**MARRIAGE AND PROHIBITED SEXUAL RELATIONS**

**IS THERE A *MITZVA* TO BE MARRIED?**

***Mitzvat Kiddushin* in the Talmud**

The Torah mentions the concept of *kiddushin* in the context of the laws of divorce (*Devarim* 24:1):

When a man takes a wife and is intimate with her, and it happens that she does not find favor in his eyes because he discovers in her an unseemly [moral] matter, and he writes for her a bill of divorce and places it into her hand, and sends her away from his house.

The Torah employs the word “*ki*” to describe the marriage, which in this case is about to be terminated. It is not clear from this verse whether the Torah means to imply that a man should or must marry a woman, or whether it is a voluntary process through which a marriage is created.

In numerous places, the Talmud implies that *kiddushin* is a “*mitzva*.” For example, the Talmud teaches (*Kiddushin* 41a) that a person should preferably not appoint an agent to perform the act of *kiddushin* (i.e. betrothing a women through a gift), as “it is better to perform a *mitzva* oneself” (*mitzva bo yoter me-beshelucho*). Similarly, in the context of the *mishna*’s statement (*Beitza* 36b) that *kiddushin* should not be performed on Shabbat and Yom Tov, the *gemara* describes *kiddushin* as a “*mitzva*,” although it appears to distinguish between the *kiddushin* of one who is already married with children and one who is not.

The *Rishonim* grapple with this interesting issue in a number of places. For example, regarding the *gemara*’s statement that a person should preferably perform the “*mitzva*” of *kiddushin* himself, the *Rishonim* disagree as to whether the *gemara* refers to the *mitzva* of *kiddushin* or whether *kiddushin* is termed a “*mitzva*” because it is a “*hechsher mitzva*,” a preparatory stage of the *mitzva* of *peru u-revu*.

The *gemara* further explains that the principle of *mitzva bo yoter mi-beshelucho* applies to women as well and that a woman should therefore preferably not appoint an agent to accept *kesef kiddushin* on her behalf. To which *mitzva* is the *gemara* referring? The Ran explains (*Kiddushin* 16b) that the *gemara* refers to the *mitzva* of *peru u-revu* and that women also fulfill the *mitzva* through their “assistance” in fulfilling it. However, the *Sefer Ha-Miknah* (*Kiddushin* 41a) disagrees and insists that the *gemara* refers to *kiddushin* as a “*mitzva*” because it is a “*matir*,” an act that permits a prohibited activity. Accordingly, a woman also has a part in this *mitzva*, as it permits her to live with her husband.

***Mitzvat Kiddushin* and *Birkat Ha-Eirusin* (The Marriage Blessing)**

The *Rishonim* relate to this issue most directly in the context of a discussion regarding the laws of the *birkat ha-eirusin*, the blessing recited at the beginning of the wedding ceremony, before the *kiddushin*. The text of the blessing is:

Blessed … Who has sanctified us by Your commandments and commanded us concerning [forbidden] intimate relationships and forbidden to us those women who are [only] betrothed with *eirusin*, but permitted to us those women who are married to us by *chuppa* and *kiddushin*. *Barukh* … Who sanctifies the people Israel by *chuppa* and *kiddushin*.

The Rosh (*Ketubot* 1:12) and other *Rishonim* note that the text of the blessing does not match the pattern of other *birkot ha-mitzvot*:

Some question the formula of the blessing and why we do not say, “[He who] has commanded us to betroth a woman.” Furthermore, where do we find a similar blessing in which we praise that which God prohibited? For we do not say, “[Blessed] … who has prohibited *eiver min ha-chai* and permitted slaughtered meat”!

Why doesn’t the *birkat ha-eirusin* follow the general pattern of other blessings recited before performing *mitzvot*?

The Rosh explains that marriage is not an inherent part of the central mitzvah of *periya u-reviya*:

It appears to me that the blessing is not for the fulfillment of the *mitzva*, as *periya u-reviya* is the fulfillment of the *mitzva*, and if he were to take a concubine (*pilegesh*) and fulfill *periya u-reviya*, he would not be obligated to wed a woman. Similarly, one who marries an older woman, an *eilonit*, or a woman who cannot bear children also says this blessing … as there is no obligation to perform this *mitzva* and it does not fulfill [the *mitzva*] of *periya u-reviya* and therefore a blessing was not instituted for this *mitzva*.

The Rosh concludes that the blessing is a *birkat ha-shevach*, which "was instituted to give praise to God who has sanctified us and separated us from the other nations and commanded us to betroth permitted women and not those who are prohibited to us.” We will challenge the Rosh’s problematic assertion regarding a *pilegesh* below.

The Rosh clearly maintains that there is no halakhic imperative to marry, nor does marriage technically fulfill a *mitzva*. Accordingly, in his view, unlike *birkot ha-mitzva*,the blessing is recited after the *kiddushin* and must be said in the presence of ten men. Although, as mentioned above, numerous sources indicate that *kiddushin* is indeed a *mitzva*, according to the Rosh, the *gemara* apparently refers to a *mitzva* in the sense of the performance of a good deed, the preferred manner in which one in meant to fulfill the commandment of procreation.

Most *Rishonim* disagree and assert that there is a *mitzva* of *kiddushin* of some sort. They differ, however, as to the type and nature of this *mitzva*.

For example, R. Yitzchak of Corbeil, in his Sefer Mitzvot Katan (Smak), implies that there is a positive *mitzva* to initiate *kiddushin* and to be married. Other *Rishonim*, however, appear to disagree, implying that although one is not obligated to marry, one who wishes to marry a woman must do so in the manner described by the Torah. The Sefer Ha-Chinukh (552), for example, writes:

We were commanded to betroth a woman in one of three ways before the marriage… Of the roots of the commandment are that we are commanded to perform an act with a woman [that] indicates the matter of their being a couple before he lays with her, and that he should not have sexual relations with her like he would have sexual relations with a prostitute, without another act between them first... And the sages obligated us to recite a blessing upon this commandment – the man betrothing (see Mishneh Torah, *Ishut* 3:3, and Sefer Mitzvot Ha-Gadol, pos. comm. 41) or someone else on his behalf and he answers, *Amen* – in the way that we recite a blessing on all commandments. For we hold that with blessings over commandments, “Even though he has [already] fulfilled [it], he may fulfill [it] for another”… And our custom is to arrange it over a goblet full of wine and to recite it after the act of betrothal. And they said that the explanation of this is that since the act of betrothal is dependent upon the consent of another – that is, the woman – it is not fitting to recite the blessing over the commandment before the commandment, as with other commandments.

The Chinukh clearly believes that the blessing is a *birkat ha-mitzva*, as *kiddushin* is considered to be a positive commandment. Interestingly, he adds that it was customary to say the blessing after the *kiddushin*, despite the fact that the *birkat ha-mitzva* is usually said before the performance of a *mitzva*, since it would be improper to say the blessing before the man betroths the woman, as she may refuse.

The Ramban (*Ketubot* 7b) offers a middle approach. He explains that in the time of the Talmud, the wedding ceremony was divided into two parts. First, the man betrothed the woman (*kiddushin*) through money, a contract, or sexual relations, and only after a year did they begin living together as a married couple (*nisu’in*). The Ramban explains that since the full *mitzva* of marriage is only fulfilled after the *kiddushin* and *nisu’in*, the blessing cannot be recited with the *kiddushin*, which is only part of the *mitzva*. According to the Ramban, while *kiddushin* and *nisu’in* together indeed constitute a *mitzva*, the blessing recited at the *kiddushin* is a *birkat ha-shevach*, and not a *birkat ha-mitzva*.

**The View of the Rambam**

The Rambam’s opinion is the subject of much discussion. Although the Rambam writes numerous times that *kiddushin* is a positive commandment (Sefer Ha-Mitzvot, pos. comm. 213; introduction to *Hilkhot Ishut*; *Hilkhot Ishut* 1:2, 3:23), it is not clear from the Rambam which part of marriage is the *mitzva*. His son, R. Avraham ben Ha-Rambam (*Birkat Avraham* 44), explains that the *nisu’in*, the second and final part of the marriage ceremony, is the *mitzva*. This fits with what the Rambam writes in his introduction to *Hilkhot Ishut*, where he writes that the *mitzva* is “*lisa isha*,” and not “*le-kadesh isha*,” as well as with the Talmud’s statement (*Moed Katan* 18b) implying that *nisu’in*, and not the *kiddushin*, is the *mitzva*. This position is certainly reasonable, as ultimately the *nisu’im* marks the beginning of married life.

Nevertheless, this position is difficult to accept, as the Rambam seems to emphasize the *kiddushin*, or “*likuchin*,” and not the *nisu’in*. This is especially true regarding the blessing over the *kiddushin*, which he describes as a *birkat ha-mitzva* that cannot be said after the *kiddushin*. If so, in what way does the *kiddushin* serve as the central part of this *mitzva*?

Interestingly, some suggest that *kiddushin* is not a positive commandment, but rather what is known as an *issur aseh* (see Rivash 395). One who engages in sexual relations outside of the context of marriage violates an “*issur aseh*,” as one is not permitted to have relations without first performing an act of betrothal. It is possible that this was also the view of the Rambam, who also describes the *mitzva* as “having sexual relations (*liv’ol*) through *kiddushin*” (Sefer Ha-Mitzvot) and “to marry (*lisa*) a woman with *ketuba* and *kiddushin*” (introduction to *Hilkhot Ishut*). In other words, *kiddushin* is a “*matir*,” an act which permits an otherwise prohibited activity.

Alternatively, it is possible that according to the Rambam, the *mitzva* is indeed the *kiddushin*, and it is the *kiddushin* that represents and reflects the nature of halakhic marriage. *Kiddushin* creates the formal, legal relationship within which one may live a full, married life. Without *kiddushin* – and, according to the Rambam, without the financial responsibility created by the *ketuba* (although the Rambam maintains that the formal obligation of *ketuba* is *mi-derabbanan*) – one is not permitted have intimate relations with a woman. It is this context and method that is the *mitzvat aseh* and which ultimately reflects the Rambam’s view of marriage. In other words, the Rambam believes the sanctification and formalization of the association between and man and woman is a halakhic prerequisite for pursuing an intimate relationship. As we shall discuss in the future, this is no surprise, as the Rambam maintains that aside from a king, one may not live with a *pilegesh* (concubine); he only sanctions a relationship forged through *kiddushin* and *ketuba*.

Accordingly, we can understand why the *birkat ha-eirusin* does not relate only to the act of *kiddushin*, but rather to the context and purpose of *kiddushin*:

Who has sanctified us by Your commandments and commanded us concerning [forbidden] intimate relationships and forbidden to us those women who are [only] betrothed with *eirusin*, but permitted to us those women who are married to us by *chuppa* and *kiddushin*.

Since it is not the act of *kiddushin* per se but the process and what it accomplishes that constitutes the *mitzva*, this is a fitting blessing.

Finally, it is worth noting the view of R. Achai Ga’on in his *She’iltot* (165):

[The obligation is to] marry and bear children and be engaged in populating the world, as it says, “Take wives and beget sons and daughters [and take wives for your sons and give your daughters to men, and they shall bear sons and daughters, and multiply there and be not diminished]” (*Yirmiyahu* 29:6).

R. Achai appears to count marriage and bearing children as one *mitzva*. This position may be similar to the approach of the Mordekhai (*Ketubot* 132), who writes:

We do not say the blessing, “He who has sanctified us with his commandments and commanded us to betroth a woman,” since the act of *kiddushin* is not the completion of the *mitzva* … And even at the time of *nisu’in*, we do not say this blessing lest it be deemed a *berakha le-vatala* (blessing in vain), lest they will not merit to have children (*le-hibanot*) together.

The Mordekhai appears to maintain that the *mitzva*, in its fullest sense, includes *kiddushin*, *nisu’in*, and bearing children.

**PHYSICAL CONTACT OUTSIDE OF MARRIAGE**

***Chibuk Ve-Nishuk* (*Negi’a*)**

The Torah states that in addition to close relatives and married women, known as “*arayot*,” one is not permitted to engages in sexual relations with a woman considered to be a “*nidda*,” i.e. who has menstruated and has not yet immersed in the *mikveh* (*Vayikra* 18:19). The Torah uses a unique phrase to describe this prohibition: “Do not approach … to reveal her nakedness.” Although some commentaries (see Ibn Ezra and Chizkuni) understand the phrase, “do not approach,” to refer to sexual relations, the Rabbis taught that this phrase alludes to an additional prohibition of “approaching” a woman in *niddut*, as well as other people with whom sexual relations are prohibited. What is the source, nature, and scope of this prohibition?

The Sifra (*Acharei Mot* 13) relates to this additional phrase and teaches:

"Do not approach a menstruating woman to reveal her nakedness" (*Vayikra* 18:19) – This only tells me not “to reveal.” How do I know not to come close? Therefore we learn, "do not approach." This only tells me for a menstruating woman; how do I know that this prohibition against "uncover" applies to all forbidden women (i.e. *arayot*)? Therefore we learn, "do not come close to uncover.”

According to the Sifra, one is prohibited from “becoming close” to a woman who is a *nidda* or any other prohibited men or women who are categorized as *arayot*.

Another source, Avot De-Rabbi Natan (2:1), also cites this prohibition:

What is the fence that the Torah made about its words? It says, “Also you shall not approach unto a woman … as long as she is impure by her uncleanness” (*Vayikra* 18: 9). May her husband perhaps embrace her or kiss her or engage her in idle chatter? The verse says, “You shall not approach.” May she perhaps sleep with him in her clothes on the couch? The verse says, “You shall not approach.”

This source specifically mentions forms of “coming close,” such as embracing, kissing, and engaging in idle chatter.

This source, while similar to the Sifra cited above, implies that this prohibition is a form of “fence.” In other words, physical contact is prohibited as a “fence,” in order to prevent men and women from engaging in forbidden sexual activity. This understanding emerges from another passage (*Shabbat* 13a), which teaches:

Ulla, when he would come from the house of his teacher, would kiss his sisters on their chests. And some say: On their hands… Is this not in contradiction, as Ulla said: Even any intimacy is prohibited [with a woman with whom he is forbidden to engage in sexual relations] due to [the reason formulated as an adage]: Go around, go around, and do not approach the vineyard, they say to the *nazir*.

Just as the *nazir* is meant to take extra precautions so that he does not consume any grape products, a person must refrain from physical contact that may lead to sexual relations.

The *Rishonim* debate whether this prohibition is of rabbinic or biblical origin. The Rambam (*Sefer Ha-Mitzvot*, *Lo Ta’aseh* 353) rules that this prohibition is *mi-de’oraita*:

Not to be intimate with a woman with whom sexual relations are forbidden in matters that might lead to intercourse – e.g., embracing, kissing, winks, or signs – as the verse states [*Vayikra* 18:6]: "No person shall approach a close relative to commit a sexual offense.” Based on the oral tradi­tion, we have learned that this prohibits intimacy that might lead to sexual relations.

The Rambam records this prohibition in the Mishneh Torah (*Hilkhot Issurei Bi’ah* 21:1) as well:

Whoever comes to the nakedness of one of the prohibited women by "way of limbs" or through hugging or kissing in the way of desire and benefits from the closeness of flesh, he is lashed in accordance with Biblical law, for it is written, "Keep my requirements and do not follow any of the detestable customs that were practiced before you came and do not defile yourselves with them" (*Vayikra* 18:30), and it is written, "Do not come close to uncover nakedness" – meaning do not come close to things which will lead one to reveal nakedness.

The Rambam clearly maintains that physical contact between *arayot*, including *nidda*, is Biblically prohibited.

Interestingly, the Rambam cites two verses. One might infer from his words that there are two separate and different prohibitions. While certain behavior may be prohibited lest it lead to sexual relations (based on "do not come close to uncover nakedness" – meaning, do not come close to things which will lead one to reveal nakedness), physical contact may also be prohibited “in accordance with Biblical law, for it is written, ‘Keep my requirements and do not follow any of the detestable customs that were practiced before you came and do not defile yourselves with them’” – in other words, because it is a “detestable custom” (*chukot ha-to’evot*). The Rambam expands upon this idea in his commentary to the Mishna (*Sanhedrin* 7:4):

Whoever comes to the nakedness of one of the prohibited women by “way of limbs” or through kissing one of these prohibited woman or if he hugged or kissed their limbs in order to derive pleasure … and similarly one who is playful with one of the prohibited women, as laughter and winking with one’s eyes with the intent of deriving benefit (*leshem ta’anug*) – all of these actions one who does them receives lashes and they are all included in two explicit Biblical prohibitions (*lavin*), one being "do not come close to uncover nakedness," as if He said “distance yourselves from those things which bring one close and accustom one to prohibited sexual relations (*giluy erva*)” … and the second as He said, “Do not follow any of the detestable customs,” and these [actions which] we mentioned are called “detestable customs.”

Although one might distinguish between actions which lead to prohibited sexual relations and those which are considered to be “detestable customs,” the Rambam clearly prohibits all of these behaviors on a *mi-de’oraita* level. Other *Rishonim* (Chinukh, *mitzva* 188; Semag, *Lo Ta’aseh* 126; Ritva, *Shabbat* 13b; Rivash 425, et. al.) also rules that certain physical contact is Biblically prohibited.

The Ramban, in his comments to the *Sefer Ha-Mitzvot* (*Hasagot* ibid.), disagrees:

Although the Rabbi found an explicit ruling and based his words upon a great tree (i.e. the Sifra), a perusal of the Talmud reveals that this is not the case, [and that] hugging and kissing are not considered to be a Biblical prohibition (i.e. a *lav*). This prohibition is Rabbinic… a mere *asmakhta*, and this is very common in the Sifra and Sifri.

According to the Ramban, this prohibition is Rabbinic, legislated in order to distance one from prohibited sexual relations.

The Shulchan Arukh (*Even Ha-Ezer* 20:1 and 21:1) rules in accordance with the Rambam.

**Types of Prohibited Physical Contact**

What kind of physical contact does this prohibition include? Although some authorities imply that all physical contact may be Biblically prohibited (see Beit Yosef, YD 195, who cites a responsa of the Rashba [*Teshuvot Ha-Meyuchasot Le-Ramban* 127] and suggests that “all contact is Biblically prohibited”) and others suggest that all physical contact may be Rabbinically prohibited (see Beit Shmuel, EH 20:1), most *Acharonim* understand that only affectionate physical contact (*chibat biah*) is prohibited. R. Shabbatai ben Meir Ha-Kohen (Shakh; 1621–1662), for example, in his commentary to the Shulchan Arukh (YD 157:10), explains that the Rambam cited above only referred to a case in which “he hugged and kissed in a sexually affectionate manner (*derekh chibat bi’ah*).”

The *Acharonim* rule that one need not be concerned with unintentional physical contact. For example, R. Moshe Feinstein, in his Iggerot Moshe (EH 2:14) rules that one should not be concerned if one inadvertently touches a woman while traveling on a bus or the subway, as the Rambam only prohibited touching which was “*derekh ta’ava ve-chiba*” (in an enjoyable and affectionate manner).”

In this context, some *Poskim* discuss whether it is appropriate, or even permitted, for men and women to shake hands. Some point to an interesting passage in the Talmud Yerushalmi (*Sota* 3:1), which describes how the *kohen* would put his hand under the woman’s hand and assist her in the waving of the *minchat sota* during the *sota* ceremony. The Yerushalmi explains that “the evil inclination is not present for such a short period of time (*ein yetzer ha-ara matzuy le-sha’ah*).”

R. Moshe Feinstein (Iggerot Moshe, EH 1:56) acknowledges that there are some people, even those who are “God-fearing,” who are lenient and will offer their hand when a woman extends her hand, as this is not “an enjoyable and affectionate manner.” Nevertheless, he concludes that it is “difficult to rely upon this.” This is the view of other contemporary authorities as well (Be’er Moshe 4:130; Az Nidberu 2:73; Rivevot Efraim 8:596:8; Avnei Yashfei 2:89:1). Incidentally, the Sefer Chassidim (12th–13th century Germany, ch. 1090) notes that one should not shake a non-Jewish woman’s hands “even if it is covered with a garment, as a fence before promiscuous behavior.”

On the other hand, it was certainly customary in certain communities to shake a woman’s hand. For example, R. Shlomo Carlebach (1845–1919), the Rav of Lübeck, Germany, testified that the custom of the land was to shake hands and it was perceived as an embarrassment to refuse to shake another person’s hand (see *Le-David Tzvi: Sefer Ha-Yovel LeRadatz Hoffman*, p. 218). In Sephardic lands, R. Yosef Chaim of Bagdad (1835–1909), author of the work *Ben Ish Chai*, relates and defends the practice of women kissing the hand of the “*chakham ve-zaken*” (the wise elder), as this is not an expression of affection. Interestingly, he objects to the “practice of the people of Europe” to shake hands, as “shaking is certainly a gesture of affection.”

Beyond the halakhic question, there are a number of other issues that one should take into account, including local custom, context, familiarity, as well as how one’s behavior will be perceived by the other person. While Torah observant Jews should not participate in a culture that encourages physical contact between men and women, especially in the current social and political climate, “the ways of the Torah are pleasant” (*derakheha darkhei no’am*) and there is no need to embarrass or make others feel uncomfortable, nor to endanger one’s livelihood, in order to avoid an unexpected, polite handshake.

**Physical Contact Between Relatives**

The Rambam (*Hilkhot Issurei Bi’ah* 21:10) relates to physical contact between relatives:

When a man embraces or kisses any of the women forbidden to him as *arayot*, despite the fact that his heart does not disturb him concerning the matter, e.g., his adult sister, his mother's sister, or the like, it is very shameful. It is forbidden and it is foolish conduct. [This applies] even if he has no desire or pleasure at all. For one should not show closeness to a woman forbidden as an *erva* at all, whether an adult or a minor, except a woman to her son and a father to his daughter.

In his Commentary to the Mishnah (*Sanhedrin* 7:3), the Rambam adds that one does not receive *malkot* in this case, implying that there is no Biblical prohibition.

The Shulchan Arukh (EH 21:10) rules accordingly:

To hug or kiss one of the *arayot* whom people do not normally lust after, such as his adult sister or his aunt or the like, even though he derives no pleasure at all, is very reprehensible, forbidden, and the act of a fool. This is because there are no relatives for [the purposes of] licentiousness at all, whether adult or minor, except the father to his daughter and the mother to her son. How is this? A father is permitted to hug his daughter, kiss her, and sleep next to her with flesh touching, and so too a mother with her son, as long as they are minors.

The Chelkat Mechokek (21:10; see also Iggerot Moshe, YD 2:137) adds that one may also hug and kiss one’s grandchildren.

**SEXUAL RELATIONS WITHOUT *KIDDUSHIN***

In this section, we will discuss the prohibition of sexual relations between a man and an unmarried woman (*panuy ha-ba al ha-penuya*), assuming that the woman has immersed in the *mikve*. We will focus on three possible sources, the first Rabbinic and the others Biblical.

***Yichud Penuya***

The Talmud teaches that in addition to prohibited sexual relations, at times, *yichud* (seclusion) is also prohibited. While the scope and details of this prohibition are beyond this scope of this *shiur*, we will note that the *gemara* refers to three types of *yichud* which were prohibited at three different times.

First, one passage (*Kiddushin* 80b) implies that there may be a Biblical prohibition of *yichud* with *arayot*. The *Rishonim* discuss whether this prohibition is indeed *mi-de’oraita* (see, for example Rambam, *Hilkhot Issurei Bi’ah* 22:1-2). The Rivash (425; see also Binat Adam 126:28) notes that this prohibition includes unmarried women in a state of *niddut*, which nowadays includes *yichud* with all unmarried women, as it is customary for unmarried women not to immerse in a *mikve*.

In addition, the Talmud (*Sanhedrin* 21a) mentions a later legislation from the time of David Ha-Melekh (*beit dino shel David Ha-Melekh*):

“And Tamar put ashes on her head and rent her garment of many colors” (*Shmuel II* 13:9). It was taught in the name of R. Yehoshua b. Korcha: In that hour, Tamar set up a great fence [about chastity]. They said: If this could happen to kings’ daughters, how much more to the daughters of ordinary men! If this could happen to the chaste, how much more to the wanton? R. Yehuda said in Rav's name: On that occasion, they made a decree … against *yichud* with … unmarried women.

The Talmud teaches that in the times of David Ha-Melekh, the sages made a decree prohibiting *yichud* with unmarried woman, even those who had immersed in a *mikve*.

Further on, we will discuss whether this enactment prohibited sexual relations between men and unmarried women, or whether these relations were already prohibited, and this enactment merely prohibited seclusion with unmarried woman. In any event, the Talmud clearly prohibits the seclusion of men and unmarried women.

Finally, the Talmud notes a third and later legislation. The *gemara* (*Avoda* *Zara* 38b; see also *Shabbat* 13b) relates that the students of Shammai and Hillel prohibited *yichud* with non-Jews (*benoteihen*).

***Issur Aseh* – The Violation of a Positive Command**

R. Yitzchak b. Sheshet (1326 – 1408), known as the Rivash, authored a responsum in which he relates to whether or not a man may live with a woman with whom he is not formally married, a *pilegesh*. In the context of this discussion, he asserts that according to the Rambam (see *mitzvat aseh* 213 and introduction to *Hilkhot Ishut*), one who has relations with a woman without *kiddushin* and a *ketuba* violates a positive commandment of “*ki yikakh isha*.” The Rivash maintains that this is one of the reasons to prohibit concubinal relationships. We will discuss the broader question of concubinal relationships next week.

***Lo Tihyeh Kedeisha***

In addition to the Rabbinic prohibition of *yichud penuyot*, and the Biblical commandment relating to marriage, the *Rishonim* discuss whether there is a Biblical prohibition of sexual relations outside of marriage.

Some *Rishonim* point to the verse, “Do not profane your daughter, to make her a harlot, lest the land fall into harlotry, and the land become full of lewdness” (*Vayikra* 19:29). The Sifra (*Kedoshim* 3:7) explains:

“Do not profane your daughter to make her a harlot” … [This includes] one who gives his unmarried daughter to another man not for the purpose of marriage, and so too a woman who gives herself to a man not for the purpose of marriage.

Rashi cites this Sifra and implies that any case of sexual relations between a man and an unmarried woman is prohibited by this verse. The Ramban (ibid.) disagrees and insists that this verse refers to one who has sexual relations with a woman whom he may not marry.

Other *Rishonim* comment on another verse, “There shall be no harlot (*kedeisha*) of the daughters of Israel, neither shall there be a sodomite (*kadesh*) of the sons of Israel” (*Devarim* 23:18). Onkelos explains that this verse refers to one who has relations with a slave or maidservant. Rashi, however, explains that the verse refers to “one who is *mufkeret*, *mekudeshet* *u-mezumenet le-zenut*” – one who engages in promiscuous sexual behavior.

The Rambam relates to this verse in numerous places. In his Sefer Ha-Mitzvot (355), he writes:

The source of this commandment is God's statement (exalted be He), "There may not be any *kedeisha* among Jewish girls." This same commandment is repeated, but using a different expression, in God's statement (exalted be He), "Do not profane your daughter to make her a harlot." The *Sifra* says, "'Do not profane your daughter' — this command is directed towards a man who hands over his unmarried daughter for sexual relations without marriage, as well as a girl who herself has sexual relations without marriage."

The Rambam appears to maintain that the verse “there shall be no harlot of the daughters of Israel” (*Devarim* 23:18) prohibits all sexual relations outside of marriage.

In the Mishneh Torah, he repeats this ruling twice. In *Hilkhot Ishut* (1:4) he writes:

Before the Torah was given, when a man would meet a woman in the marketplace, and he and she desired, he could give her payment, engage in relations with her wherever they desired, and then depart. Such a woman is referred to as a harlot (*kedeisha*). When the Torah was given, [relations with] a harlot became forbidden, as [*Devarim* 23:18] states: "There shall not be a harlot among the children of Israel." Therefore, a person who has relations with a woman for the sake of lust (*zenut*), without *kiddushin*, receives lashes as prescribed by the Torah, because he had relations with a harlot.

Similarly, in *Hilkhot Na’ara Betula* (2:17), the Rambam writes:

When a girl prepares herself [for relations] either on her initiative or on that of her father, she is a harlot. And the prohibition against harlotry applies both with regard to a virgin and a non-virgin.

In both places, he implies that sexual relations outside of marriage are prohibited, although he also describes these situations as “for the sake of lust” and “when a girl prepares herself,” possibly implying that only indiscriminate sexual relations are included in this prohibition. Of course, as mentioned above and as implied by the Rambam’s ruling regarding *pilagshot*, according to which he prohibits all concubinal relationships (as we will discuss next week), sexual relations without *kiddushin* and *ketuba* are prohibited by the positive commandment of *kiddushin*.

The Ra’avad disagrees with the Rambam. In *Hilkhot Ishut*, he explains that “a *kedeisha* only refers to a woman who is available to all; a woman who designates herself to a single man is not subject to lashes, nor is there a negative prohibition. This is the concubine referred to in the Torah.” In *Hilkhot Na’ara Betula*, he comments, “My view does not concur, as a *kedeisha* is a woman who stands at a prostitution stand (brothel).” Here too, it is not clear from the Ra’avad whether this prohibition relates to all promiscuous sexual relations or only relations with a woman who engages in this behavior professionally.

Rabbeinu Yona appears to adopt the Ra’avad’s approach. He writes:

And you can see how great the punishment is for one who designates a woman for promiscuous sexual behavior (*zenut*), as it says, “Do not profane your daughter, to make her a harlot, lest the land fall into harlotry, and the land become full of lewdness.” And one who has relations with an unmarried woman by chance (*derekh mikreh*) received lashes (*makat mardut*), [for he has violated] the words of the Sages.”

**Physical Contact after *Tevila***

Although a single woman (*penuya*) who has already immersed in a *mikve* is no longer considered to be *arayot*, since sexual relations are still prohibited, this may not entirely mitigate the prohibition of physical contact. Is physical contact between a man and an unmarried woman who has immersed in the *mikve* prohibited?

The Rambam (*Hilkhot Issurei Bi’ah* 21:3), after discussing inappropriate contact between men and woman who are considered to be *arayot*, adds:

These matters are [also] forbidden with regard to women with whom relations are forbidden on the basis of [merely] a negative commandment.

Elsewhere (*Peirush Ha-Mishna*, *Sanhedrin* 7:4), the Rambam repeats this ruling and is more explicit regarding physical contact with unmarried women:

Sexual relations with an unmarried woman is subject to lashes, even though it does not forbid her from marrying a *kohen* and she is not considered a “*zona*” on account of it. But other sexual activity with an unmarried woman, and the other forms of erotic intimacy that we said incur lashes in the context of a forbidden relationship, do not incur lashes in the case of an unmarried woman, since the actual act of intercourse itself is only subject to lashes [and not *karet*]. But all of these actions are forbidden and in no way permitted.

Some also note that R. Chaim Yosef David Azulai, in his Kisei Rachamim (Kalla 1; see also Shiyureu Berakha 21:1), explains that the law “*kalla be-lo berakha asura le-ba’ala ke-nidda*” (before the *berakhot* are recited under the *chuppa*, a bride is prohibited to her husband as if she were a *nidda*) refers to all physical contact. The Otzar Ha-Poskim (20:1) discusses this issue at length.

In light of these sources and other considerations, it would seem that the practice of the bride and groom touching on the day of the wedding, after the bride has already immersed in the *mikve* but before the wedding, is improper.

It is worth noting the ancient practice of German communities to hold two ceremonies, one in the morning and the *kiddushin* and *chuppa* later in the day. The Maharil (pg. 464) describes how the “[groom] takes the [bride] by her hand and wrings her … hand in hand, and all the bystanders throw wheat at them and say ‘*peru u-revu*’ three times, and they walk together until they reach the *beit kenesset*.” It appears that this was part of the marriage ceremony itself, and was therefore permitted. (See R. Binyamin Hamburger, *Shorshei Minhag Ashkenaz*, vol. 4, p. 496).

**A MARRIAGE-LIKE RELATIONSHIP WITHOUT *KIDDUSHIN***

May a man and woman live today in a monogamous, “marriage-like” relationship without the halakhic framework of *kiddushin* and *nisuin*?

***Pilagshut***

We find the term *pilegesh* numerous times in *Tanakh*, always referring not to a temporary arrangement, but rather to a wife of some sorts. For example, Ketura, is described as Avraham’s *pilegesh* (*Bereishit* 25:6). Earlier, the Torah states that Avraham “took a wife (*isha*), and her name was Ketura” (ibid. 1). Bilha, the maidservant of Yaakov who bore two of Yaakov’s children, is described as a *pilegesh* (ibid. 35:22). David Ha-Melekh’s relationship with his concubines appears to be permanent (*II Shmuel* 20:2), even after his death, as was Shaul’s relationship with his *pilegesh* (ibid. 3:7). Even in the story of *pilegesh ba-Giv’a*, the *pilegesh’s* father is referred to as “his father-in-law” (*Shoftim* 19:4). In the *Tanakh*, the term *pilegesh* refers to regular women as well as to maidservants, and it appears to indicate a marriage, but of a lower status.

***Pilegesh* in the Talmud**

We should first note that there is a debate regarding the definition of a *pilegesh*. The Talmud Yerushalmi (*Ketubot* 5:2) questions the following verse, “And David took more concubines and wives out of Jerusalem after he came from Hebron; and there were yet sons and daughters born to David” (*II Shmuel* 5:13):

And who is a wife and who is a concubine? R. Meir says: A wife has a *ketuba*, while a *pilegesh* does not have a *ketuba*. R. Yuda says: Both [a wife and a *pilegesh*] have a *ketuba*; a wife has a *ketuba* and the extra stipulations of a *ketuba* (*tenai ketuba*), and a *pilegesh* has a *ketuba* but does not have the extra stipulations of a *ketuba*.

This passage implies that the sole difference between a wife and a *pilegesh* is the extent of the husband’s financial responsibilities. However, a woman becomes a *pilegesh* through *kiddushin* and is halakhically viewed as an *eshet ish*. This also emerges from another passage in the Yerushalmi (*Yevamot* 2:4), which implies that the relatives of a *pilegesh* are forbidden to her husband, just as if they were formally married. This approach seems to match the Biblical model of a concubine, who is a permanent, lifetime partner – a somewhat “lower level” spouse.

The Talmud Bavli seems to adopt a different approach. In a similar attempt to explain the verse cited above, the *gemara* (*Sanhedrin* 21a) teaches:

Who are wives and who are concubines? R. Yehuda said that Rav said: Wives are with a *ketuba* and *kiddushin*; concubines are without a *ketuba* and without *kiddushin*.

Although our text of the *gemara* states that a *pilegesh* has neither a *ketuba* nor *kiddushin*, some *Rishonim* apparently had a variant text, which implied that even according to the Talmud Bavli, the only difference between a wife and a *pilegesh* was the *ketuba*. This *girsa* is cited by Rashi (*Bereishit* 25:6), Raavad (*Hilkhot Ishut* 1:4), Ran (*Teshuvot* 68), the Rivash (395), and others. Most *Rishonim*, however, maintain that a *pilegesh* does not have *kiddushin* either.

It is important to note that there is no evidence of concubinal relationships in Talmudic literature, and aside from the passage cited above, there are no discussions relating to its details or nature.

***Pilagshut* in the *Rishonim***

The *Rishonim* discuss this question and disagree regarding the definition and permissibility of a *pilegesh*. There appear to be four approaches found in the *Rishonim*.

Some *Rishonim* rule that a concubinal relationship is created through *kiddushin*, and it is therefore, in essence, not much different than a regular marriage. As mentioned above, aside from Rashi, R. Yitzchak ben Sheshet Perfet (1326–1408), known as the Rivash, rules in accordance with this view.  It would appear that according to this view, a concubinal relationship can only be terminated with a *get*.

Others maintain that while a *pilegesh* does not have *kiddushin*, only a king, and not a regular person (*hedyot*), is permitted to enter a concubinal relationship. This position corresponds with the impression given by the *Tanakh*, although the story of *pilegesh ba-Giv’a* (*Shoftim* 19) must then be understood as being against the *halakha*, or as referring to another type of wife (such as an *ama Ivriya*). This approach also explains why there is no evidence of concubinal relationships from the Talmudic period.

The Rambam (*Hilkhot Melakhim* 4:4), in the midst of a discussion regarding the rights of a Jewish king, writes:

Similarly, he may take wives and concubines from the entire territory of *Eretz Yisrael*. The term “wives” implies women who were married with a *ketuba* and *kiddushin*; concubines are women who were not given a *ketuba* and *kiddushin*. With the act of *yichud* alone, the king acquires her, and relations with her are permitted him. A commoner (*hedyot*) is forbidden to have a concubine.

The Rambam rules clearly that a regular person may not have a concubine. Other *Rishonim*, including Rabbeinu Yona (Sha’arei Teshuva 3:94), Rashba (Responsa 4:314), and Me’iri (*Sanhedrin* 21a), concur with the Rambam.

What is the source of this prohibition? Most commentaries (Kesef Mishna, *Hilkhot* *Melakhim* 4:4; Ra’avad, *Hilkhot Ishut* 1:4; Rema, *Even Ha-Ezer* 26:1) prohibit *pilagshut* due to the prohibition of *kedeisha*, "There shall not be a harlot among the children of Israel" (*Devarim* 23:18), which we discussed last week. Some insist that living with a *pilegesh* would violate the positive commandment of *kiddushin* (see, for example, Rivash 395). Others suggest that according to the Rambam, this prohibition is only Rabbinic (see Radak 9:8, Radbaz 4:225), although the text of the Rambam does not support this claim. Incidentally, the Ramban (*She’elot U-Teshuvot Ha-Rashba Ha-Meyuchasot Le-Ramban* 284) had a different text of the Rambam, which does not mention this prohibition.

Of course, the question remains why a *pilegesh* is permitted to a king. The *Acharonim* offer different explanations. Rabbeinu Yona (Sha’arei Teshuva 3:94) explains that since the fear of the king is upon everyone, even without the formalities of *kiddushin* and *ketuba*, the king’s relationship with a *pilegesh* will be permanent, as there is no fear of her engaging in promiscuous behavior.

Other *Rishonim* explain that theoretically, a *pilegesh* (without *kiddushin*) would be permitted, but such behavior is Rabbinically prohibited. For example, R. Moshe Ha-Levi Abulafia (Yad Ramah, *Sanhedrin* 21a, s.v. *mai*; see also Responsa Binyamin Ze’ev 112), explains that “the rabbis prohibited [this practice] so that the daughters of Israel should not be *hefker*.” Others suggest that the rabbis feared that concubines, due to their somewhat less public profile, would not properly immerse in the *mikve*, and therefore they prohibited the entire institution of *pilagshut* (see Shulchan Arukh, *Even Ha-Ezer* 26:1).

Finally, some *Rishonim* rule that there is no fundamental halakhic objection to a concubinal relationship. The Ramban (ibid.), for example, in response to a question from Rabbeinu Yona, wrote that “a *pilegesh* is certainly permitted.” He continues:

One who wishes to marry a woman, so that she should be prohibited to others and be considered his [wife regarding] inheritance and to defile himself for her [i.e. a *kohen* would become ritually impure when burying her], the Torah says he should betroth her, accompany her to the *chuppa*, and say the *birkat chatanim* in the presence of ten… And if he wishes that she should be a *pilegesh*, and not be his [wife] and not prohibited to others, and not betroth her, the choice is his.

The Ramban appears to present two different models of permitted relationships, *ishut* and *pilagshut*. Other *Rishonim*, including the Raavad (*Hilkhot Ishut* 1:4), Ran (*Teshuvot* 68), and Rosh (ibid., see also *Teshuvot Ha-Rosh* 32:13), agree with the Ramban.

All of these opinions are referring to a permanent relationship, in which a couple lives together as husband and wife – not to a couple deciding whether to formalize their relationship, and certainly not to a couple living with each other for an undefined period of time. As we shall see, R. Yaakov Emden was the only authority to suggest the permissibility of a concubinal relationship for a short, defined period, “*le-zman katzuv*.” Furthermore, the Ramban himself concludes, “And my teacher… in your place warn them to stay far from the *pilegesh*, because if they were to know of this permissive ruling, they would stray, and break boundaries, and lie with them during their time of *niddut*.”

R. Yosef Karo rules in the Shulchan Arukh (*Even Ha-Ezer* 26:1):

A woman is not considered to be a married woman unless she is properly betrothed. Even if he lies with her in a promiscuous manner, without the intent of marriage, she is not considered to be his wife … and even if he designates her for him, we force him to release her.

The Rema adds:

She is certainly embarrassed to immerse [in the *mikve*], and he will lie with her in her state of *niddut*. But if he designates her and he immerses in the *mikve* for him, some say that this is permitted, and that this is the *pilelgesh* mentioned in the Torah, and some say that this is prohibited and that he receives lashes for violating "There shall not be a harlot …"

Both R. Yosef Karo and the Rema seem to agree that concubinal relationships are forbidden, although they appear to disagree regarding the source.

***Pilagshut* in the *Acharonim***

There have been occasional attempts in the modern era to implement *pilagshut*. For example, in response to the challenges of his day, R. Yaakov Emden, (1697–1776) suggested instituting the practice of *pilagshut*. In a shocking responsum (Responsa Ya’avetz 2:15), he examines the sources and rules that if the woman will immerse in the *mikve* and will remain faithful to her “husband,” the concubinal relationship is not only permitted, but may also be beneficial:

And regarding the fact that our communities has refrained from the practice of *pilegesh*, they have done so of their own volition and out of the assumption that it is prohibited… The truth is that the [concubinal relationship] is permitted and no prohibition was ever enacted against it, even as a safeguard… On the contrary, *pilagshut* itself is a safeguard around the Torah, because it can keep one from promiscuous and licentious behavior, and sexual liaisons and relations with one’s wife during her menstrual period, and the wasting of seed by men who are not married, and even by those who are married when their wives are not available to them. [Moreover, *pilagshut* is beneficial] also towards the great mitzvah of *peru u-revu*…

And so, regarding these rabbis who follow in the Ashkenazic customs… they have wrought all sorts of destructive stumbling blocks upon the people, compelling many to transgress what is indeed forbidden by the Torah. Therefore, in my opinion, it is a great *mitzva* to publicize that [*pilagshut*] is permitted. Especially so in our generation, when the “Canaanites dwell in the land” who so love sexual licentiousness, in particular the spreading among our people of the immoral cult of Shabbatai Tzvi, prince of the adulterers…

Nonetheless, I do not want that one should rely exclusively on my opinion about this subject, unless it is endorsed by the Greats of the generation… Anyone who wants to rely upon my ruling on this matter should first seek the involvement of a Rabbinic authority … that it is permissible and clean of any hurdles and that there be an exclusive relationship.

A similar suggestion was made by R. Yitzchak Toledano (Ha-Yam Ha-Gadol 75) in the 20th century. It should be noted that aside from the objections described below, R. Emden is the first to view the concubinal relationship as “temporary,” and not as a form of *ishut*.

Although R. Emden never implemented his proposal, it sent shockwaves throughout the Rabbinic world. His view was met with halakhic and moral objections. As we demonstrated, the majority of *Rishonim* reject the option of *pilagshut* for either halakhic or practical reasons. Furthermore, he does not take into account the standing and welfare of the women (i.e. the *pilegesh* and the wife), and he does not relate to the impact this practice may have on the institution of marriage or to the larger moral and societal ramifications of his suggestion. R. Chaim Soloveitchik reportedly described one who acts upon this proposal as “*naval bi-reshut Ha-Torah*.”

Although the *Acharonim* either reject or discourage the practical implementation of *pilagshut*, at times, halakhic authorities invoke *pilagshut* to solve difficult halakhic quandaries in areas such as *giyur*, *pesulei chitun*, and *agunot*.

In recent years, Prof. Zvi Zohar (*Akdamut* 17) suggested encouraging young religious singles to adopt the model of *pilagshut* as a means of permitting pre-marital sexual relationships. He claims that a high percentage of young Orthodox single are sexually active but do not keep the laws of family purity, and it is, therefore, proper to bring this halakhic model to their attention. He suggests that young religious Israelis who are not married but who are sexually active should maintain one partner and define their relationship as “*pilagshut*.” His article was widely criticized, both for its poor and misleading scholarship and for its morally and spiritually problematic content.

As mentioned above, many object not only on halakhic grounds but also out of concern for women and their status in society and the impact of such proposals to the institution of marriage. R. Ben-Zion Meir Chai Uziel (1880-1953), the first Sephardic Chief Rabbi of Israel, raises a broader concern (*Piskei Uziel Be-She’elot Ha-Zeman* 75):

This is a great breach not only in the married and family life of the Jewish People, but also in the entire Torah, as [the Torah] is one organized and protected package, and any violation of it cause destruction to the entire [package]. Not recognizing “He who sanctifies the Jewish People through *chuppa* and *kiddushin*” transforms the Jewish People into a secular [nation], and from there secularism spreads to all aspects of [our] lives.

Recognizing and encouraging non-marital sexual relationships not only weakens the sanctity of marriage, but also threatens to undermine the Torah’s ideal of infusing all aspects of our lives with *kedusha*.

***NISUI’N EZRACHI’IM* (CIVIL MARRIAGE)**

The question of the status of civil marriage has been widely discussed and is of great halakhic import for two reasons. First, the overwhelming majority of Jews in the world are wed in civil ceremonies. Are these couples considered to be halakhically married? If they divorce, do they need a *get*? If a woman remarries without a *get* and has children, are they considered to be *mamzerim*? Second, the State of Israel currently only recognizes religious marriages performed in Israel. For numerous reasons, there is pressure to offer a possibility of civil marriage to couples who are unable to be married according to Jewish law (*kohen* and *gerusha*, *mamzerim*, Jews and non-Jews, etc), as well as for those who for personal or ideological reasons prefer not to be married by the Rabbanut. Can religious parties embrace such a proposal? Will couples married civilly under Israeli law need to be divorced by Rabbinic courts, including a *get*, in order to remarry? The goal of this *shiur* is to clarify some of the issues at hand.

**Definition and Scope of *Kiddushei Bi’ah* and Illicit Sexual Relations**

The *mishna* (*Kiddushin* 2a) teaches that there are three ways through which one can create a halakhic union between a man and a woman (*kiddushin*): *kesef* (money), *shetar* (a document), and *bi’ah* (sexual relations). Although the Talmud (ibid. 12b) relates that Rav cursed those who would betroth a woman through sexual relations, technically, if one says to a woman “behold you are consecrated unto me through this ‘*bi’ah’*” in front of two *eidim* (witnesses), and they witness the man and women in seclusion (*yichud*), they are considered to be married (*Shulchan Arukh*, EH 33).

The *mishna* (*Gittin* 81a) discusses a case in which a man and woman are secluded in from of witnesses:

With regard to one who divorces his wife, and afterward she spent the night with him at an inn [*be-fundaki*], Beit Shammai say: She does not require a second *get* (bill of divorce) from him, and Beit Hillel say: She requires a second *get* from him [since they may have engaged in sexual relations at the inn, and he thereby betrothed her once again]. When did they say this *halakha*? When she was divorced following the *nisu’in*. Beit Hillel concede that when she was divorced following the *eirusin*, she does not require a second bill of divorce from him, due to the fact that he is not accustomed to her [and there is therefore no concern that they engaged in sexual relations, even though they spent the night together at the inn].

The Talmud explains that both Beit Shammai and Beit Hillel agree that in this case, there were witnesses to the *yichud*, but not to sexual relations. Beit Shammai maintain that “we do not say that the witnesses of seclusion are considered the witnesses of sexual relations,” while Beit Hillel hold that “we do say that the witnesses of seclusion are considered the witnesses of sexual relations.” Thus, according to Beit Hillel, since it is assumed that they engaged in sexual intercourse, the woman is required to obtain a *get* from him.

The Rambam (*Hilkhot Geirushin* 10:18) summarizes this law:

If a man entered into privacy with his divorcee in the presence of witnesses, the two witnesses observed [their conduct] simultaneously, and [the couple] had been married previously, we suspect that they engaged in sexual relations. The witnesses to their entrance into privacy are thus considered to be witnesses to sexual relations. For a person who consecrates his wife via sexual relations need not engage in relations in the presence of witnesses. [All that] is necessary is that [the couple] enter into privacy in the presence of witnesses and engage in relations in privacy, as explained.

Since [it is possible that the couple engaged in relations], the status of the woman is in doubt, because we suspect that she has been betrothed. Because of this suspicion, she requires a [second] *get*. If, however, the woman had merely been betrothed and was divorced [before she was married], we do not suspect [that they engaged in sexual relations], because they did not share such familiarity.

Apparently, under certain circumstances, if a man and women enter seclusion (*yichud*) in from of witnesses, and there is reason to believe that they have engaged in sexual relations with the intent of marriage, we may consider them to be married.

The *Rishonim* discuss the implications of this passage, which at face value may have far-reaching ramifications. The Rambam (ibid. 19) cites the position of “some of the *Ge’onim*,” who insist that “any woman with whom a man engaged in sexual relations in the presence of witnesses requires a *get*, [the rationale for their ruling being that] a person will not carry out illicit sexual relations.” The Rambam disagrees with this ruling:

I considered these opinions to be far from the paths of the Torah judgment, and it is not fit for one to rely on them. Our Sages made such statements only with regard to [a man's] wife whom he divorced, or to a person who consecrated a woman conditionally and then entered into sexual relations without clarifying his intent. For in these instances the woman is the man's wife, and with regard to a man's wife we assume that he will not enter into sexual relations with a licentious intent unless he explicitly states that this is his intent, or that he is entering into these relations with a condition in mind. With regard to other women, however, [we do not follow this assumption]. Instead, whenever [a man enters into relations with] a wanton woman, we assume that he had a licentious intent, unless he explicitly states that he intends to betroth her.

The Rambam disagrees with the *Ge’onim* and maintains that we do not generally assume that one who secludes with an unmarried woman does so with the intent of marriage. Therefore, they are not considered to be married in any manner.

Although the Shulchan Arukh (EH 149:5) appears to rule in accordance with the Rambam, the Rema (ibid. 33:1) cites both views, and some *Acharonim* challenge the premise that the assumption that “a person does not engage in illicit sexual relations” is limited to certain circumstances (see Arukh Ha-Shulchan 149:13).

**Civil Marriage – *Rishonim***

A number of *Rishonim* discuss this question in the context of non-halakhic marriages. R. Yitzchak ben Sheshet Perfet (1326–1408), a Spanish halakhic authority who fled to Algeria following the persecutions of the Jews in 1391, was possibly the first to address this issue. In his responsum (Rivash 6), he describes how he was approached by a woman, a converso (Marrano) from Majorca (a small island off of Spain), with her small child. She related that she had been married by a priest to another converso, after they had been forced to convert to Christianity. They lived together as a married couple for three months, which was known by other conversos, during which time she became pregnant. Her husband subsequently disappeared, and she asked permission to remarry.

The Rivash concludes, “There is no doubt that the *kiddushin* or *eirusin*, call them what you wish, which were performed according to the customs of non-Jews and their priests, are not considered to be *kiddushin*.” He writes that the non-Jewish ceremony, which differs from the halakhic ceremony that requires the man to declare his intention and giver the woman an object of value (*ve-amar hu ve-natan hu*), is not a valid wedding ceremony. In addition, we are not concerned that living together as a married couple constitutes a form of *kiddushei* *bi’ah*, as in the passage cited above (*Gittin* 81b):

Since they formalized their marriage by non-Jewish law and in their house of worship in the presence of a priest, it is as if they explained that their intention is NOT to be married by the laws of Moshe and the Jews *(ke-dat Moshe ve-Yehudit*), but rather in the ways of the non-Jews.

Furthermore, the Rivash explains that since the woman clearly did not observe the laws of *nidda*, as no *mikvaot* were available after the forced conversion, we can certainly not apply the assumption that the man would not engage in illicit sexual relations (*ein adam oseh be’ilato be’ilat zenut*). Finally, the Rivash suggests that since the husband did not see the witnesses, this too may invalidate the marriage.

R. Yisrael Isserlin (1390–1460, Austria) reaches a similar conclusion in his Terumat Ha-Deshen (209):

And the following case came before me. A [Jewish] apostate married a Jewish woman who converted [to Christianity] in the presence of a priest. They lived together for two to three years, after which she returned to the true faith and was married to another man. I permitted [their marriage], as certainly she and the apostate did not intend that their relationship, as non-Jews, was for the sake of marriage according to the law of Moshe and Yisrael (*ke-dat Moshe ve-Yisrael*)… and that is why he brought her to the priest to be married. I said that certainly we cannot apply the principle that “one does not engage in illicit sexual relations” to this apostate.

In this case as well, the Terumat Ha-Deshen rules that we cannot assume that the man and woman married *ke-dat Moshe ve-Yisrael*, and the wedding is therefore halakhically invalid.

Finally, R. David Ben Zimra (1479-1573), known as Radbaz, addresses this issue in his responsa (Teshuvot Radbaz 1:351). Radbaz fled Spain in 1492 and became a leader of Egyptian Jewry, and towards the end of his life he settled in Tzfat. He reiterates the Rivash’s claim that one who weds in the presence of a non-Jewish court, and one who violates Torah prohibitions such a *nidda*, clearly does not intend to be halakhically married.

In summary, these three late *Rishonim* – the Rivash, Terumat Ha-Deshen, and Radbaz – offer three reasons not to recognize civil or non-Jewish marriages:

1. Choosing to be married by a priest or a court reveals that one does not intend to be halakhically married

2. The couple’s lack of observance, especially regarding the laws of *nidda*, undermines the halakhic assumption that one does not engage in illicit sexual relations

3. The absence of proper “*eidei yichud*” (those who witness their seclusion)

**Civil Marriages – *Acharonim***

This issue was discussed with greater intensity in the 19th and 20th century. There appear to be three approaches among the *Poskim*.

R. Yosef Eliyahu Henkin (1881–1973), a prominent halakhic authority in America after emigrating in 1922, strongly objected to those who did not recognize secular marriages as halakhically binding and who did not require those who seek to divorce to receive a *get*. R. Henkin argues that there is simply no proof that *kiddushin* can only be achieved if the couple intends to be married *ke-dat Moshe ve-Yisrael*. He concludes:

And the wonder of wonders, which makes one’s hair stand on edge, is that you are lenient regarding a marriage performed by a Reform rabbi. Is there really a need for an officiating rabbi? If a Jewish man says to a Jewish woman “you are mine” in front of witnesses, then she becomes his wife. And if there are no witnesses at the ceremony, the fact that they live together as a married couple for many years is considered acceptable testimony. What difference does it make if the witnesses were Reform?

He claims that the Rivash referred to an extreme case of conversos, who explicitly left the Jewish religion. However, in the case of civil or Reform marriages, as long as the couple intends to be “married,” their marriage is valid (*Ha-Pardes* 37:7; see also *Ha-Pardes* 8:6--8 and Perushei Ibra, pp. 87-117).

On the other hand, R. Moshe Feinstein (1895– 1986), throughout his writings, appears to categorically reject the validity of civil or Reform marriages. In a series of *teshuvot* written in the late 1950s (*Iggerot Moshe*, EH 1:74-6), he explicitly argues with R. Henkin and affirms the ruling of the Rivash. For example, he writes:

If the people who had only civil marriage are halakhically observant, the couple requires a *get* because of the rule *ein adam oseh be'ilato be'ilat zenut*. If it is possible, one should obtain a *get* even for those couples who are not halakhically observant, as is the generally accepted rabbinical practice. However, if it is impossible to obtain a *get* and the woman would otherwise remain an *aguna*, one may rely on the lenient ruling of the Rivash. (*Iggerot Moshe*, EH 1:75)

He writes that in a case of *igun* (when one is unable to receive a *get* from the husband), the woman may remarry without a *get*.

Similarly, R. Eliezer Waldenberg (*Tzitz Eliezer* 2:19, 20:1, 22:67) deals with this question extensively, and warns that stringency in this matter have unexpected and undesirable consequences, such as *mamzerut*. He therefore rules that the woman does not need a *get*, and that she may even marry a *kohen*. R. Ovadia Yosef (*Yabi’a Omer*, EH 8:12; see also ibid. 6:1) also relates to this question, and explains that since the man and woman had a “different” type of marriage in mind, they are not considered to be married. Therefore, he adds, Karaite weddings are also not considered to be halakhic marriages, and there is no concern of *mamzerut* regarding their children.

In contrast to R. Henkin and R. Feinstein, some authorities write that this issue should be addressed in a case by case manner. R. Yechiel Yaakov Weinberg, for example, in his *Seridei Eish* (3:22), concurs with a view brought in the *Devar Avraham* (3:29), which suggests that a *beit din* should investigate each case and the nature of their marriage. R. Weinberg writes, “His opinion seems [correct] to me, in order that the generation should not be lawless.” In theory, R. Yitzchak Herzog, the first Chief Rabbi of Israel (*Heikhal Yitzchak*, EH 2:30-31) accepts this approach, but he rules that in general, we are not concerned with civil marriages. (See also *Chelkat Yaakov*, EH 1:1.)

R. Meshulam Rath, in his responsa *Kol Mevaser* (22) concludes:

Almost all of the authorities of the previous generation agreed that civil marriages that were performed in secular courts do not require a *get* at all, and even those few who required a *get* only did so as a stringency in a case in which the *beit din* would not perform their wedding and they were forced to perform a civil marriage.

This is indeed the practice of most rabbinical courts. Although some may try to secure a *get* if possible, they allow the woman to remarry if there is no possibility of obtaining a *get*.

**Conclusion**

The status of civil marriages is intriguing both from a practical and conceptual point of view (i.e. does the couple’s intention define whether or not their relationship is defined as “marriage”). The majority of contemporary halakhic authorities, including R. Chaim Ozer Grodzinsky (*Achiezer* 4:50), R. David Tzvi Hoffman (*Melameid Leho’il* 3:20), R. Moshe Feinstein (above), R. Ovadia Yosef (above), R. Yechiel Yaakov Weinberg (above), R. Yitzchak Isaac Herzog (above), R. Shlomo Zalman Auerbach (*Minchat Shlomo* 3:100), and Dayan Y.Y. Weisz (*Minchat Yitzchak* 3:125), reject R. Henkin’s opinion and do not recognize the halakhic validity of civil marriages.

As noted above, in Israel, alongside the political debate, the rabbinic community has begun to examine the ramifications of institutionalized civil marriage or recognized partnerships. While civil marriages are not halakhically acceptable for observant Jews, if the State of Israel decides to offer civil ceremonies and legal recognition for those who cannot be married under Jewish law, or even for those who do not wish to be married in an Orthodox ceremony, can the rabbinic establishment declare that these unions are not halakhically valid, do not require a *get*, and are free from concerns of *igun*, *mamzerut*, and *pesulei kehuna*? This question will certainly be discussed with greater intensity in the years to come.