INTERNATIONAL BEIT DIN
בית דין בינלאומי לעניני אישות

File no. 136

Beruria (Plaintiff) vs. Aaron (Defendant)
Names and dates have been changed to preserve anonymity of parties

Summary of Procedural Facts of the Case:

Beruria petitioned the International Beit Din in December 2015 to release her from the chains of her *igun*.

Beruria (the plaintiff) and her husband Aaron (the defendant) were married in January of 1989 and were subsequently married civilly in November of 1989. From the very outset of the marriage, the couple had problems and they sought the help of psychologists to rehabilitate their marriage. Notwithstanding their problems, they had two children: a son, born in 1992, and a daughter, born in 1994. The defendant, Aaron, sued to divorce his wife, the above plaintiff, in 1999, and shortly thereafter, a civil judgment was issued by a state court dissolving the marriage. Three months later, the defendant married another woman.

The defendant did not give his wife a *get piturin* (bill of divorce) as required by *Halakha*, and the plaintiff therefore turned to us to seek a solution to her *igun*.

We sent three summonses to the husband to appear before the Beit Din, but he refused to appear, and he still refuses to give the said plaintiff a *get piturin*.

When the couple was married in January 1989, a Reconstructionist rabbi conducted the ceremony and the question of the validity of a Reform marriage must be discussed.

Deliberations

We have investigated the facts, insofar as possible, and we have sought and found a way of releasing the plaintiff, Beruria, from the terrible calamity of *igun*, in the best way possible and with no reservations.

As stated, the marriage of Beruria and Aaron was consecrated by a Reconstructionist rabbi. The Reconstructionist stream of Judaism, which is a liberal stream on matters of religion, denies the Divine Revelation and is not committed to the *halakhah*. Hence, even though a ceremony took place which was called "*huppah and kiddushin*" (the traditional betrothal/marriage ceremony according to *Halakha*), this ceremony has neither validity nor the halakhic significance of an act of *kiddushin* or of *huppah and kiddushin*; and in any event, this ceremony, which was conducted by the aforementioned rabbi, cannot change the halakhic status of the woman from an unmarried woman to a married woman because it cannot be said by any means that two people who married in such a ceremony are considered to be married to each other according to *Halakha*.

Let us elaborate.

1. *Kiddushin* by means of a ring that does not belong to the husband

Halakha clearly prescribes that the ring used for the *kiddushin* must be owned by the groom, and as the *Tur* wrote, for example (*Even ha-Ezer,* 28): "The money with which he weds her must be his" (see *Shulhan Arukh, Even ha-Ezer* 28,), and in order to dispel all doubt, the groom gives the ring to the wife whom he is marrying as an outright gift. However, in this groom's family, another "custom" had been adopted. The mother of the groom, the "matriarch" of the family, had a ring, and at the *huppah* of each of her descendants, she would give the ring to the groom and with this ring the groom would wed the bride.

This is what occurred in the present case too, and therefore, since the wedding ring was not owned by the groom – our defendant – then there was no valid act of *kiddushin*, and therefore the bride remained unmarried.

- In our humble opinion, extensive discussion is required here of the *halakha* of a borrowed ring for the *kiddushin*, for the Rishonim (earlier authorities) disagreed on this question (*Tur* and *Shulhan Arukh*, *Even ha-Ezer* 28:19). Therefore, if the groom borrows a ring from a family member for the sake of *kiddushin*, it is not so simple to invalidate the *kiddushin* without clarifying how the loan of the ring was made in the particular case, since the bride may have had benefit from this, and by virtue of this benefit she is wed.
- *Shulhan Arukh, Even ha-Ezer Hil. Kiddushin* 28:19: One who borrows an item from another and announces that he wishes to wed a woman with this item – she is wed. And if not, her status is that of a woman whose marriage is of doubtful validity.

2. Absence of eligible witnesses to the *Kiddushin*

The abovementioned rabbi told us, in all innocence, that he does not in general designate witnesses, and even when the couple asks that there be witnesses, he does not ensure that these will be eligible witnesses. In the photographs of the ceremony of said couple, we saw all the guests who stood under the *huppah*, and there was not even one eligible witness amongst them. Not a single one of them observed the dietary laws, or else they were relatives, or they did not observe the laws of the Sabbath and Festivals, or they were non-Jewish. Even the person conducting the ceremony, the said rabbi, admitted that he does not believe in the truth of the Torah and he does not observe the laws of the Torah.

After the said investigation, we understood the wisdom of the words of the great sage, Rabbi Moshe Feinstein, in his work *Iggrot Moshe*, who possessed great foresight, and constantly repeated his position that "It is clear that Reform *kiddushin* amount to nothing" (*Resp. Iggrot Moshe, Even ha-Ezer* 4:75). This statement appears in several places in his work (see *Resp. Iggrot Moshe, Even ha-Ezer*, 1:76-77 and others).

This being the case, since there was no *huppah and kiddushin* conducted according to *Halakha*, the plaintiff Beruria was never a married woman, and she is permitted to marry any person, including a Kohen, as taught by the sage Rabbi Moshe Feinstein z"l.

3. *"Anan Sahadei"* ("We are Witnesses") instead of attesting witnesses to the *Kiddushin*

Indeed, even though eligible witnesses were not designated, the fact that a large audience was present at the ceremony creates "knowledge of the marriage," as stated by *Hatam Sofer* in a responsum (EH 3:100. See also: *Resp. Havot Yair* 19) which deals with a case in which a rabbi performed the *kiddushin* for a couple, and designated the beadle as a witness; he later learned that the beadle was a relative of the bride, but he ruled that it was not necessary to undergo *kiddushin* again, since there was a large audience at the wedding who saw the *huppah*, and in any case we have clear knowledge that this woman is married. If we were to apply the ruling of *Hatam Sofer*, then apparently, in our case, the plaintiff is a married woman.

However, this view must be rejected for several reasons. First, *Hatam Sofer*'s novel position does not have the status of binding precept, for several Rishonim and Aharonim have proved that the *halakhah* is otherwise. This emerges from *Resp. Mahar'i Weil* (no. 7), *Resp. Maharshakh* (1:25); *Resp. Ne'eman Shmuel*, no. 59, and other decisors, on the basis of whose words R. Eliezer Waldenberg (*Tsits Eliezer* 37) provided a lengthy proof that we do not say "*anan sahadei*," contrary to the view of *Hatam Sofer*.

And indeed, the basis of *Hatam Sofer*'s view is unclear, for "*anan Sahadei*" means that we have factual knowledge, that is, in the particular case we know that the groom gave the ring to the bride for the purpose of *kiddushin* and that *huppah and kiddushin* took place according to *Halakha*. In relation to *kiddushin*, however, the witnesses are not merely *testifying* witnesses, but they are *attesting* witnesses (whose presence is necessary for an act to have legal validity); and how can "*anan sahadei*" turn testimony into attestation? This requires further investigation (see *Hiddus ha-Rashba, Kiddushin* 66:b).

It must also be said that in relation to *kiddushin* which were not performed in accordance with the *halakha*, just as eligible witnesses are of no avail in legitimizing the marriage, so too is the doctrine of "*anan sahadei*" of no avail in legitimizing the marriage, as emerges from *Resp. Rivash* (no. 6), whose view will be discussed below. Rivash ruled in relation to a *kiddushin* ceremony that was performed in non-Jewish tribunals, that even if there were eligible witnesses, it is invalid, since the marriage "that took place according to the custom of the gentiles … there is no suspicion of *kiddushin*. Even if there were eligible witnesses there"; this proves that there is no concern arising from the doctrine of "*anan sahadei*" in the case of *kiddushin* that were not performed according to Jewish law.

This was also the approach of Rabbi Feinstein (*Resp. Iggrot Moshe, Even ha-Ezer* 2, 76):

> It is clear and straightforward that in relation to an evil one of the Reform stream who conducted *kiddushin*, there is no "*anan sahadei*" that an act of *kiddushin* was done by him giving [the ring] to her and making a statement, for every Reform rabbi does some act that he makes up himself and says that this is *kiddushin*, and there is not here even adherence to the most minimal standards; and in any case, people who did not see and did not hear the act of *kiddushin* – even though they know that the rabbi there did something that he called *kiddushin* – are not witnesses that an act of *kiddushin* according to the Torah was performed, even if it so happened that there was a giving and a statement according to the law.

This is how the rabbinical court in Netanya ruled (File no.866381, Netanya Regional Beit Din, 11.11.2012) in a case of divorce of a couple who had married in a civil ceremony and a Reform ceremony, the latter being conducted by a person who did not attribute importance to the *halakhot* of *kiddushin* contained in the *Shulhan Arukh*: "There is no '*anan sahadei*' that the *kiddushin* were performed in accordance with the *halakha*."

And we will see further that a distinction must be drawn between the case discussed by *Hatam Sofer* and our case, for the rule of "*anan sahadei*" applies only if there are

observant Jews amongst the guests, as in the case of *Hatam Sofer*; only then does the guests' knowledge create a prohibition of a married woman (i.e., she will have the status of a married woman), for "*anan sahadei*" is an alternative to the attestation of two eligible witnesses, and it has the capacity to overcome the problem only of the witnesses being related or being ineligible, in which case we do not say "testimony that is partially invalid is entirely invalid." However, when there are no observant Jews amongst the guests, such that there are no eligible witnesses, there is no rule of "*anan sahadei*" that could create and apply the prohibition of a married woman.

4. The *halakhic* validity of permanent cohabitation and civil marriage

Still, even if the *kiddushin* ceremony that was performed by the said rabbi has no validity, we must investigate the question of the validity of the marriage of the couple due to the fact that they cohabited for almost nine years, and there is a presumption that "a man will not have intercourse as an act of fornication" (*Ketuboth* 73a; *Gittin* 81b); hence, the plaintiff is deemed to be a married woman by virtue of *kiddushin* through cohabitation, and apparently, there is cause to be strict and to require her to obtain a *get* from her husband.

Said presumption has been discussed in recent generations particularly in relation to the *halakhic* validity of civil marriage, which is relevant in our case, for as we said, the couple also married in a civil ceremony.

There is a presumption that a person will not have intercourse as an act of fornication.

Rivash (*op. cit.*) discussed the question of whether civil marriage is valid by virtue of the presumption that "a man will not have intercourse as an act of fornication" (*Gittin* 81b; *Ketuboth* 73a), and cites the Geonic rule in relation to a person who divorces his wife and then she lodges with him in an inn. He states as follows:

> Some Geonim ruled, that any woman who has intercourse in front of witnesses requires a *get*, because of the presumption that a person will not have intercourse as an act of fornication. And according to this view, the same would apply to a couple who had married [in a non-Jewish ceremony], since they are sexually comfortable with each other; hence it would appear that she requires a *get* from him if there were witnesses to the seclusion, even though there are no witnesses to the intercourse. In this sort of case we say, the witnesses to the seclusion are also the witnesses to the intercourse, and because there was intercourse we say that it was for the purposes of *kiddushin* with her husband, for "a person does not have intercourse as an act of fornication."

Rivash, however, rejects this approach and cites Rambam:

> Indeed Rambam z"l rejected this ruling outright, and wrote that this reasoning is weak, and it should not be relied upon. For our sages invoked this presumption only in relation to the wife whom he had divorced, for it is almost certain that he was alone with her or was intimate with her for the purpose of *kiddushin*, because he wished to take her back. Or that it was the case of a person whose *kiddushin* was conditional, and he had intercourse irrespective of the condition, for she is his wife, and in relation to his wife, a person does not have intercourse as an act of fornication, unless he specifies that it is an act of fornication, or he specifies that on this condition he has intercourse with her. But in relation to all others – any unmarried man who has intercourse with an unmarried woman – there is no suspicion that the intercourse was for the sake of *kiddushin*.

Rivash also rejects the possibility that Rambam was referring to casual relations but not to permanent intimate relations:

> And if one were to say: even Rambam z"l [*Hil. Gerushin* 10:19] was referring only to an unmarried man who had intercourse with an unmarried woman as a casual act, that because he did not specify, we say that he did not intend this to be for the sake of *kiddushin* but as an act of fornication, but if he married her and made a condition that she would be his wife, the circumstances make it clear that he spoke with her about matters of *kiddushin* at the time that he was alone with her, and there is no need to specify, for it is clear that he specified and said to the witnesses to the seclusion that it is his intention to have intercourse with her for the sake of *kiddushin*. The reply must be, that exactly the opposite is the case, that even according to those Geonim who hold that in general, intercourse is for the sake of *kiddushin*, in this case intercourse was not for the sake of *kiddushin*. For since they made their marriage conditional upon non-Jewish laws, and it took place in the house of idolaters and was performed by a priest, it is as if they specified that they do not intend their act to be for the sake of *kiddushin* in accordance with Jewish law, but in the way of idol-worshippers, which has nothing to do with the Jewish laws of marriage and divorce. And therefore she is not as a married woman, but she is like a concubine without a *ketubah* (Jewish marriage contract) and *kiddushin*.

And it is indeed true that the majority of decisors, both Rishonim and Aharonim, did not agree with said approach of the Geonim. See at length in *Otzar Haposkim* (26:1), and in *Resp. Yabia Omer* (6, *Even ha-Ezer* 1; 10:13, at the end of the responsum), and

this is the approach generally adopted by the rabbinical courts in Israel (see the abovementioned File No. 866381/1).

Recently, the question of the non-applicability of the above presumption was discussed by Rabbi Zion Luz-Ilouz of the Beer Sheva Regional Beit Din in File no. 86586/3 (7.10.2014), in a similar case, and he enumerated several reasons for the non-applicability of the presumption. This is what he said, in brief:

As a rule, the Beit Din holds that Rambam (*Mishneh Torah, Gerushin* 10:19) and most of the Rishonim rejected the approach of the Geonim whereby this presumption also applies to an unmarried woman, and *Shulhan Arukh* ruled accordingly (*Even Ha'ezer* 149:5). Nevertheless, there is room to distinguish between casual intercourse and an established relationship, as stated by many decisors (e.g., *Resp. Zaken Aharon* 2:103; *Resp. Ohel Abraham*, 103), and at least the latter should be considered as doubtful *kiddushin*. And the Beit Din notes that "many of the decisors disagreed with this (and rule the *halakha* to be so) for various reasons, the principle common to them all being that in the prevailing reality in recent generations, it is irrelevant to apply the principle that a person does not have intercourse as an act of fornication."

Three reasons for the non-applicability of the presumption arise from Rivash's responsum: a) When there is intention and conscious choice not to marry in accordance with *halakha*, the presumption will not apply, even in relation to established relationships, except in the case of the couple living in a state in which they do not have a choice as to how to marry. In the United States, it is certain that civil marriage is a matter of choice, and therefore the presumption will not apply; b) A person who does not observe the laws of forbidden relations and family purity is also not particular about intercourse as a non-marital act, and the presumption is inapplicable to him; c) the lack of witnesses testifying to the couple engaging in intercourse negates the application of the presumption (contrary to the minority opinion of Rabbi Aharon Halevi).

A fourth reason is based upon *Resp. Helkhat Yaakov, Even ha-Ezer* 71, which states as follows:

> Since it is clear that in relation to civil marriage a *get* is not required by virtue of the basic law for all the reasons as stated, even in order to accommodate a wide range of opinions a *get* should not be given, and it should not be said that even if it does not help, it does not hurt. This is not so, for there should be no collaboration with civil marriage, which would cause it to be deemed by the public as having some sort of halakhic value.

The fifth reason is based on *Resp. Sha'agat Arieh* (end of resp. no. 1 at the end of the volume, and others) that the presumption does not apply in our times. It "was correct

in previous generations, who would betroth even by way of intercourse, and this concept was known as *kiddushei bi'ah*, which is not the case in later generations, when the average person is not aware that *kiddushin* may be executed by way of intercourse. And *a fortiori* in relation to a person who never learned about these subjects." And even though there is a basis for Rabbi Waldenburg's surprise (*Resp. Tsits Eliezer* 2:19, chap. 6) at this approach, due to the fact that the decisors (Rambam and *Shulhan Arukh*) mentioned this presumption as a matter of law intended for practical application, despite the fact that in their times *kiddushei bi'ah* was no longer practiced, this approach can be aligned to the others as an additional consideration.

The sixth reason is based on *Resp. Mishpat Ouziel* (*Even ha-Ezer* 59), whereby "the end proved the beginning." In other words, in the case of a couple who were married civilly and ultimately separated without any religious act – their separation proves, in relation to the beginning of the marriage, that their marriage was devoid of all religious intent. And even though the *Beit Din* comments that in relation to this permit it should be asked "whether the *kiddushin* can be uprooted retroactively by proofs that are built of things that happened after the *kiddushin*. But in my humble opinion this question is pertinent in relation to proper *kiddushin*; but in relation to *kiddushin* that originate in a presumption and are only a matter of general suspicion and doubt, then the later proofs completely nullify the existence of the presumption in the said case, and it is indeed pertinent to say that the end proved the beginning."

The seventh and final reason is provided by Rabbi Luz-Ilouz who writes (in expressing support for what he wrote in *Resp. Heikhal Yitzhak*, part b:33, letter b):

> And I in my humility, beyond all the above permits, do not understand the words of the decisors of our times in relation to civil marriage in our times. Usually, in view of the growing permissiveness of our times, couples have cohabited even prior to their civil marriage, and hardly one in a thousand arrives at the point of civil marriage without having cohabited with her partner prior to the civil marriage. And therefore, it is difficult to say that the intercourse after the civil marriage is intercourse for the sake of *kiddushin*, whereas the acts of intercourse beforehand were fornication – what basis is there for thinking there is a distinction? What cause is there to say that a person does not have intercourse as an act of fornication, and is now having intercourse for the sake of *kiddushin* in such a case. From all these reasons that have been stated one can deduce that the woman may be released [allowed to remarry] without a *get*.

Notwithstanding the above, said the Beit Din, it is customary to arrange a *get* in order to accommodate as wide as possible an interpretation, even if only due to "the fact that the parties are registered as married, and in order that it not be said (erroneously) that a married woman is leaving the marriage without a *get*"; but in a case of *igun* of

the husband, such as in the case discussed in the above judgment, "there is no need to arrange a *get* at all, and the man should be released from the chains of the *igun* in which he is held."

Accordingly, it should also be said in our matter that in the case of *igun* of the wife, we can rely on the chain of decisors who permit [terminating the marriage without a *get*] and on the reasons why the presumption that a person does not have intercourse as an act of fornication does not apply in these circumstances.

Disagreement amongst the later authorities regarding the validity of civil marriage

The question of marriage in a non-Jewish forum, "civil marriage," arose before World War Two, and a serious dispute arose between the decisors – those who prohibited it and those who permitted it.

Amongst the more strict views was that of Rabbi Yosef Rozin, the Rogachover, who was the rabbi of the Hassidic community in Dvinsk (today – Donetsk) (*Resp Zofnat Pane'ah*, 26-27). His view was that a strict line must be taken and a *get* is required in the case of a woman who underwent a civil marriage; his approach is a huge innovation, which is described below in brief.

According to the Rogachover, "two laws" apply to cohabitation. There is the prohibition, namely, that a married woman is forbidden to others, as stated by the *gemara*: "… that makes her forbidden to everyone like consecrated property" (*Kiddushin* 2b). And there is another law, that a married woman is acquired by her husband. In relation to a Noahide, even though he has no capacity for ritual acquisition (but only the positive injunction of "and he shall cleave to his wife" and not the wife of his fellow), he does have a capacity for matrimonial acquisition, and in all events in relation to civil marriage there is no prohibition of a married woman for others; however, the law of acquisition does apply, in that the woman is exclusive to her husband, and in order to negate and to release the property connection she requires a *get* from her husband.

Despite the brilliance of the new concept introduced by the Rogachover, which he reiterated several times in his book, many later authorities disagreed with him, including Rabbi Avraham Shapira, the rabbi of Kovno (today, Kaunas) (see *Resp. Dvar Avraham*, 3:29); Rabbi Haim Ozer Grodzinsky (see: *Hapardes*, Av 5701, 15th year, part 5, 7-8) and Rabbi Yehiel Yaacov Weinberg (*Resp. Seridei Esh, 1, Even ha-Ezer* 100). Rabbi Weinberg challenged the Rogachover on the basis of an explicit ruling of Rambam (*Mishneh Torah, Hil. Kings* 9:8), whereby a Noahide is liable to the death penalty for consorting with the wife of his fellow. Rambam states as follows:

> A gentile who singles out one of his maid-servants for one of his slaves and, afterwards, engages in relations with her is executed because of her, for violation of the prohibition against adultery. However, he is not liable for relations with her until the matter has become public knowledge and everyone refers to her as 'the wife of X, the slave.' When do relations with her become permitted again? When he separates her from his slave and uncovers her hair in the market-place. When is a gentile woman considered divorced? When her husband removes her from his home and sends her on her own or when she leaves his domain and goes her own way. And there is no written get. The matter is not dependent on the man's volition alone. Whenever he or she decide to separate, they may and then, they are no longer considered as married.

Rambam wrote explicitly that there is no written get, and the dissolution [of the marriage] is effected on the basis of [the nullification of] the acquisition element of the marriage.

Indeed it is well-known that here too, in the United States, this dispute made waves. Rabbi Yosef Eliahu Henkin, in his book *Perushei Ivra* (3-5, and see his book *Perushei Lev Ivra* pp. 12-19), held that the fundamental position is that there is no way to terminate a marriage between a man and his wife other than by a *get piturin*. His view was that the presumption that "a person will not have intercourse as an act of fornication" is still valid, and even without there having been witnesses at the time of the *huppah*, the marriage of the couple who lived together and cohabited is valid. He agrees, however, that in the case of *igun* there is no need for a *get*.

However, some thirty years ago, with the dissolution of the Soviet Union and the beginning of the immigration of Soviet Jewry to Israel and the West, the question arose of the eligibility of those Jews, who, during the seventy years of the Soviet regime, had not had the possibility of undergoing marriage and divorce according to Jewish law.

Many of those who supported Rabbi Henkin's view then argued that there is a major problem with those couples, for they cohabited and are considered to be married according to *halakha* on the basis of the presumption "a person does not have intercourse as an act of fornication," and since in Soviet Russia there were not, in general, rabbis who were expert in matters of Jewish divorce, consequently many Russian Jews are *mamzerim* (bastards according to *halakha*) who are now becoming assimilated into the Jewish communities of Eretz Yisrael, the United States and the entire Diaspora.

Rabbi Feinstein, however, took a courageous, firm stand in order to resolve this problem, and with his power of leniency, he ruled in quite a number of cases that

huppah and kiddushin that were conducted without eligible witnesses having been present – witnesses who were so designated at the time to see that the ring was given – have no halakhic validity.

And I, too, can attest that many years ago, when I was still a rabbi in St. Louis, and Rabbi Bezalel Zolti, the Chief Rabbi of Jerusalem, came for a visit, I spoke with him about the position adopted by Rabbi Feinstein, and he said to me as follows: "This thing [i.e., that without the presence of the witnesses there is no valid *huppah and kiddushin*] is straightforward in Eretz Yisrael, without any questions and investigations, just as here it is straightforward that one makes a blessing *hamotzi lehem min ha'aretz* over a piece of bread."

And indeed, on this issue, most modern decisors have decided that according to the *halakha*, there is no need for a *get* to be given when a civil marriage is dissolved, as summarized by the Netanya Beit Din in the abovementioned File 866381/1:

> That most if not all great sages in previous generations agreed that in relation to civil marriage there is no need for a *get*, and only in order to be as accommodating as possible they required a *get lehumrah*, and when there is a concern about *igun*, then it is clear that we must be lenient.

Where there is *igun*, such as in our case, the civil marriage should be dissolved, in accordance with the rulings of the decisors of our generation and the policy of the Israeli rabbinical courts.

Parenthetically, it should be noted that even though in an appeal to the Chief Rabbinical Court 4276/63 (11.11.2003), Rabbi Shlomo Dichovsky wrote that the validity of civil marriage should be according to the view of the Rogachover. It seems to us that this is neither a substantive novel halakhic ruling nor a change in the direction of the rulings of the rabbinical courts; rather, this was basically a *halakhic* public policy position justifying the jurisdiction of the rabbinical court to discuss the dissolution of a civil marriage, in an attempt to prevent this type of matter usurped by the Israeli Supreme Court (see Amihai Radzyner's 6-7 MISHPAHA BEMISHPAT, 5773-5774, at pp. 579-604, and his dispute with Avishalom Westreich in his article *ibid*., at pp. 543-578).

5. Conclusion

In view of all that has been said above, Beruria is not a married woman and she is permitted to marry any man.

In witness whereof we have signed this 11 day of Adar 5776 (21 March 2016)