

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

194 - PILEGESH - PART 1 OU ISRAEL CENTER - WINTER 2020/21

- One of the underlying themes in Chumash and Tanach is the range of different relationships between men and women - within marriage and outside it. Consider the following within Sefer Bereishit alone:
 - Marriages: Adam and Chava, Lemach and his 2 wives - Ada and Tzila, Avraham and Sarah, Avraham and Hagar?, Avraham and Ketura?, Yitzchak and Rivka, Yaakov and Rachel/Leah, Yaakov and Bilha/Zilpa, Esav and multiple wives, Yosef and Osnat.
 - Pilegish arrangements - Avraham and Hagar?, Avraham and Ketura?, Reuven and Bilha?
 - Rape and Sexual Violence against women - the Bnei Elohim 'taking' the Bnot HaAdam (Chap 6), Shechem raping Dina, the abduction of Sarah and Rivka.
 - Temptation and Adultery - Yosef and Eshet Potifar, Reuven and Bilha?
 - Homosexuality - the people of Sodom
 - Incest - Lot and his daughters
 - Prostitution - Zonah/Kedesha - Yehuda and Tamar
- This mini-series of 2 shiurim will look in more detail at the halachic and hashkafic issues raised by Kedesha and Pilegish and their application, if any, to our contemporary social structures.
- One of the religious challenges of contemporary society is the sexual pressure which is placed on young people who identify as Orthodox and are often committed and observant, but are not yet married. This is exacerbated by a number of factors, including:
 - marriage at a much later age than in earlier generations. Due to university, army service and a general change in attitudes and expectations of marriage, it is common for religious youth to remain single into their mid 20s and beyond. Contrast this with society as recently as the 19th Century, when marriage was common in teens.
 - earlier sexual maturity and awareness.
 - a society in which men and women are far more mixed - in work and socially - than in previous generations.
 - a sexual ethic in secular society which is liberal, highly permissive and all-pervasive.
 - exposure to sexualize imagery, including on-line.
- As a result of these challenges, many young people are struggling to keep to the halachic framework and hashkafic sensitivities of the Torah sexual ethic. This frustration and, in many cases departure from a halachic lifestyle, can manifest in many ways in teens and young adults, none of which are religiously positive.
- Identifying the challenge is one thing. Finding authentic halachic and hashkafic solutions is another! In recent years there has been a resurgence of debate on Torah attitudes to sexual activity outside the framework of marriage¹, which includes a discussion of Pilegish and whether this status has any relevance in today's world.

A] MARITAL/SEXUAL RELATIONSHIPS AND MITZVOT

The Chumash outlines 6 types of sexual connection - some permitted and some prohibited:

- Arayot - Prohibited with karet/death eg incest, adultery², nidda.
- Non-Arayot - prohibited as a *lav*- negative mitzva - eg a Moabite, Amonite, Mamzer, Gerusha to Kohen, KEDESHA
- Me'anes - rape - prohibited (may also be arayot) and crime of violence³, with financial penalties and marriage where agreed by the woman (Devarim 22:23-29).
- Mefateh - seduction - financial penalties⁴ and marriage where agreed by the woman (Shemot 22:15-16).
- Pilagshut - concubinage
- Ishut - marriage

1. A controversial article was written in 2006 by Prof Tzvi Zohar from Bar Ilan University. We will look in Part 2 at some of the issues he raised, together with the responses and rebuttals that the article triggered. For those interested in reading the articles in full, they can be found at https://bmj.org.il/wp-content/uploads/2019/12/17.11.Zohar_.pdf. Needless to say, the popular press picked this up and dumbed it down with pieces on 'Kosher Concubines'. See <https://www.israelnationalnews.com/Articles/Article.aspx/6669> and <https://www.jpost.com/jewish-world/jewish-features/kosher-sex-without-marriage>.

2. It should be stressed that the Torah prohibition of adultery is equally applicable whether the woman is a *nesua* (fully married and living with her husband) or *arusa* (betrothed and still living with her parents). Today, we perform erusin/kiddushin and nissuin together under the chuppah, but in world of Chazal and even later, it was common for a young girl to be betrothed by her father well in advance of the actual wedding. A woman in that situation would be halachically married, and any sexual relationship with a man (other than her arus) would be adultery for the man and woman.

3. Rape which is also arayot (including nidda) is compared in Chumash to murder. Rape of any other type is a crime of 'chavala' and also a breach of multiple Torah mitzvot. In a new book 'Avo Beitecha' just published by Rav David Stav and Rav Avraham Stav, the authors deal at length with the Torah treatment of rape and the way in which this crime is seen through Torah and contemporary perspectives.

4. The halacha does not hold a single woman liable for seduction unless she was betrothed (*arusa*). There is evidence however that the Saducees took a stricter line and even held single women to be liable to death for infidelity - see below.

B] KEDESHA IN TANACH

- The Kedesha is referred to a number of times in Tanach, including in Parashat Vayeshev.

1. (טו) וַיִּרְאֶה יְהוּדָה וַיַּחְשְׁבֶהָ לְזוֹנָה כִּי כִסְתָה פָּנֶיהָ: ... (כ) וַיִּשְׁלַח יְהוּדָה אֶת־גְּדִי הָעֲזִים בְּיַד רַעְיוֹ הַקְּדָשִׁי לְקַחַת הָעֶרְבוֹן מִיַּד הָאִשָּׁה וְלֹא מִצָּאָהּ: (כא) וַיִּשְׁאַל אֶת־אֲנָשֵׁי מְקוֹמָהּ לֵאמֹר אֵיךְ הַקְּדָשָׁה הוּא בְּעֵינֵינוּ עַל־הַדָּרָךְ וַיֹּאמְרוּ לֹא־הִיְתֵהּ בָּזָה קְדָשָׁה: (כב) וַיִּשָּׁב אֶל־יְהוּדָה וַיֹּאמֶר לֹא מִצָּאָתֶיךָ וְגַם אֲנָשֵׁי הַמְּקוֹם אָמְרוּ לֹא־הִיְתֵהּ בָּזָה קְדָשָׁה:

בראשית פרק לח

Yehuda meets Tamar and believes that she is a zona - apparently a regular prostitute⁵. When Yehuda sends his friend to pay her he asks for the 'kedesha' - a sacred prostitute⁶.

2. לֹא־אֶפְקֹד עַל־בְּנוֹתֶיכֶם כִּי תִזְנֶינָה וְעַל־כְּלֹתֶיכֶם כִּי תִנְאַפְנֶנָה כִּי־הֵם עִם־הַגֹּתִים וְעַם־הַקְּדָשׁוֹת יִזְבְּחוּ וְגַם לֹא־יָבִיאוּ קִבְּבֹט:

הושע ד:יז

Hoshea contrasts a regular zona with a kedesha who is also involved in pagan sacrifice⁷ and worship.

3. אַל־תְּחַלֵּל אֶת־בִּתְּךָ לְהִזְנוֹתָהּ וְלֹא־תִזְנֶנָה הָאָרֶץ וּמִלֶּאָהּ הָאָרֶץ זָמָה: (רש"י - צמוסר צתו פנויה לזיאה שלא לשם קידושין)

ויקרא יט:כט ורש"י

The Torah prohibits⁸ profaning one's daughter as a 'zona', which Rashi defines as sexual relations outside marriage.

4. (ט) אַל תַּחֲלֵל אֶת בִּתְּךָ לְהִזְנוֹתָהּ - צמוסר צתו פנויה שלא לשם קדושין ... לשון רש"י. ולא הבינותי דעתו, שאין זנות בתורה צפנויה, שהלכה פסוקה היא (יבמות סח): פנוי הבא על פנויה שלא לשם אישות לא עשאה זונה ... וזה שאמרו צמוסר את צתו פנויה שלא לשם אישות - כלומר למי שאי אפשר להיות אישות ציניהם

רמב"ן יט:כט

The Ramban disagrees and rules that this verse is NOT speaking about a single man and single woman having sexual relations since this will not make her into a 'zona' (although it is clearly prohibited - see below). The Ramban learns that this verse is referring to a couple who would be prohibited to marry each other.

5. לֹא־תִהְיֶה קְדָשָׁה מִבְּנוֹת יִשְׂרָאֵל וְלֹא־יִהְיֶה קְדָשׁ מִבְּנֵי יִשְׂרָאֵל: (רש"י לא סביב קדשה - מופקרת, מקודשת ומזומנת לזנות. לא יכיה קדש - מזומן למשכב זכר.)

דברים כג:יח

Another verse prohibits a man or woman from being a kadesh/a. Again, Rashi explains to refer to a person who engages in⁹ promiscuous behavior.

6. קְדָשָׁה - זונה, פנויה מנאפת: קדש - צא על פנויות בלא כתובה וקידושין ולא מיוחדת לו כפלגשים.

רשב"ם דברים כג:יח

Rashbam follows the approach¹⁰ of Rashi¹¹ and defines Kadesh/a as a sexual relationship either without marriage (kiddushin/ketuba) or without the monogamy of Pilagshut.

5. A number of such women appear in Tanach. Consider Rahav (Yehoshua Chap 2), Yiftach's mother (Shoftim 11:1-2), the zona of Aza with whom Shimshon spent the night (Shoftim 16:1), the two zonot in the court case with Shlomo (Melachim 1:3:16), the zonot of Shomron (Melachaim 1:22:38).

6. The Ramban writes that it was the custom in the ancient world for kedeshot - sacred prostitutes - to cover their faces so that they could meet with family members without being recognized. The Ramban writes that this was still practiced in his time in places where kedeshot operated.

7. Sacred prostitution was very common in the ancient world. In some cases it was part of an elaborate pagan worship system, often connected with the goddess Astarte and the sacred feminine. In other cases it referred to regular zonot who worked close to temples.

8. An excellent resource is Nissuin Shelo Kedat Moshe VeYisrael by R. Eliakim Elision (1975).

9. *Mezumenet* implies 'available for' whereas *mekudeshet* implies 'dedicated to', perhaps indicating that Rashi leans more towards the position of the Ra'avad below - that a *kedesha* is a dedicated prostitute.

10. Note however alternative understandings such as Targum Unkelos, who defines Kadesh/a as a free person who sleeps with a slave.

11. The Rashbam is unequivocal that a *kedesha* refers to any promiscuous conduct, not simply prostitution.

C] KEDESHA IN HALACHA

1. The discussion of the poskim concerning sexual relationships before marriage assumes that there is NO arayot. In the case of a single woman who reached puberty and has not been to the mikve, there will always be a halachic relationship of arayot due to nidda. As such, the question of sexual relationships before marriage in this section assumes that the single woman has been to the mikve¹² and successfully become tehora from nidda.

2. The discussion below relates to sexual relations entirely before/outside marriage. Where one of the parties is married there are potentially many more serious halachic issues involved, such as adultery (where the woman is married) and, in all cases, a gross breach of fidelity and marriage commitments on a bein adam lechavero level.

3. In our current social milieu there are effectively three different scenarios in which sexual relationships form before marriage: (i) a contractual relationship of prostitution; (ii) a promiscuous culture of casual sexual relationships; (iii) a monogamous relationship outside marriage. Each of the sources below must be analyzed to ascertain which of these scenarios is being referred to.

C1] KEDESHA IN THE SECOND TEMPLE PERIOD AND AS SEEN BY CHAZAL

7. **אל תחלל את בתך להזנותה** (ב) ואיזה זה? זה המוסר לחבירו בתו פנויה שלא לשם אישות. וכן המוסרת עצמה שלא לשם אישות. (ה) רבי אליעזר בן יעקב אומר - מתוך שהוא בא על נשים הרבה ואינו יודע על איזה מהם בא, והיא שקיבלה מאנשים הרבה ואין יודע מאיזה מהם קיבלה, שגג ונשא לבתו, שגג והשיאה לבנו. נמצא הוי נשוי לבתו ובנו לאחרותו נמצא ממלא את העולם ממזירים שנאמר זימה 'זה מה הוא'?

ספרא קדושים פרשה ג פרק ז:ב,ה

On the mitzva of 'al techalel et bitcha', Rashi on Chumash was quoting from the Sifra. The first opinion quoted understands this mitzva to be someone who allows his daughter or a woman who allows herself to have sexual relations without marriage. The second opinion (R. Eliezer b. Yaakov) give a specific reason for the mitzva - to avoid mamzerim.¹³

8. **לֹא־תִהְיֶה קְדֻשָּׁה - זו אזהרה למופנה שנאמר (בראשית לח:כא) לֹא־הִיְתֶה בְּיָדָהּ קְדֻשָּׁה**

ספרי דברים פרשת כי תצא פיסקא רס

Chazal in the Sifrei cross refer to the episode of Yehuda and Tamar and appear to learn that the mitzva of Kedeshah is a prohibition on sexual relations with a single woman.

9. **לֹא־תִהְיֶה קְדֻשָּׁה - אזהרה למזנה כענין שנאמר (בראשית לח:כא) לֹא־הִיְתֶה בְּיָדָהּ קְדֻשָּׁה**

ספרי שם נוסח הראב"ד על רמב"ם הלכות נערה בתולה פרק ב הלכה יז

However, there is an different nusach¹⁴ of that Sifrei, which indicates that it is a prohibition on 'znut'.

12. On the issue of single women using the mikve note the following:

- When halachic observance of tuma and tahara was still practiced, single women would go to mikve to become tehora to eat teruma, ma'aser sheni and korbonot. Now that this is no longer relevant, and the only purpose of tevila for women is to permit a wife to her husband, single women are not longer permitted to use the mikve. This practice dates at least from around the 12th Century - see Shu't Rivash 425 who quotes the Ramban (13C) who writes that 'recent generations' prohibited mikve which could encourage people to be lenient in prohibited pre-marital relationships. The Ramban quoted is from his chiddishim to Shabbat 13b and is not dealing specifically with the case of single women, but a parallel case of tevila of taharat. This Ramban is however quoted as the earliest relevant source on this issue. Note also that the Ramban permitted Pilegsh (see Part 2) and would certainly permit (and requires) such a woman to use the mikve. Those who speak of a 'takanat Chazal' that single women should not use the mikve are incorrect, as the source of the practice is much later - in the Rivash/Ramban. Even to speak of 'takanat HaRivash' is a little misleading since the Rivash simply explains why there was no decree that single women SHOULD use the mikve. Nevertheless, it is clear from the Rivash that, by his time, it was considered halachically prohibited for single women to use the mikve.
 - There were some communities where single women went to mikve before Yom Kippur, although this is prohibited by most poskim - see Sde Chemed Ma'arechet Yom HaKippurim 1:6 and Mateh Moshe 841. The Ben Ish Chai writes (Vol 1, Netzavim 3 and Vayelech 8) that the minhag in his community was the single girls DID go to mikve before Rosh Hashana and Yom Kippur. This is also recorded in the Minhagim of the Maharil (14C), Hilchot Erev Yom Kippur 3.
 - The issue of single women going up to Har Habayit also raises this question and, for this reason, most of the poskim who permit entry to Har Habayit today do not allow it for single women. (Note Chashukei Chemed of R. Silberstein who rules (Nidda 32a) that a single woman doctor on duty in the Old City may go to the mikve to remove her status of nidda in case she is called onto Har HaBayit for pikuach nefesh).
 - The issue of single women using the mikve became politicized in around 2008 when the Chief Rabbi of Israel ruled that single women should be prevented from using the mikvaot in Israel - see <https://www.jpost.com/jewish-world/jewish-news/chief-rabbi-prohibits-single-women-from-going-to-mikve>. This was followed by a number of court cases where single women claimed the legal right to use public mikvaot which were funded by public tax revenues. Following a petition to the Supreme Court (backed by women's organizations in Israel) the Rabbanut adopted a 'don't ask don't tell' policy on single women attending the mikve, see <https://www.haaretz.com/.premium-dont-ask-dont-tell-1.5242313>
 - On the practical halachic question of whether single women should be advised in any situation to use the mikve, almost all poskim have said publicly that this is prohibited and could fall into the category of 'naval bireshut haTorah' - someone who is manipulating the halachic system to justify their own desires. In one sense this could be seen as worse than transgressing a greater prohibition in the heat of yetzer hara. Others make the analogy of asking a police officer to state on the record whether one should drive while drunk or without a licence. Clearly, both are wrong and no officer will recommend either but, privately, would give an opinion. In private consultation there is no doubt that some poskim look at each case separately and advise accordingly. There is clearly a difference between casual promiscuity and a long-term monogamous relationship outside marriage and, although both are halachically prohibited, some poskim will differentiate between the cases. For a rare public discussion of the issues see shu't Asher Hanan 8:60 by Rav Hanan Aflalo who addresses the reality of young people in Israel who identify as Orthodox or Mesorati and who chose to be in monogamous sexual relationships outside marriage but wish to be careful about hilchot Nidda.
 - The question of monogamous relationships outside marriage also raises the issue of Pilegsh, which we will deal with in Part 2.
13. This debate is paralleled in Tosefta Kiddushin 1:4 as a machloket between R. Elazar and R. Eliezer b. Yaakov, who apparently disagrees with the first opinion. According to R. Elazar any sexual relations before marriage are prohibited. R. Eliezer b. Yaakov seems more concerned with promiscuous relationships which could lead to mamzerim.
14. This is the nusach quoted by the Ra'avad. It seems that the Rambam had the first nusach.

10. (41) But when she, inflaming and exciting her lawless desire, kept continually tempting him, and continually throwing herself in his way, and continually failing in her object, she at last, in the violence of her passion, had recourse to force, and seizing hold of his cloak dragged him vigorously toward the bed, her passion endowing her strength with greater vigour, as it often does strengthen even the weak. (42) But he, proving more powerful than even the alluring opportunity, uttered a cry becoming a free man, and worthy of his race, saying, What are you forcing me to? We, the descendants of the Hebrews, are guided by special customs and laws of our own; (43) In other nations the youths are permitted, after they are fourteen years of age, to use concubines and prostitutes, and women who make gain by their persons, without restraint. But among us a harlot is not allowed even to live, but death is appointed as a punishment for any one who adopts such a way of life. Therefore, before our lawful marriage we know nothing of any connection with any other woman, but, without ever having experienced any similar cohabitation, we approach our virgin brides as pure as themselves, proposing as the end of our marriage not pleasure but the offspring of legitimate children.

Philo - On Joseph 41-43

Philo expresses (through the mouth of Yosef) that Jewish sexual ethics of his time were against any pre-marital sexual relationships for men or women.

11. And if any woman or maid commit fornication amongst you, burn her with fire, and let them not commit fornication with her after their eyes and their heart;

Book of Jubilees 20:4

Sefer Yovlim - a non-halachic Second Temple book - decrees the death penalty on any woman, married or single, who has a sexual relationship outside marriage.

12. For in singleness of eye he had gone and sought for punishment, namely, according to the judgment of Abraham, which he had commanded his sons, Judah had sought to burn her with fire.

Book of Jubilees 42:32

Sefer Yovlim also identifies the judgment of Yehuda on Tamar¹⁵ as an ancient law given by Avraham to his sons!

- This approach was NOT however taken in the halacha. As we shall see below, single men and woman are not permitted to have sexual relationships before marriage, and to do so may be a Torah prohibition. But if they do, there is no halachic consequence, punishment or stigma involved.

C2] RAMBAM - TORAH PROHIBITION ON ALL PRE-MARITAL RELATIONSHIPS

13. קדם מתן תורה היתה אדם פוגע אשה בשוק אם רצה הוא והיא נותן לה שְׂכָרָה ובוֹעֵל אוֹתָהּ עַל אִם הַדָּרֶךְ וְהוֹלֵךְ. וְזוֹ הִיא הַנִּקְרָאת קְדֻשָּׁה. מִשְׁנֵתָנָה הַתּוֹרָה נֶאֱסָרָה הַקְדֻשָּׁה שֶׁנֶּאֱמַר (דברים כג: יח) לֹא תִהְיֶה קְדֻשָּׁה מִבְּנוֹת יִשְׂרָאֵל. לְפִיכֵן כָּל הַבוֹעֵל אִשָּׁה לְשֵׁם זְנוּת בְּלֹא קְדוּשִׁין לֹקֵה מִן הַתּוֹרָה לְפִי שֶׁבָעַל קְדֻשָּׁה

רמב"ם הלכות אישות פרק א הלכה ז'

In Hilchot Ishut the Rambam describes a pre-Sinai world, where a man and a woman could engage in a casual and consensual sexual relationship. After Matan Torah, this is a Torah prohibition of kedeshah.¹⁶

14. הַמְצוּה הַשְּׁנִי: הִיא שֶׁהַזְהִירָנוּ שֶׁלֹא לְבַא עַל אִשָּׁה בְּלֹא כְתוּבָה וּבְלֹא קְדוּשִׁין וְהוּא אִמְרוּ יִת' לֹא תִהְיֶה קְדֻשָּׁה מִבְּנוֹת יִשְׂרָאֵל. וְכִבֵּר נִכְפְּלָה הָאֲזָהָרָה בְּזֶה הָעֵנִין בְּלִשׁוֹן אַחֵר וְהוּא אִמְרוּ (קדושים יט:כט) אַל תַּחַלֵּל אֶת בִּתְךָ לְהַזְנוֹתָהּ

ספר המצוות לרמב"ם מצות לא תעשה שנה

The Rambam rules in Sefer Hamitzvot that the ONLY halachically acceptable way to conduct a sexual relationship is through a marriage which comprises kiddushin and includes a proper financial settlement for the wife through a ketuba.¹⁷

15. Through a halachic lens, Yehuda's decree on Tamar is explained on the basis that she was betrothed to Shela as a shomeret yavam (thus liable to the death penalty for sleeping with another man) and (at least midrashically) was the daughter of Shem/Malchizedek, the Cohen of the time (and thus liable for sereifa as a bat Cohen).

16. We will see below that the Ra'avad clearly understands that the Rambam is referring even to a monogamous relationship outside marriage, although the Ra'avad disagrees with this psak and rules that kedeshah is prohibited solely in a promiscuous context.

17. This would seem to rule out the possibility of Pilegsh and we will return to the Rambam's position on this in Part 2.

15. אני אומר שזה שפאמר בתורה (ויקרא יט:כט) אל תחלל את בתך להזנותה. שלא לאמר האב הואיל ולא חיבה תורה מפתה ואונס אלא שיתן ממון לאב, הרני שוכר בתי הבתולה לזה לבוא עליה בכל ממון שארצה. או אני זה לבוא עליה בחנם שיש לו לאדם למחל ממונו לכל מי שירצה. לכה נאמר אל תחלל את בתך. שזה שחיבה תורה לאונס ולמפתה ממון ולא מלקות בשארע הדבר מקרה שלא מדעת אביה ולא הכינה עצמה לכה, שדבר זה אינו הוזה תמיד ואינו מצוי. אבל אם הניח בתו הבתולה מוכנת לכל מי שיבוא עליה גורם שתמלא הארץ זמה ונמצא האב נושא בתו והאח נושא אחותו, שאם תתעבר ותלד לא יודע בן מי הוא. והמכין בתו לכה הרי היא קדשה ולוקה הבעול והנבעלת משום (דברים כג:ח) לא תהיה קדשה. ... אבל זו שהכינה עצמה לכה בין מדעתה בין מדעת אביה הרי זו קדשה. ואסור קדשה אחד הוא בין בבתולה בין בבעולה. ...

רמב"ם הלכות נערה בתולה פרק ב הלכה ז

Elsewhere in Mishne Torah¹⁸, the Rambam seems to indicate that the prohibition is more akin to 'organized znut' or at least some kind of 'hefkerut' for znut.

16. א כל הבא על ערוה מן העריות דרף איברים או שחבק ונשק דרף תאוה ונהנה בקרוב בשך הרי זה לוקה מן התורה. שפאמר (ויקרא יח:ל) לבלתי עשות מלקות התועבת וגו'. ונאמר (ויקרא יח:ו) לא תקרבו לגלות ערוה. כלומר לא תקרבו לדברים המביאין לידי גלוי ערוה ...
ג והדברים האלו אסורין בחיבי לאוין ...

רמב"ם הלכות איסורי ביאה פרק כא הלכה א

The Rambam rules that *shemirat negia* - refraining from sexual contact other than full sexual relations - is a Torah prohibition for relationships which are *arayot*, and also prohibited¹⁹ for those relationships which are not *arayot*, but a negative Torah prohibition. This will include²⁰ *Kedesha*.

17. ובעילת האשה הפנויה חייבין עליה מלקות, ואף על פי שאינה נפסלת לכהונה ואינה נקראת זונה. אבל בעילת הפנויה דרך איצרון ושאר הדרכים שאמרנו שחייבין עליהן מלקות צערוה, אין חייבין עליהן מלקות צפנויה לפי שעלם ביאתה במלקות כמו שביארנו. אבל כל אותם הדברים אסורים ואינם מותרים בשום אופן.

פירוש המשנה לרמב"ם מסכת סנהדרין פרק ז משנה ד

The Rambam is very clear in his commentary on the Mishna that the Torah prohibition includes ANY²¹ pre-marital sexual relationship²² and that *shemirat negiah* with a non-*erva* single woman (ie a woman who has been to the mikve) is also halachically required.²³

- Based on this, many commentators²⁴ understand that the Rambam considers ALL pre-marital relationships to be a Torah prohibition, even if entirely monogamous, even if a long-standing informal 'common-law' marriage by habit or repute, and even if a civil marriage without *kiddushin*.
- Other commentators²⁵ understand that the Rambam does NOT prohibit monogamous relationships as *kedesha*²⁶, but only a casual relationship.
- Yet others²⁷ understand that the Rambam prohibits as *kedesha* ONLY a woman whose normal practice is openly promiscuous.

18. See also Sefer HaMitzvot Lav 355, where the Rambam also rules in this way. He contrasts there the cases of *ones* and *mefateh* - rape and seduction, where the woman is either being attacked or enticed and is thus not liable, with the case of *kedesha*, where both parties are entirely consensual and thus are both in breach of the Torah mitzva.

19. It is not clear whether this is on Torah level or Rabbinic.

20. The Rambam lists (Hilchot Ishut 1:7) nine Torah prohibited relationships which are not *arayot*. However, he does not include *Kedesha* in that list. Nevertheless, it is apparent from his wording in his Commentary on the Mishna (below) that sexual contact with a non-*arayot*, non-married woman is also prohibited.

21. A premarital sexual relationship with a Jewish man, even if a Torah prohibition, will not invalidate a future marriage to a Cohen. However, a relationship with a non-Jewish man or one of the *arayot* or *pesulei kahal* (eg *mamzer*) will be considered a 'beilat zenuh' and will prevent future marriage to a Cohen.

22. This is also the Ra'avad's understanding of the Rambam's position. See however Kesef Mishne on Hilchot Na'arah Betula 2:17 who sees a contradiction between the Rambam in Hilchot Ishut and Hilchot Na'arah Betula. He concludes that the Rambam clarifies his position in the latter halacha and prohibits only promiscuous relationships.

23. In recent years one has started to see at some weddings that the *chatan* and *kalla* hold hands etc for photos before the *chuppa* on the basis that she has been to the *mikve* and is not yet an *arusa* (post *kiddushin*). For an *arusa*, Chazal applied the *psak* כנדה לבעלה ברכה אסורה לבעלה כנדה. However, even before the *kiddushin*, even though she is not a *nidda*, sexual relations between them is still prohibition and thus *shemirat negiah* is required.

24. Including Rivash (Shu't 395), Magid Mishne (on Hilchot Ishut 1:4), Rashba (Shu't 4:314), Kesef Mishne (Hilchot Melachim 4:4). This is also the understanding of the Rema (EH 26:1) as to the position of the Rambam.

25. Ramban (Shu't 284 - see Part 2), Tur (EH 26), Radvaz (4:225)

26. However, they may still be prohibited under the *issur assei* of *kiddushin* - see below. This feeds into the discussion on *Pilegish* - see Part 2.

27. Including Beit Shmuel 26, Gra (EH 26:8). For further details see Nissuin Shelo Kedat Moshe VeYisrael pp 56-60

C3] RA'AVAD - TORAH PROHIBITION ON PRE-MARITAL **PROMISCUOUS** RELATIONSHIPS

18. ח"א ... אין קדשה אלא מזומנת והיא המופקרת לכל אדם. אצל המייחדת עומה לאיש אחד אין זה לא מלקות ולא איסור לאו. והיא הפילגש הכתובה ... מ"מ אין איסור לאו אלא במזומנת עומה לכל אדם. שאם כדבריו מפתח היאך משלם עליה ממוון? והלא לוקה עליה! אלא ודאי משכרמה לפיתוי, אינה קדשה.

השגת הראב"ד על רמב"ם הלכות אישות פרק א הלכה ד

The Ra'avad on hilchot Ishut indicates that promiscuous relationships are forbidden by the Torah prohibition of kedasha, but monogamous relationships constitute the Torah concept of Pilegesh, which is not prohibited as kedasha.

19. ח"א אין דעתי מסכמת לזה. שאין קדשה אלא בעומדת בקובץ של זנות.

השגת הראב"ד על רמב"ם הלכות נערה בתולה פרק ב הלכה יז

The Ra'avad on Hilchot Na'ara Betula seems to indicate that the prohibition of kedasha is only where a woman is actively engaged in prostitution.

C4] RAMBAN - TORAH PROHIBITION ON PRE-MARITAL RELATIONSHIPS WITH PESULEI KIDDUSHIN

20. שכבר נתבאר בדבריהם שאין 'זונה' בכל מקום בתורה ... אלא באסורי הביאה שאין בהם קדושין. וכן הזכירו בכל לשון 'זנות' שבה בתורה. אם כן אל תחלל את בתך להזנותה יזהיר מזה לפי שהאב זכאי בבתו בקדושה ... אבל אסר עליו למכרה למי שאין קדושין שלו תופסין בה. וכן גם לאו הקדשה כך הוא.

השגות הרמב"ן לספר המצוות לרמב"ם מצות לא תעשה שנה

The Ramban (as in his commentary on the Torah) rules that these prohibition apply only to a relationship which would be a prohibited marriage where kiddushin is not valid.²⁸

- We will see in Part 2 that the Ramban²⁹ clearly rules that a monogamous non-marital relationship can be classified as Pilegesh and he even understands this to be the position of the Rambam too.

D] **THE MITZVA OF KIDDUSHIN**

21. והמצוה הרי"ג: היא שצונו לבעול בקדושין ולתת דבר ביד האשה או בשטר או בביאה. וזו היא מצות קדושין

ספר המצוות לרמב"ם מצות עשה ריג

The Rambam rules that there is a positive mitzva to perform kiddushin³⁰ and that sexual activity may only be a result of kiddushin.

- On that basis, sexual activity outside marriage will, for the Rambam³¹, also be a 'bitul aseh' of this mitzva and this prohibited under Torah law. This is irrespective of the potential breach of the Torah prohibition of kedasha.

22. In order to prevent these great evils sexual relations were only permitted when man has chosen a certain woman, and married her openly. For if it was sufficient simply to choose to be alone with her, many people would bring a *kedesha* into their home at a certain time agreed upon between them, and say that she was his wife. Therefore it is commanded to perform the act of betrothal (*kiddushin*) by which he declares that he has chosen her to take her as his wife, and then to go through the public ceremony of marriage (*nissuin*), such as 'and Boaz took ten men' (Ruth 4:2).

Maimonides, Guide to the Perplexed 3:49

- A separate but related question is where a relationship can be construed as an effective intention to create a Jewish marriage through kiddushin, which would require a halachic get to dissolve the marriage.

28. The Ramban also stresses that the Torah prohibition only applies in a situation which is promiscuous and could lead to mamzerim - like the opinion on R. Eliezer b. Yaakov in the Sifra.

29. In a teshuva to his cousin Rabbeinu Yona (printed in Shu't Rashba attributed to Ramban 284) - see Part 2.

30. Other Rishonim understand that kiddushin is not an independent mitzva, but a preparatory 'hechsher mitzva' for the mitzva of pru u'revu.

31. This the understanding of the Rivash as to the position of the Rambam.

23. **מתני'.** המגרש את אשתו ולנה עמו בפונדק, ב"ש אומרים: אינה צריכה הימנו גט שני, ובה"א: צריכה הימנו גט שני. אימתי? בזמן שנתגרשה מן הנשואין. ומודיים, בנתגרשה מן האירוסין - שאינה צריכה הימנו גט שני, מפני שאין לבו גס בה. **גמ'.** אמר רבה בר בר חנה א"ר יוחנן: מחלוקת - בשראוה שנבעלה. דב"ש סברי: אדם עושה בעילתו זנות, וב"ה סברי: אין אדם עושה בעילתו זנות. אבל לא ראוה שנבעלה - דברי הכל אינה צריכה הימנו גט שני.

גיטין פא.

Chazal debate whether a person can be assumed to intend their sexual encounters to be legitimate and create a formal marriage, or whether such a relationship should be seen as 'znut'. Clearly, the answer will depend largely on the context and the people involved.

E] THE MITZVA OF YICHUD

24. (שמואל ב יג:יט) וַתִּלְקַח תָּמָר אֵפֶרֶת עַל-רֵאשֶׁה וּכְתַנְתָּ הַפְּסִים אֲשֶׁר עָלֶיהָ קָרָעָהּ. תנא משמיה דרבי יהושע בן קרחה - גדר גדול גדרה תמר באותה שעה. אמרו: לבנות מלכים כך - לבנות הדיוטות על אחת כמה וכמה! אם לצנועות כך - לפרוצות על אחת כמה וכמה! אמר רב יהודה אמר רב: באותה שעה גזרו על הייחוד ועל הפנויה. יחוד? דאורייתא הוא! ... אלא אימא: גזרו על ייחוד דפנויה.

סנהדרין כא.

Chazal learn that the prohibition of Yichud with someone who is in an erva relationships is deoraita³². This would include a woman who is nidda. However, Yichud applies on a Rabbinic level even with a single woman who is not a nidda. This was introduced after the episode of Amnon and Tamar.

25. **שלא להתעדן באחת מכל העריות** ואפילו בלא ביאה כגון חיבוק ונישוק וכל הדומה לאלו הפעולות ועוד אמרו רבותינו זכרונם לברכה במצוה זו שאסור להתייחד עם כל העריות, רצוני לומר עם כל העריות דבר תורה, בין זקנה בין ילדה, שהייחוד לגלות ערוה הוא גורם. חוץ מן האם עם בנה והאב עם בתו והבעל עם אשתו נדה שמתרין כשאירע מעשה אמנון ותמר. גזר דוד ובית דינו על ייחוד דפנויה. שמאי והלל גזרו על ייחוד גוים.

ספר החינוך מצוה קפח

The Sefer HaChinuch explains that Yichud, like shemirat negia, is a Torah mitzvah to protect against greater sexual contact. However, Yichud is not only a biblical 'fence' to sexual relations but also a separate prohibition of 'closeness' in its own right. The Yichud itself is an invitation to intimacy, as we see at a wedding when the chatan and kallah enter a 'cheder yichud'. After the events of Amnon and Tamar it was extended rabbinically to include relationships which are not arayot. The students of Hillel and Shamai further extended it to apply with non-Jews.³³

• In Part 2, we will focus specifically on the question of Pilegesh - in Tanach, Chazal and halacha. We will also look at various historical attempts to re-legitimize or even reinstate the institution of Pilegesh, including in our own times, and the response/backlash against those moves.

32. The commentators discuss whether Yichud is learnt from the Torah through the verses (the Gemara in Sanhedrin 21a refers to a 'remez' to Yichud in the Torah text) or whether it is learnt as an Oral Tradition from Sinai (see Rambam Hilchot Isurei Biah 22:2)

33. See Shabbat 13b.