara* discusses an unrelated invalid case of *kiddushin* in which a man limits the scope of his *kiddushin* to half of the woman ("*chatzi isha*"). The *gemara* claims that the partial *kiddushin* does not automatically extend to the entire woman, as the woman may be opposed (in contrast to "unilateral" halakhic activities, in which a partial status MAY automatically expand). The Rashba considers a situation in which a woman is not opposed to the expansion of the marital status (from half to whole). If she indicates willingness to allow the status to expand, why should it be disqualified? The Rashba responds that any female role in shaping the scope of the marital status would entail a disqualification of "*Ki yikach ve-lo ki tikach*." Even though she has not delivered money or verbalized the *kiddushin* formula, her MERE INVOLVEMENT (in this instance, in determining the scope of the yielded marital status) disqualifies the *kiddushin*. It appears that the Rashba agrees the woman must remain inactive. Her activities invalidate the *kiddushin* even if she hasn't preempted a full act of *kiddushin* by the man.

A second statement of the Rashba reinforces this notion. The *gemara* in *Kiddushin* (9b) discusses the authorship of the *shetar kiddushin*. Must the husband secure the wife's approval to DRAFT the contract? Although he must secure her approval to conduct the marriage ceremony WITH THE CONTRACT, perhaps he can unilaterally draft the contract (just as he can unilaterally draft a *get*). The *gemara* cites a dispute among the *Amora'im*. The

Rashba questions why the *gemara* does not consider a third option – that the woman ALONE draft the *shetar*, subsequently handing it to the husband so that he can formally deliver it to her. The Rashba responds that this would entail a concern of "*Ki yikach ve-lo ki tikach*," since the woman would be (solely) involved in drafting the *kiddushin* contract. Again, the Rashba describes a scenario of the woman's intervention in a preliminary stage that is not integral to the ACTUAL *kiddushin* process, yet the disqualification of "*Ki yikach ve-lo ki tikach*" applies. Evidently, the woman's intervention is not merely preemptive of the husband's performing a complete *kiddushin* process. Any intervention invalidates the *kiddushin*, even one that merely assigns the woman an authorial role in an early stage of the process.

A fascinating (and extremely provocative) application of this idea is suggested by the Ran in *Nedarim* (30a). Conventionally, the woman's role in the *kiddushin* process is compared to the seller's role in a land based acquisition. Just as the seller ACTIVELY intends the sale – known as "*da'at makneh*" – a woman similarly ACTIVELY intends the marriage process. Although no *gemara* assigns *da'at makneh* to the woman, several allude to this role, as do many *Rishonim*. (See, for example, Rashi on *Kiddushin* 44a, who explicitly identifies the woman's intent as *da'at makneh*.) Presumably, in standard *kiddushin* ceremonies, since the woman has not performed any ACTION, nor has she altered the normal scope of the *kiddushin* (as opposed to stretching an otherwise partial *kiddushin*, as described in the aforementioned Rashba), she has not violated "*Ki yikach ve-lo ki tikach*." This is the standard model of classic *kiddushin* – the man acquires and performs the requisite activities while the woman supplies the *da'at makneh*.

The Ran disagrees with this model. Supplying *da'at makneh* would be TOO ACTIVE a role for the woman and would violate "*Ki yikach ve-lo ki tikach*." Instead, the Ran writes, the woman merely "allows" the marriage by removing any resistance and enables the husband to perform the marriage. This has significant implications as to the LEVEL of *da'at* the woman must supply and even the TYPE of woman who can be married. However, it is also a bold statement about the rule of "*Ki yikach ve-lo ki tikach*." Any active role of the woman – even if standard and even if merely mental – would disqualify the *kiddushin*! Clearly, her activity disqualifies the *kiddushin* inherently and not merely because she prevents her husband's performance of the complete *kiddushin*.