**YESHIVAT HAR ETZION**

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

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

**LIFECYCLES – HILKHOT ISHUT**

**Rav David Brofsky**

**Shiur #03: Sexual Relations without *Kiddushin***

 After discussing whether or not we perceive marriage as a *mitzva*, we began studying the prohibitions related to sexual relations outside of marriage. Last week, we discussed the prohibition of intimate physical contact between those who are not permitted to each other.

This week, we will question whether a man and an unmarried woman may engage in sexual relations (*panuy ha-ba al ha-penuya*). 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*.” Although this fascinating custom is beyond the scope of this *shiur*, 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).

**Conclusion**

 It is clear from the Talmud and the *Rishonim* that sexual relations without *kiddushin* are prohibited, either due to the prohibition of *yichud*, an/or the positive commandment not to have relations without *kiddushin* and *ketuba*, or the prohibitions relating to promiscuous sexual behavior.

 Next week, we will address one final question: Is it permitted to be in a monogamous relationship which includes sexual relations, known as *pilagshut* (a concubinal relationship)? We will explain the nature of this relationship and study the views of the *Rishonim* who discuss this question.