

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

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**TALMUDIC METHODOLOGY**

By: Rav Moshe Taragin

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IN MEMORY OF SARAH ESTHER BAT HARAV MOSHE ZELIG (TARAGIN)

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**KIDDUSHEI BI'A**

The first mishna in Kiddushin lists the three devices by which halakhic kiddushin may be effected: kesef, shtar, and bi'a (money, contract, and sexual relations). Subsequently, the gemara (4b) derives kiddushei bi'a from a verse in Ki Tetzei "Ki yikach ish isha u-va eileha" (when a man acquires a woman and commences their conjugal activities). This verse implies that the process of acquiring a woman may be performed through the act of marital relations. Another gemara (9b), however, offers an alternate source for kiddushei bi'a: a verse (Devarim 22:22) which forbids a man from intimate relations with a married woman. This verse describes a married woman as a 'be'ulat ba'al' (a woman who already maintains an intimate relationship with another man). We will begin our shiur with a very simple question. What is the difference between these two sources? How might the nature of kiddushei bi'a vary depending upon which verse it is derived from?

1. Two Understandings of Bi'a

The first verse appears to be straightforward. The process of 'kicha' (halakhic acquisition of a wife) may be effected by a bi'a performed as the initiation of marriage. One might have questioned the very applicability of bi'a to initiate marriage and particularly the acquisitional dimension of kiddushin. After all, kesef and shtar each have parallels in the world of kinyan, and hence their ability to effect kiddushin is logical. Bi'a, seemingly a personal encounter, would appear to have no relevance to the world of kinyan. However, based upon this verse we might nonetheless view bi'a as a process which might engender some form of kinyan. After all, we do recognize a kinyan 'chazaka' (possession) which mandates performing some act which reflects the standard relationship between the future owner and the object being acquired. By building a symbolic fence, for example, the owner demonstrates the type of behavior which will characterize his future ownership of a field. Similarly, one might reason, by inaugurating the kiddushin through bi'a, the ba'al has fingered the one act which most accurately depicts the conjugal nature of their future relationship. In fact, the Yerushalmi in the beginning of Kiddushin does establish a parallel of sorts between kiddushei bi'a and kinyan chazaka. This would form the relatively simpler version of kiddushei bi'a - a symbolic act meant to demonstrate ownership and thereby effect kiddushin.

The second verse, however, is different in that it describes not an act of acquisition (kicha) effected through the performance of bi'a (u-va eileha), but instead a state - she is now 'be'ulat ba'al,' married to another. This might indicate a radically different understanding of kiddushei bi'a.

Usually, within Halakha, a formal act is performed to initiate an halakhic transformation. These acts (ma'aseh) are highly symbolic and are meant, in part, to convey the mutual will of the parties to establish this halakhic change. For example when performing a transfer of ownership on a small item, an act of hagbaha (the new owner elevating the item) encapsulates the mutual agreement of the two parties to effect the exchange. The act is symbolic rather than essential; the change is not engendered by what has occurred in the physical realm as much as what has changed in the abstract. Even if the new owner returns the item to the house of the previous owner - the item is still the new owner's since he has symbolically acquired possession. Of course, the degree of abstraction differs depending upon the act in question. A ma'aseh chalpin (handing over a handkerchief) is much more abstract than pulling an animal into my house (meshikha). Yet, they all share one common theme - they symbolize a change which in effect is authored by the parties in question. The ma'aseh is merely a device or apparatus to achieve the said change.

Our first view of bi'a maintained that bi'a, as well as kesef and shtar, is a ma'aseh kiddushin effecting the acquisition in an abstract manner through a symbolic act. Might bi'a be something different? Might it not merely signal the start of a relationship but actually forge that VERY relationship? Instead of operating in an abstract realm of symbolism might it establish a visceral and tangible relationship? Two individuals who have actually engaged in relations for the purpose of being married are ipso facto married. Bi'a might not be a device intended to symbolize mutual assent to initiate a relationship, but might instead actually manufacture the essence of the relationship itself. It might be a metzi'ut (a self-driven reality) rather than a ma'aseh kinyan!!! A woman who has had bi'a of kiddushin is automatically in the state of be'ulat ba'al - MARRIED!!!

We might corroborate this possibility with an interesting Rambam. The history of kiddushin as an halakhic act of acquisition dates back to matan Torah (the giving of the Torah). Before being mandated by the Torah, handing money to a woman had no real meaning. The abstract halakhic system per se had yet to be established and the various symbolic devices had yet to be implemented. The Rambam describes the state before matan Torah as one in which "if a man and woman decided to marry he would bring her into his house and by engaging in intimate relations with her she became his wife." Bi'a, we see, had meaning as a trigger for marriage even before the Torah was given because it isn't an abstract manner to symbolize the start of kiddushin. Rather, it establishes its own reality of marriage which society then validates.

## 2. Ramifications

The nafka minot (ramifications) of this issue might be significant. Any symbolic act doesn't independently accomplish an halakhic transformation but rather catalyzes that

change which ultimately is effected by the will of the parties. Hence, we require individuals who are capable of an halakhic level of da'at, or intent. A cheresh (deaf-mute), shoteh, or katan, being mentally unstable or immature, cannot participate in an halakhic process of change. The Yerushalmi in Yevamot (14:1) alludes to the possibility that while a cheresh is incapable of effecting kiddushin through kesef or shtar, he might be capable of performing a valid kiddushei bi'a. Similarly, Rashi (cited by the Shita Mekubetzet in Ketuvot 73b) implies the same about a minor. Does this not indicate that the rules for kiddushei bi'a are different from those of a standard kiddushin? Perhaps this shows us that bi'a creates its own reality of marriage, and is not just another symbolic act of acquisition. Therefore, bi'a is not totally dependent on the parties intent, and doesn't demand a mature halakhic author to initiate the change.

A similar distinction might stem from the ability of a Gentile to execute kiddushei bi'a. Like a minor, a Gentile is halakhically incapable of steering an halakhic process of change. What about kiddushei bi'a? Might a Gentile be capable of creating a marriage through bi'a, being that the encounter per se creates an objective state of marriage? The Ramban (in the beginning of Ki Tetzei) asserts that the only way to perform a halakhically binding kiddushin with a yefat to'ar (Gentile captive from a war) is through kiddushei bi'a. Similarly, the gemara in Sanhedrin 57b maintains that a Gentile who commits adultery with a married woman who has already engaged in bi'a has committed 'gilui arayot' and can be punished according to halakha. If the woman has not yet had bi'a, EVEN IF SHE HAS COMPLETED CHUPPA, no legal adultery has been committed. This gemara confirms that only through bi'a can a Gentile construct a marriage accepted by halakha. Obviously, these cases demonstrate the unique nature of bi'a - bi'a is not your standard kinyan.

### 3. T'nai and Shlichut

Another discussion which evinces the unique quality of bi'a is cited in the gemara Ketuvot (74a). The gemara suggests that kiddushei bi'a (unlike kiddushei kesef and kiddushei shtar) must be performed in an absolute manner and cannot be hinged around a t'nai (condition). The gemara reasons that just like one cannot delegate a shaliach (agent) to perform kiddushei bi'a one may similarly not forge kiddushei bi'a around a t'nai. Two questions immediately pose themselves: Why is kiddushei bi'a different from shtar and kesef in that no condition may be stipulated and no shaliach may be delegated? Furthermore, what common denominator characterizes these two factors (t'nai and shlichut) that enables the gemara to base the inability to stipulate a t'nai upon an inability to name a shaliach?

In truth, each of these halakhot is based upon the aforementioned principle. Symbolic acts are merely devices or tools which are used to establish a halakhic change. Effectively, the author behind these acts and his counterpart are orchestrating the change themselves, and only employing the ma'aseh to trigger the change. The author retains the right to delegate the symbolic act to a shaliach. I may appoint another to perform the symbolic act of kinyan and still dictate that the ownership be acquired by myself. The ability to delegate shlichut, more than anything else, highlights the control of the author

of the act and the relatively symbolic (and hence secondary) importance of the actual performance of that act. The ultimate change in status issues not directly from the act but from the will of its author; as its author I may delegate its performance to another. In such cases I may also hinge the change upon an external stipulation. Even though the act was performed in full, I may, as its author, state certain contingencies which must occur for the change to be valid.

As stated earlier, kiddushei bi'a might be different: the marriage evolves naturally, as an independent reality of this intimate encounter. There is no one person exerting authorial control; rather each is a PLAYER and a participant in an act which carves out its own reality. My lack of control is evidenced by my inability to appoint a shaliach. If Reuven performs bi'a on Shimon's behalf, REUVEN is married to Leah, NOT Shimon. I cannot disassociate the resultant marriage from its original intimate context. The inability to perform shlichut underscores the difference between bi'a on the one hand and kesef and shtar on the other. Lacking control over kiddushei bi'a, I am also unable to pitch the resultant marriage around an external condition. One who performs kiddushei bi'a IS MARRIED - PERIOD!! He cannot stipulate an external factor which will determine this marriage any more than a carpenter can make a table conditionally. Regarding the actual halakhic ruling, regarding stipulating conditions for kiddushei bi'a, there appears to be a dispute between two sugyot. The gemara in Ketubot concludes that despite the compelling logic not to allow the stipulation of conditions, we nevertheless apply a broad comparison between all forms of kiddushin - "akshinan havayot le-hadadi;" just as one may stipulate t'nai with a shtar or kesef, one may do the same with kiddushei bi'a. The gemara in Yevamot (15a), however, apparently understands that this ruling is still the subject of a machloket, or controversy.

#### 4. The Requirements of Kiddushei Bi'a

How might this question affect the actual performance of kiddushei bi'a? An interesting difference from other kiddushin is alluded to by the Tosefta (1:1). Typically an act of kiddushin contains two components - one physical and one verbal. When awarding the money or delivering the shtar the husband recites the formula of 'harei at mekudeshet,' 'you are hereby married.' This declaration plays more than an explanatory role (see shiur #8 of the VBM series on Massekhet Kiddushin [YHE-KIDDUS]). It actually helps launch the kiddushin. Would amira be necessary when performing the act of kiddushin through bi'a? One might reason that given bi'a's unique nature in self-starting a marriage on its own, we would not require any declaration. Possibly we might demand some designation. After all, the parties must clarify their overall intent - Is this indeed intended as the start of marriage or merely as extra-marital prostitution (bi'at zenut)? However, we might not demand the formal declaration of 'harei at mekudeshet;' this might be reserved for shtar and kesef in which the person himself drives the kiddushin and does so through clear-cut intent expressed verbally. The Rambam (Ishut 3:5) seems to demand the identical declaration for kiddushei bi'a as for kiddushei kesef and shtar. The Tosefta, however, appears to discriminate, only claiming that bi'a must be performed "be-torat kiddushin" - with the design of initiating a marriage.

Another manner in which the unique nature of kiddushei bi'a might affect its performance is addressed by the gemara in Kiddushin (10a). The gemara questions whether performing kiddushei bi'a creates a state of kiddushin (betrothal, after which nissu'in is necessary to 'consummate the marriage') or immediately creates a state of nissu'in. On the surface, this possibility seems preposterous!! The parties clearly intended the preliminary state of kiddushin, and not full-blown marriage!! Why should the ensuing state of nissu'in, normally one which requires a separate process, evolve automatically?

If, as stated before, kiddushei bi'a differs from other forms of kiddushin in that it establishes an objective reality of marriage, it might be more difficult to schedule the different stages of this marriage and to stunt them. Kesef and shtar are symbolic acts which do not necessarily reflect the ultimate and complete stages of marriage. Driven by their authors, they can be geared toward establishing a preliminary stage which can form the foundation of a more complete relationship to be constructed at nissu'in. Bi'a, however, reflects a real marriage and possibly one cannot help but reach the full stage of nissu'in after bi'a has been performed. This argument is especially compelling if we view nissu'in as embodying the actual marriage, as opposed to kiddushin which expresses the abstract formal relationship. (See Kiddushin shiur #7.)

For further research:

1. The gemara (10a) debates whether bi'a acquires at the beginning of the act or only upon its completion. In light of the above analysis, how can this be explained. See Tosafot s.v. Kol, Ritva s.v. Ibai.
2. The gemara (4b) attempts to derive kiddushei bi'a from yibbum. How can yibbum be a paradigm for kiddushin? After all, yibbum takes effect despite lack of da'at, and is therefore clearly not similar to kiddushin which requires da'at.

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