**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**LIFECYCLES – HILKHOT ISHUT**

**Rav David Brofsky**

**Shiur #05: *Nisui’n Ezrachi’im* (Civil Marriage)**

**Introduction**

In previous weeks, we discussed whether or not marriage is considered to be a “*mitzvah*,” and the various prohibitions associated with *chibuk ve-nishuk* and pre-marital sexual relations. Last week, we questioned whether there is a type of relationship, a lower form of “*ishut*,” within which a man and an unmarried woman may live together, without *kiddushin* and a *ketuba*, known as *pilagshut*. We noted that while the *Rishonim* disagree as to whether there is actually such a model, even those who acknowledge that it exists strongly criticize and discourage it. R. Yosef Karo (Shulchan Arukh, *Even Ha-Ezer* 26:1) writes, “And even if he designates her for him we force him to release her,” and R. Moshe Isserles (Rema) adds, “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 …’" Halakhic authorities have at times invoked *pilagshut* in order to solve difficult halakhic quandaries, in areas such as *giyur*, *pesulei chitun*, and *agunot*, but the *Acharonim* either reject or discourage the practical implementation of *pilagshut*.

 This week, we will discuss the halakhic status of a civil marriage. In a future *shiur*, we will address the status of Reform and Conservative weddings.

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 become 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.