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# *Survey of Recent Halakhic Periodical Literature*

## CAN THERE BE MARRIAGE WITHOUT MARRIAGE?

The advent of the Enlightenment and extension of civil rights and liberties to Jewish nationals in virtually all Western countries was accompanied by abrogation of the autonomy previously enjoyed by the Jewish community in matters of family law. With the loss of that autonomy it became impossible for the commuity to impose the discipline of Jewish law upon its constituent members. As a result, the Jewish community has been forced to confront the social, legal and halakhic phenomenon of the modern-day *agunah*, i.e., a woman whose husband has taken advantage of the institutions of the secular state in order to terminate the marital relationship and even to establish a new family unit but, by failing to execute a religious divorce, denies his wife the opportunity to enter into a new marital relationship in a halakhically viable manner. The increased incidence of marital breakdown, relaxed sexual mores and the absence of the wide array of religious and communal sanctions available under the pre-Emancipation *kehillah* system have combined to create a problem even in the State of Israel where marriage and divorce are subject to the jurisdiction of rabbinic courts.

From the time of the French revolution until the present, numerous proposals designed to ameliorate the problem have been advanced. Virtually all those proposals, which range from conditional marriage and designation of an agent for delivery of a *get* in the event of a breakdown of the marriage to a financial penalty to be exacted for failure to execute a *get*, share a common element, *viz.*, preservation of the integrity of the marital relationship during the lifetime of the marriage. Even the proposal for conditional marriage that would have the effect of nullifying the marriage retroactively is designed to yield that result only if the husband is recalcitrant in executing a *get*.

Ostensibly, the simplest solution to the problem is completely to do away with marriage as a halakhic institution. Couples might simply enter into an ongoing monogamous relationship without benefit of matrimony. If there is no marriage, there is no need for a *get*; if there is no problem, there in no need for a solution. Such a bald-faced solution has never been proposed by any reputable scholar for the simple reason



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that, in light of Judaism's prohibition against extramarital sexual relationships, it is simply not halakhically viable. If, however, an acceptable arrangement could be identified that would halakhically legitimate a sexual relationship outside of the framework of matrimony, the problem of a *get* might readily be resolved by supplanting marriage with an alternative relationship reflecting that arrangement.[1]

A proposal for a solution based upon establishment of an alternative relationship of that nature has indeed been advanced in the past.[2] That solution calls for replacement of the marital relationship with that of concubinage.[3] The proposal is predicated upon two halakhic premises: 1) concubinage is halakhically acceptable; and 2) severance of such a relationship does not require a *get*. However, that proposal has been rejected by an overwhelming consensus of rabbinic authorities because they have found one or both of the premises to be halakhically unacceptable. Many authorities follow the opinion of Rambam in maintaining that a concubine is permissible only to a monarch. Some decisors have asserted that a concubine requires a *get* in order to establish a new relationship.[4] For either reason, or for both reasons, concubinage has been dismissed as a viable option.[5]

In an article published in *Diné Israel*, volume XIX (5757-5758), Professor Meir Simchah Feldblum of Bar Ilan University claims to have identified a halakhically recognized institution that differs from both matrimony and concubinage. Professor Feldblum contends that this newly identified relationship, which he terms *"derekh kiddushin"* (in the manner of marriage), is freely and legitimately available to all and can be terminated without need for a *get*. Moreover, asserts Professor Feldblum, such a relationship already exists *de facto* in some sectors of the community, *viz.*, marriages among couples who have apparently entered into matrimony "according to the Law of Moses and Israel" but which involve a bride who would not have consented to such a relationship were she to have been apprised of the true nature of the matrimonial relationship in Jewish law. Hence, concludes Professor Feldblum, no *get* is required to terminate such a marriage.

In an earlier contribution to this column,[6] the present writer has argued that, even if Professor Feldblum's categorization of the relationship he terms "*derekh kiddushin*" were to be accepted as correct, the marriages of the couples described are nevertheless entirely valid "according to the Law of Moses and Israel" and hence those marriages do indeed require religious divorce for their dissolution. However, the issue of whether a couple might *ab initio* contract a relationship *"derekh*

*kiddushin*" by express stipulation is an entirely different issue and requires analysis on its own merits.

Professor Feldblum bases his thesis entirely upon the position of a number of early-day authorities regarding the status of the marriage of a minor female whose father has effectively abandoned her by journeying to a distant land and whose mother and brother have contracted a marriage on her behalf and upon the similar position of some authorities regarding the status of a marriage contracted by a father on behalf of a son who is a minor and, more specifically, upon the terminology employed by one of those authorities.

Biblical law empowers a father to contract a marriage on behalf of a minor daughter. An orphaned minor lacks halakhic capacity to contract her own marriage. Rabbinic legislation provides for the marriage of such a minor by granting her mother and brothers, acting jointly, the authority to contract a marriage on her behalf. The purpose of the enactment, states the Gemara, *Yevamot* 112b, is to prevent unscrupulous individuals from taking sexual liberties with an unprotected child. The rabbinic marriage (but not the biblical marriage) of a minor may be nullified by means of *mi'un*, i.e., renunciation on the part of the bride, unless it is confirmed by cohabitation after the wife reaches the age of halakhic capacity.

The selfsame social problem that confronted the Sages of the Talmud in the case of an orphaned minor was also present in instances in which a father journeyed to a distant land and thereby effectively abandoned his obligations vis-a-vis his daughter. *Tosafot, Kiddushin* 45b, cite the opinion of Rav Aha'i Ga'on who rules in his *She'iltot* that the status of such a child is identical to that of an orphan with the consequence that her mother and brothers may contract a marriage on her behalf. Since, according to Rav Ahai Ga'on, such a marriage is valid by virtue of rabbinic enactment it can be terminated by the child only by means of *mi'un*. *Tur Shulhan Arukh, Even ha-Ezer* 37, adds that, according to *She'iltot*, such a marriage remains valid even subsequent to the return of the father. *Tosafot* also cite the conflicting opinion of an early authority who maintains that the concern that, unbeknown to the family, the father may have contracted a biblically valid marriage on behalf of his daughter is sufficient reason to preclude any rabbinically valid relationship in such circumstances. Rosh, *Kiddushin* 2:8, adopts a third view in declaring that, in such circumstances, there is no provision for rabbinic marriage but formulates his opinion with the additional comment: "Nevertheless, she cannot be forbidden [such a relationship] because

she is to be considered an unmarried girl who engages in a licentious relationship [with her consort] for, since she is with him is the manner of marriage (*derekh kiddushin hi ezlo),* it is not licentiousness."[7] In those words Rosh acknowledges that the relationship is not tantamount to rabbinic marriage but nevertheless asserts that the relationship does not resolve itself into illicit fornication simply because it does not rise to the level of a regularized marital relationship. Both the view of Rav Aha'i Ga'on as well as the conflicting position of Rosh are cited by *Shulhan Arukh, Even ha-Ezer* 37:14.

A related problem exists with regard to the status of a marriage contracted by the father of a minor son on the latter's behalf. No biblical authority exists for such action on the part of the father. Accordingly, Rambam, *Hilkhot Issurei Bi'ah* 21:25, and *Shulhan Arukh, Even ha-Ezer* 1:3 and 43:1,[8] categorize such a relationship as licentious. A similar position is adopted by *Teshuvot ha-Rashba*, IV, no. 207. However, *Tosafot, Yevamot* 96b, applaud the practice and declare that, although the Sages did not ordain rabbinic marriage on behalf of a minor groom, "nevertheless there is no transgression, for it is not deemed to be fornication." Rosh, in his earlier cited ruling, couples marriage of a minor girl whose father is unavailable to act on her behalf with the marriage of a minor groom.[9] From that terminology it might be inferred that, in this case as well, *Tosafot* recognize a status intermediate between fornication and rabbinic marriage. Elsewhere, in their commentary to *Yevamot* 62b, in reference to the marriage of a minor, *Tosafot* remark that "even though the Sages did not ordain marriage on his behalf . . . nevertheless they ordained marriage for him [to the extent] that his sexual act is not fornication."

Seizing upon the terminology employed by Rosh, *viz., "derekh kiddushin,"* Professor Feldblum argues that any relationship "in the manner of marriage" is permissible even if the marriage is not technically valid and moreover, since no marriage has been established, a *get* is not required for dissolution of the relationship. He then concludes that any couple may signify that they do not intend to contract a valid marriage and may instead opt for a relationship *"derekh kiddushin."*

This approach is encumbered by a conceptual problem. How does *derekh kiddushin* differ from concubinage? Differing domestic arrangements and/or societal categorizations do not serve to establish diverse halakhic institutions. How, then, can concubinage be regarded as forbidden, as is the consensus or rabbinic authorities, but *derekh kiddushin* be permitted? Is not *derekh kiddushin* simply concubinage by another name?

In point of fact, this problem does not present itself in the first instance in association with the proposal to establish an institution to be known as *derekh kiddushin*. The problem is inherent in the terminology employed by Rosh in his comment and, more fundamentally, in understanding the basic position of the early-day authorities who recognize the legitimacy of marriage of a minor girl whose father is in a distant land but do not require *mi'un* for its dissolution as well as in understanding the position of those who recognize the legitimacy of the marriage of a minor male but who do require a *get* for the dissolution of such a marriage. The simple answer is to be found in the earlier-cited words of *Tosafot, Yevamot* 62b, who speak of a rabbinic enactment establishing a novel halakhic relationship the case of a minor male child. It might readily be argued that the authorities who sanction marriage on behalf of a minor girl whose father has, in effect, abandoned active involvement in her welfare, similarly maintain that such an institution governing a relationship of this nature has been established by explicit rabbinic decree. Of course, it follows from this analysis that "*derekh kiddushin*" is a valid institution only in those situations in which it is expressly sanctioned by rabbinic decree, i.e., in the case of a minor male and/or a minor female who has been constructively abandoned by her father but does not represent a legitimate option available to other couples simply for the asking.

However, this resolution of the issue simply pushes the problem back one step. According to those who maintain that cohabitation with an unmarried woman constitutes transgression of the commandment "There shall be no harlot among the daughters of Israel" (Deuteronomy 23:18), by what authority did the Sages sanction an institution that is tantamount to fornication and harlotry? For that matter, according to those authorities, by what authority did the Sages ordain rabbinic marriage for an orphaned minor or for a deaf-mute? Such relationships, to be sure, are not promiscuous but, from the vantage point of biblical law, even a monandrous non-marital relationship represents concubinage. No scholar has pointed to the institution of rabbinic marriage as evidence of rabbinic authority to abrogate biblical law in an overt, active manner.[10]

The basis for formal rabbinic marriage in the case of a deaf-mute and an orphaned minor can be understood in the light of comments of R. Meir Simchah ha-Kohen of Dvinsk, recorded in his commentary on the *Mishneh Torah, Or Sameah, Hilkhot Melakhim* 2:1, as well as in a letter published in *Ein Tena'i be-Nisu'in*, ed. R. Judah Lubetsky (Vilna, 5690), pp. 29-32.[11] *Or Sameah* is concerned with the provision of law,

accepted by all authorities, to the effect that concubines are permitted to a king. No other restriction imposed by religious law is suspended as a form of monarchial privilege.[11a] *Or Sameah* explains that the prohibition against concubinage, in its essence, represents a prohibition against promiscuity. Since (according to most authorities) a concubine may terminate any such relationship at will and without formal proceedings there is nothing to prevent a concubine from consorting serially with multiple males. In the instance of a royal concubine, argues *Or Sameah*, that is not the case. The Mishnah declares that the scepter used by a king may not be used by a commoner,[12] nor may his widow enter into a subsequent marriage with anyone[13] other than, according to one opinion,[14] another monarch. A similar restriction, observes *Or Sameah*, should logically apply with regard to the concubine of a monarch with the result that, once a woman has entered into such a relationship with a king, she is effectively barred from any further sexual relationship. Accordingly, since in the limited case of a royal concubine there does exist a halakhic barrier to promiscuity, the relationship is not banned.[15]

In *Ein Tena'i be-Nisu'in*, the same authority applies this line of reasoning in explaining why a couple may live together as man and wife even following execution of a bill of divorce conditioned upon subsequent death of the husband without issue. A woman continuing in such a relationship cannot legitimately enter into any other sexual relationship in anticipation that her marriage will become invalid retroactively. If her husband sires a child, even by another woman, the marriage is valid and any other relationship on the part of the wife is adulterous. In no way can there be a determination that the marriage is invalid until the husband actually dies. Thus, promiscuity during the lifetime of the husband is effectively barred. A concubinary relationship that carries with it a barrier to promiscuity, argues R. Meir Simchah of Dvinsk, is not prohibited.

*Or Sameah*'s thesis may also serve to explain an otherwise puzzling ruling of Rema. Rema, *Even ha-Ezer* 157:4, cites with approval the view of Mahari Bruna to the effect that a woman who fears that she may not be released from levirate regulations because her husband's brother is an apostate or because his whereabouts are unknown may enter into a conditional marriage with the provision that, if the husband precedes her in death without issue, the marriage will retroactively be null and void. Under such circumstances, the widow, in effect, retroactively acquires the status of a concubine. Although concubinage is generally forbidden, and that restriction effectively serves to preclude conditional marriage, according to the thesis advanced by *Or Sameah*, it is

readily understandable why in this case—and in this case alone—conditional marriage is permitted. Rema's case is unique in that the wife is effectively precluded from entering into any other sexual relationship during the lifetime of her husband. Failure of the husband to predecease her without issue would render any such relationship adulterous. Thus, even if it should prove to be the case that the marriage is nullified retroactively and the woman's status throughout the marriage proves to be that of a concubine, her status is different from that of other concubines in that she cannot terminate the relationship at will and enter into a second relationship.

The same line of reasoning would serve to explain the legitimacy of marriage that is valid only by virtue of rabbinic law. Although, in terms of biblically recognized institutions, the relationship established is identical to concubinage, it is readily understood that promiscuity is obviated by virtue of rabbinic legislation requiring divorce or formal renunciation of the marriage by the wife in the form of *mi'un*. This line of reasoning also serves to explain the position of the early-day authorities who refuse to accept the legitimacy of a relationship contracted by a minor male or of a marriage contracted on behalf of a minor daughter when her father is unavailable. Since there exists no rabbinic requirement for a *get* or *mi'un* under such circumstances the relationship established is not at all dissimilar to prohibited concubinage.

However, both R. Meir Simchah of Dvinsk, *Ein Tena'i be-Nisu'in*, p. 31, and R. Eliyahu Henkin, *Peirushei Ivra*, no. 4. sec. 15, resolve the problem of rabbinic marriage in a different manner. Both scholars advance the thesis that, according to Rambam, the prohibition. "There shall not be a harlot from among the daughters of Israel" pertains only to a relationship in which the option of matrimony is rejected. The biblical passage "If a man shall take a wife" (Deuteronomy 24:1) serves as a commandment requiring matrimony as a precondition to a sexual relationship. However, that requirement, argues Rabbi Henkin, is present only when there is no impediment to matrimony; when matrimony is halakhically impossible, the commandment "If a man take a wife" is not applicable. Concubines are prohibited, he asserts, because initiation of such relationships *ipso facto* involves rejection of the option of matrimony. *Or Sameah* similarly argues that the Torah does not brand as harlotry a sexual relationship between individuals lacking capacity to contract a marriage. Thus, when the parties do indeed desire marriage but marriage is impossible because of lack of capacity, e.g., in the case of a deaf-mute or of an orphaned minor, there is no prohibition attendant upon their relationship since both parties would choose marriage were such an

option biblically available. Accordingly, concludes *Or Sameah*, since there exists no biblical prohibition, the Sages were free to regulate such relationships by means of rabbinic marriage.

This thesis also serves to explain the position of the early-day authorities who permit the "marriage" of minor males and of minor females whose fathers are unavailable. Since for these persons biblical marriage is not an option, failure to contract a marriage cannot constitute a transgression of biblical law. The authorities who permit such relationships maintain that those relationships were neither regulated by rabbinic law in the sense of requiring a *get* for their termination nor prohibited by rabbinic decree. According to the thesis advanced by these scholars, the term "*derekh kiddushin*" employed by Rosh should be understood as connoting nothing more than the relationship between parties who wish to enter into a proper marriage but find themselves unable to do so by virtue of the technicalities of biblical law.

If note is taken of the provenance of the phrase "*derekh kiddushin*" the permissive view of the early-day authorities regarding a marital relationship with a minor male as well as with an abandoned minor female may be explained in an even simpler manner. The phrase "*derekh kiddushin*" appears in the words of Rosh, *Kiddushin* 2:8. Rosh's view with regard to concubinage appears in a brief responsum included in his *Teshuvot ha-Rosh, klal* 32, no. 13.[16] Rosh rules that family members may prevent the *paterfamilias* from taking a concubine because of the ignominy caused the entire family and, moreover, that the *bet din* must compel him to dismiss the concubine because "it is known that she will be embarrassed to immerse herself with the result that he will cohabit with a *niddah*."[17] Rosh maintains that there is no biblical prohibition per se[18] against consorting with a concubine and that the concern is based upon embarrassment attendant upon openly acknowledging the relationship. That embarrassment stems from the low social esteem in which a concubine is held rather than from halakhic odium. According to Rosh's own categorization of the prohibition associated with concubinage, it is readily understandable that no prohibition is attendant upon a situation in which the relationship is *derekh kiddushin*, i.e., a situation in which the parties seek to establish a matrimonial relationship but fail to realize their intention because of a technicality in the form of a lack of halakhic capacity to contract a valid marriage. Since the parties genuinely desire to effect a marital relationship, a woman entering into such a relationship suffers no social stigma. A woman in such a relationship will achieve the dignity and social station of a lawfully wedded wife and will therefore have no reason to refrain from visiting the ritualarium

for monthly post-menstrual immersion. Hence, according to Rosh, there is no reason to interdict such a relationship. If this explanation is correct, it follows that no such relationship could be condoned by those authorities who maintain that concubinage is intrinsically prohibited. Even if the permissive view regarding a relationship with a minor *derekh kiddushin* is accepted as normative, the status of a concubine is clearly different and will remain different even if such a relationship is formalized in the guise of civil marriage or the like. Even in such circumstances the woman's status would remain inferior to that of a full-fledged wife and would give rise to ongoing feelings of humiliation.

Be this as it may, concubinage is prohibited. Relationships with minor males and young females whose fathers have actually or constructively abandoned them are exceptions to a prohibition that remains in full force in all other instances. Couples cannot avoid the prohibition against concubinage by means of a simple declaration that they wish to categorize their relationship as "*derekh kiddushin.*"[19] Yiddish-speaking readers will recognizes the aphorism "*Die selbe kallah, nor andersh geshleiert*"—The same bride, but with a different veil." Professor Feldblum has presented us "*die selbe pilegesh, nor andersh gesheleiert*—the same concubine, but with a different veil."

## NOTES

1. One must be mindful, however, that the price to be paid for ameliorating the plight of the *agunah* in this manner is abrogation of the sacred institution of matrimony. Many rabbinic scholars regarded any solution that involves compromising the sanctity of the martial relationship as unworthy of consideration. See for example, R. Meir Simchah ha-Kohen of Dvinsk, *Ein Tena'i be-Nisu'in*, ed. R. Judah Lubetsky (Vilna, 5690), p. 15. Examination of that important fundamental issue is beyond the scope of this undertaking. The present discussion is relevant only if that objection is not regarded as dispositive.
2. See R. Ya'akov Moshe Toledano, *Ozar Hayyim*, ed. R. Chaim Ehrenreich, VI (5690), p. 209; and *idem*, *Teshuvot Yam ha-Gadol*, no. 75.
3. For a comprehensive survey of concubinage in Jewish law see R. Elyakim Ellinson, *Nisu'in she-lo ke-Dat Mosheh ve-Yisra'el* (Tel Aviv, 5736), pp. 40-96.
4. See R. Yosef Eliyahu Henkin, *Perushei Ivra* (New York, 5704), no. 4; and *idem*; *Lev Ivra* (New York, 5719), pp. 12-20. For a discussion of that view see this writer's *Contemporary Halakhic Problems*, I (New York, 1977), 159-162. See also R. Joseph Rosen, *Teshuvot Zofnat Paneah* (Jerusalem, 5728), I, no. 5.
5. See, for example, R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, III, no.

23. See also R. Menachem ha-Kohen Rizikoff, *Teshuvot Sha'arei Shamayim, Even ha-Ezer* no. 42. For a brief survey of the proposal see Abraham Chaim Freimann, *Seder Kiddushin ve-Nisu'in* (Jerusalem, 5764), p. 396.
6. *Tradition*, vol. 33, no. 1 (Fall, 1998), pp. 112-116.
7. Similar terminology is employed by *Teshuvot Rivash,* no. 194.
8. See *Bet Yosef, Even ha-Ezer* 1. Cf., however, *Perishah, Even ha-Ezer* 14:20; *Tiv Kiddushin, Even ha-Ezer* 14:36; and *Avnei Mishpat, Even ha-Ezer* 14:13.
9. Support for this view is found in the statement of the Gemara, *Yevamot* 96b, declaring that there are no levirate obligations with regard to the wife of a minor. See *Teshuvot Rivash*, no. 193.
10. See *Yevamot* 89b. For citation of another example of rabbinic law as demonstrating such authority see, for example, *Tosafot, Ketubot* 11a, s. v. *matbilin.*
11. Reprinted in *Teshuvot Or Sameah* (Jerusalem, 5741), *likkutim*, no. 10.
11a. Cf. Rabbi Henkin, *Perushei Ivra,* no. 4, sec. 16, and *Lev Ivra*, pp. 16-17, who resolves the problem by asserting that the status of a monarch vis-à-vis his subjects is analogous to that of a master vis-à-vis his female maid-servant (*amah ivriyah*). Rabbi Henkin asserts that the biblically sanctioned relationship known as *yi'ud* is, in fact, concubinage. Accordingly, a concubine is permitted to a king just as the *amah ivriyah* is permitted to her master.
12. *Sahedrin* 22a.
13. *Sanhedrin* 18a.
14. R. Judah contra the Sages, *loc. cit.* Cf. Rambam, *Commentary on the. Mishnah, loc. cit.* and *Hilkhot Melakhim* 2:2.
15. For an alternative explanation of monarchial privilege with regard to a concubine see *Teshuvot Hatam Sofer, Orah Hayyim*, no 84.
16. Cf., however, *Yam shel Shlomoh, Yevamot* 2:11, who denies that Rosh is addressing a situation of concubinage. That view is refuted by *Bah, Even ha-Ezer* 26; *Helkat Mehokek, Even ha-Ezer* 26:2; and *Bet Shmuel, Even ha-Ezer* 26:2
17. A similar view is found in *Teshuvot ha-Rashba ha-Meyuhasot le-Ramban*, no. 284.
18. Cf., however, *Bah, Even ha-Ezer* 26.
19. Professor Feldblum's proposal would, in a sense, create the mirror image of the two- tiered system of marriage now established by statute in the state of Louisiana as paliation of no-fault divorce. Were Professor Feldblum's proposal to be implemented, each couple would be required to choose between marriage *ke-dat Mosheh ve-Yisra'el* that can be dissolved only by means of a *get* and a relationship *derekh kiddushin* that may be terminated at will or in a manner regulated by the state. In Louisiana a couple must choose between a relationship that, in an age of no-fault divorce, is termed "traditional marriage" and a "covenant marriage." A "traditional marriage" may be dissolved upon petition of either spouse on a no fault basis on proof that the parties to the marriage have been living separately and apart continuously for a period of six months (La. Cov. Code Ann. Art. 102) (1993) . A couple electing a "covenant marriage" are required to "solemnly declare that marriage is a covenant between a man and wife who agree to

live together as husband and wife for so long as both may live." However, despite a declaration on the part of the couple that "we understand that a covenant marriage is for life" the statute provides for divorce on fault grounds of adultery, abuse, abandonment and imprisonment for a felony and even for no-fault divorce after a separation of two years duration (La. Rev. Stat. Ann. 9:272-75, 307-09 West Supp. 1998)