THE CENTER FOR WOMEN IN JEWISH LAW

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P.O.B. 8600, Jerusalem 91083

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fax. 02-6790840

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THE SCHECHTER INSTITUTE OF JEWISH STUDIES

The Schechter Institute of Jewish Studies in Jerusalem, with its Graduate School of Advanced Jewish Studies, Rabbinical School, and Center for Jewish Education, is one of Israel's leading academic centers for modern Jewish learning. The school is affiliated with the Jewish Theological Seminary of America and the Masorti/Conservative Movement in Israel. Over 500 students, coming from secular, traditional and observant bacgrounds, learn Jewish studies side-by-side within a pluralistic environment. The Schechter Institute is also responsible for the TALI Education Fund which provides enriched Jewish studies to 20,000 schoolchildren in over 100 state schools and kindergartens, and for Midreshet Yerushalayim which provides Jewish education to new immigrants from the FSU in learning centers throughout Israel.

THE CENTER FOR WOMEN IN JEWISH LAW

The Center for Women in Jewish Law was established at the Schechter Institute of Jewish Studies in Jerusalem in 1999 with the assistance of a grant from the Ford Foundation in order to study the status of women in the synagogue and to find halakhic solutions to the problem of modern-day *agunot* (anchored women) who are compelled to wait many years to receive a *get* (religious divorce) from their husbands. Since Jewish law requires that the husband must grant his wife a divorce, a shameful situation has developed whereby some greedy and vindictive husbands withhold their consent. In most *agunah* cases, the husband refuses to give his wife a *get* until she pays him a substantial amount of money. Should she be unable or unwilling to give the husband the cash or property he demands, the woman remains an *agunah*, or ''anchored woman'', forbidden to remarry or have children with another mate until the husband agrees to release her.

The Center for Women in Jewish Law will present solutions to the problem of modern-day *agunot* in two ways: in a book entitled *Halakhic Solutions to the Agunah Dilemma in the Twentieth Century,* which will review all the halakhic solutions that have been suggested during the last century; and in the bi-annual *Jewish Law Watch*, which will examine actual *agunot* cases that have languished for years in the rabbinical courts without resolution. In most instances, the rabbinical courts have not written or published their decisions on cases brought before them. The decision we have presented here is not a halakhic decision in the formal sense, as the Center's staff did not sit as a rabbinical court and the parties did not appear before them for examination of their testimony or other evidence. We present, rather, ''halakhic directions'' which the rabbinical courts should have examined in order to free ''Rachel'', a modern-day *agunah*.

The goal of the *Jewish Law Watch* is to pressure the rabbinical courts to publish their decisions in a timely and orderly fashion, much as civil court decisions are published, and to encourage rabbinical courts to use the halakhic tools which are at their disposal in order to free modern-day *agunot*.

As our Sages have taught: "the rabbis were lenient in order to prevent *agunot*" (*Yevamot* 88a). Maimonides ruled (Laws of Divorce 13:28) that "one does not examine the witnesses thoroughly in *agunah* cases because the Sages said to be lenient in order to release *agunot*". Rabbenu Asher, the Rosh, stated that "it is worthy for every halakhic authority to examine all sides [of the case] in order to allow [an *agunah* to remarry]" (*Responsa of the Rosh* 51:2). These sources dealt with a husband who disappeared, but in our day there is a new type of *agunah* – women who are blackmailed by their husbands – and there is no doubt that the Sages and the rabbis would have examined all sides of each case in order to allow them to remarry. Indeed, that is one of the main goals of The Center for Women in Jewish Law.

YAD L'ISHA

This case was given to "The Center for Women in Jewish Law" by *Yad L'isha*, the Max Morrison Legal Aid Center and Hotline. The staff of *Yad L'isha* represented Rachel in the Rabbinical Courts from the time of *Yad L'isha's* inception in September 1997 until Rachel was freed in March of 2001. *Yad L'isha* argued Rachel's case at the rabbinical district court level, appealed that decision to the Supreme Rabbinical Court, and initiated the supplication to leading rabbinic authorities after Rachel's appeal was effectively rejected.

Yad L'isha's immediate goals are to help individual women who are chained to dead marriages by their recalcitrant husbands. Moreover, *Yad L'isha* aims to raise public consciousness to the plight of the *agunah*, and works to help find a general solution to this problem that threatens the credibility of Jewish Law as a viable institution in the modern world.

THE METHOD

Adv. Sharon Shenhav was in constant touch with the staff of *Yad L'isha* and with "Rachel" in order to ensure that the facts were accurate. Rabbi Diana Villa and Rabbi Monique Su¨sskind Goldberg researched the case in depth under the guidance of Rabbi Richard Lewis, using bibliography which I supplied. Rabbi Villa wrote "The Facts" and Rabbi Su ¨sskind Goldberg wrote "Our Proposals". Rabbi Lewis and I then added a number of paragraghs and Mr. Yisrael Hazzani corrected the Hebrew style. The case study was translated into English by Dahlia

Friedman and myself, and Prof. Alice Shalvi corrected the English style. I then edited both versions and saw the case study through the press.

It is our hope that the *Jewish Law Watch* will make public the anguish of modern-day *agunot* like Rachel and will spur rabbinical courts to free these women from their chains. We welcome the responses of rabbis, religious court judges (*dayanim*), judges, lawyers, scholars and the public at large to this case study.

Rabbi David Golinkin

Schechter Institute of Jewish Studies

Jerusalem

July, 2001

CASE STUDY NUMBER THREE

THE FACTS

''Rachel'', [1] an Israeli woman from a religious family, wanted to fulfill the dream of her lifetime and marry a man from a similar background. In 1992, she met ''Levi'' [1] who presented himself as a yeshivah student who had emigrated to ''Argentina'' [1] in 1990. Before leaving Israel, he had married and divorced. In Argentina, there were rumors that he had married a non-Jewish woman, fathered a son and divorced again. He had also waived his Israeli citizenship in order to obtain Argentinian citizenship, which he apparently received as a result of that marriage.

In early 1993, Rachel got married to Levi in Israel; soon after they moved to Argentina. When she consented to marry him, Levi did not tell Rachel about his relationship with the non-Jewish woman and the son it produced. She was also unaware that Levi's army file noted that he ''suffers from severe neurosis''.

Within a year, the new bride began to suffer from living with her husband. She was subjected to verbal and emotional abuse. After the birth of their daughter, who was born with severe medical problems, the situation deteriorated further. Levi wanted the daughter institutionalized, but Rachel refused and for years she cared for her at home.

Given this difficult situation, where her husband derided her and failed to support her, [2] Rachel could not remain at his side and properly care for her daughter. In the end, the couple returned to Israel in order to enable Rachel to live near her parents and care for her daughter with the help of her family. Because Rachel took care of her daughter and could not go out to work, she was in urgent need of financial support. In November 1994, she sued for child support in the Jerusalem District Court and for a *get* (religious divorce) in the Jerusalem Region Rabbinic Court.

After Rachel sued for alimony, Levi filed a motion in his defense and the couple began negotiating a divorce agreement. The husband demanded that his wife waive child support payments for their daughter in return for a *get* and, despite her difficult financial situation, Rachel agreed.

1 All the names and some other identifying details have been deliberately changed here in order to protect those involved in the case.

2 According to the Argentinian rabbinic court in its ruling of June 5, 2000, he even pocketed the money which he received from the Argentinian government for the care of his ailing daughter.

In the wake of the agreement to waive child support payments, it seemed as if Rachel would soon receive a divorce from her husband. In January 1995, the Jerusalem Region Rabbinic Court set two dates for handing over the *get*. At the meetings in court, however, Levi also demanded an end to the alimony suit filed in the Jerusalem District Court (i.e. the secular court). Rachel wanted to first consult with a lawyer, but one of the rabbinic court judges pressured her into signing a document in court stating that she was withdrawing the suit, telling her that in so doing she would guarantee herself an immediate divorce.

Rachel gave in to the judge's pressure and agreed to end all suits so that her husband would hand her the divorce. Despite the far-reaching concessions made by Rachel, immediately after she signed the document in the rabbinic court stipulating that she would end the alimony suit, Levi refused to give her a divorce. He even deceived the rabbinic court – which believed in his sincerity and therefore put pressure on his wife – and claimed that he wanted *shlom bayit* (marital harmony).

Because Levi did not hand her the *get*, Rachel continued her alimony suit in the District Court. Despite a request for the court to issue an order for the deposit of his passport and two court orders barring him from leaving the country (one from the Jerusalem District Court and one from the Jerusalem Region Rabbinic Court), Levi managed to flee back to Argentina in March 1995. In the same month, the District Court ruled that there should be a monthly alimony payment of NIS 2,500 retroactive to November 1994 and that the sum to be paid should be adjusted every three months. Even so, Levi never paid this child support.

During the period under discussion, Levi made excessive demands in return for agreeing to divorce his wife. For example, he demanded a bank guarantee for tens of thousands of dollars in the event that Rachel reopen the suits against him.[3] Yet his letters clearly indicate he had no intention whatsoever of releasing her. In a letter dated October 20, 2000, he wrote that ''the daughter will not be raised by a stranger and no man may take the rabbi's wife [= my wife] to live with him. Anyone who may say otherwise is taking part in a great sin''.

In June 1996, a year and a half after the first attempt to receive a *get* from Levi failed, the Jerusalem Region Rabbinic Court ruled: '' **The husband should be forced** to return to Israel and to stand in judgement with the wife or he should give a *get*''. The Argentinian rabbis were asked to undertake to persuade Levi to do so. The rabbinic court considered Levi a recalcitrant husband in every respect and this is how they summarized the situation in their reasons for the ruling: ''In early 1995, the parties drew up a divorce agreement, but the husband refused to

3 Ibid., p. 1.

give his wife a *get* and demanded *shlom bayit* . After the wife closed her court cases, he fled abroad. In response, the wife reopened the court cases''. [4]

In January 1997 – two years after the original rabbinic court decision – the same court turned to the Argentinian communal rabbi and asked him to help implement the ruling of the previous June. The ruling stated: ''The rabbi of the community [in Argentina] should be turned to and asked to do everything possible, such as ostracizing and barring any support for him and to **compel him by whatever form of coercion possible** until he upholds the ruling of the rabbinic court in Jerusalem that he must return to Jerusalem and appear in the court which will judge all the suits between him and his wife or he should write a *get* there [in Argentina] and send the *get* to Israel via an emissary''.

In June 1997, in the absence of any positive results for their efforts up until then, the rabbinic court in Jerusalem ruled as follows: ''1) To seek the extradition of the husband and have him brought to Israel. 2) **The husband shall be obligated to divorce his wife and he should be compelled** and it is the husband's right to come to the rabbinic court in Israel and request another discussion of the case''.

In January 2000, Levi sent a fax to one of the rabbis in which he asked on the one hand for *shlom bayit* in Argentina while also threatening to get even with his wife for the anguish she had caused his family. In response, the rabbinic court issued an injunction to protect the wife, which stated: ''The police should be notified of the husband's letter dated 20.1.2000 and the wife should be given a protective injunction.''

During these years, the rabbinic court in Argentina did its best to convince the husband to grant the *get*. Finally, on March 8, 2000, more than five years after the rabbinic court first decided that divorce was unavoidable in this case, Levi wrote the *get* in the rabbinic court in Argentina. The divorce was sent to the Jerusalem Region Rabbinic Court via airmail to be handed to Rachel in the proper fashion.

On March 12, 2000, one of the members of the rabbinic court in Jerusalem received an anonymous fax sent from Levi's home claiming that the divorce was annulled and that it was also a *get me'useh* (forced divorce), i.e., that the husband was forced to grant it against his own free will. According to this fax, ''the divorce was written under threats, deadly torture, and electric shocks... a forced divorce, a complaint was filed with the police''. [5]

4 The rabbinic court secretary made an error. Rachel *agreed* to end the suits, but did not actually do so.

5 The fax was quoted in the ruling of the Supreme Rabbinic Court in Jerusalem, December 18, 2000, p. 2.

On April 16, 2000, the Jerusalem Region Rabbinic Court sitting as a court for *agunot* agreed to hand over the *get* to the wife and then review its validity. After that, the rabbinic court in Argentina clarified in writing that there was no coercion. A letter from the Chief Rabbinate of Argentina dated June 5, 2000 explicitly stated: ''We did not exert any form of coercion against the said husband... At the time the *get* was handed over, he said nothing about handing it over against his will''. Despite this, the Jerusalem Region Rabbinic Court issued a majority ruling on July 9, 2000 that because of ''numerous doubts about the *get* delivered by messenger'', the wife's divorce is questionable and she should not be given her divorce certificate. [6] Rachel appealed to the Supreme Rabbinic Court.

On December 18, 2000, the *Av Bet Din* (Chief Judge) of the Supreme Rabbinic Court ruled that the *get* was valid because:

1) A rabbinic court in Israel does not represent a legitimate court of appeal regarding decisions of foreign rabbinic courts. If the foreign rabbinic court determined that there was no coercion, its opinion must be accepted;
2) The rabbinic court in Argentina did indeed testify that there was no coercion;
3) The husband deserves to be coerced in any case, as the court in Argentina (June 5, 2000) and the above-mentioned judge in Jerusalem (June 1997) ruled;
4) The fax cancelling the divorce is not valid because it was not signed by the husband. After the fact, it is inappropriate to question a *get* and to cause a lengthy period of *igun* (state of being an *agunah*).

A second judge ruled that in light of the statements made to the rabbinic court in Jerusalem, ''we have not eliminated all doubts'' and ''writing a second *get* is unavoidable''. He also argued ''that based on the material in the file, the husband will agree to grant a divorce if the conditions he has made are met...''.

The third judge argued that a written cancellation is indeed a cancellation. But because it was a typed, unsigned fax that was sent from the husband's fax machine, the case ''should be forwarded to our teachers and rabbis, the great scholars of Israel, who have the ability to rule on a new matter such as this one... and as they rule, so shall it be''.

The conclusion was: ''In light of the above, the ruling follows the opinion of the majority to reject the appeal''.

6 Since the *get* always remains with the rabbinic court, a divorced woman must receive a divorce certificate in order to prove that she is single in the event that she wishes to remarry.

The ruling was apparently sent to some great scholars deemed authoritative by the Supreme Rabbinic Court, who apparently ruled that the *get* was valid and that Rachel should be given a certificate of divorce.

The certificate was finally given to Rachel on March 29, 2001. The delay in issuing her the certificate made her suffer through an additional year of misery and denied her the possibility of rebuilding her life, beyond the five years and five months that elapsed from the time the suit was filed until the *get* was written.

To summarize: Rachel and Levi lived together for a period of approximately one-and-a-half years. During that time, Rachel suffered from a husband who did not support her and, after they had a daughter born with severe medical problems, he refused to fulfill his responsibility to her. Rachel began the process of filing for divorce and child support in November 1994 and the rabbis already tried to write the *get* in January 1995 (without even mentioning the possibility of *shlom bayit*), but Levi fled the country in March 1995 and it did not happen. Several courts explicitly ruled that Levi should be compelled to grant a divorce.

During the five years that passed, Levi did not support his wife, who lived off of National Insurance allowances and took care of their daughter, while being prevented from ending this miserable chapter of her marriage and starting a new family. In the meantime, Rachel's biological clock continued ticking and she is now 36 years old.

Even after the rabbinic court in Argentina finally wrote her a *get* and mailed it to Israel, the husband attempted to cancel it and also claimed that since he did not give it voluntarily, the *get* was forced and not valid. In light of his constantly shifting demands and his attempt to cancel the *get* with an anonymous fax, the husband appears to be someone who deceives everyone, including the rabbinic court judges.

The Jerusalem Region Rabbinic Court sitting as a court for *agunot* questioned the halakhic validity of the *get* issued in Argentina and agreed to hand Rachel the *get* without issuing a certificate of divorce, effectively barring Rachel from remarrying. Despite her appeal to the Supreme Rabbinic Court, her appeal was rejected, following the majority opinion. The *Av Bet Din* , in a minority opinion, clarified that ''after he gave the *get*, it is inappropriate to question it and cause a long period of *aginut* ''. Luckily for Rachel, the great scholars who were asked to review the case and to say the last word on the matter, agreed with the minority opinion of the *Av Bet Din*, and therefore she was finally able to obtain a certificate of divorce.

Jewish law understood from its inception that although married life is recommended and family life is most important, the match does not always work out. That is why the Torah itself already describes the possibility of giving

a bill of divorce. Rachel's nightmare lasted for over six years. During those six years of waiting, the rabbinic courts should have applied the existing halakhic solutions to free her from her chained status as an *agunah*. We must take into account that they themselves saw a need for a divorce immediately after the suit was filed in this case, did not even raise the possibility of *shlom bayit*, and even asked the court in Argentina for its cooperation in obtaining a divorce, even if it had to use coercion. Rachel is another one of the "wretched" women whose cry has reached us. We are glad that the great scholars heard her cry, but this case did not need to reach them. *Every* rabbinic court must prevent this kind of *agunah* with the help of the halakhic solutions available to them.

OUR PROPOSALS

1. THE *AV BET DIN* WAS RIGHT

First of all, we wish to agree with the opinion of the *Av Bet Din* of December, 2000 that the divorce was valid. In addition to his arguments, cited above, two other important arguments should be added:

I. We learn in *Bava Batra* (138b): "One court does not look closely at the actions of another court". And so ruled Maimonides (*Hilkhot Edut* 6:5): "And never does one court check up on another court, rather it assumes that they are experts and will not err...". In other words, once the court in Argentina ruled that the divorce was valid, the court in Israel should not disqualify the divorce.

II. Rabbeinu Tam and his student Rabbeinu Moshe "and all the great rabbis decreed in a gathering in the Troyes marketplace that no Jew may question any *get* after it has been given". This decree is found in the Mordechai on the tractate of *Gittin* (at the end of *Hilkhot Haget,* Vilna edition, folio 9a) and every rabbinic court recites this ban aloud immediately after writing a *get* (*Tur* and *Shulhan Arukh Even Ha'ezer* 154:22).[7]

7 The Mordechai is a commentary on the Rif written in 13th century Germany. For discussion and various versions of the enactment, see Israel Schepansky, *Hatakannot B'yisrael*, Vol. 4, Jerusalem, 1993, pp. 160-162 and the Mordechai to *Gittin*, ed. Mayer Rabinowitz, in: H.Z. Dimitrovsky, ed., *Mehkarim Umekorot*, Book 2, Vol. 2, Jerusalem, 5750, pp. 870-872.

Rabbeinu Tam's ban has a practical implication for our case. There is a dispute over whether the ban of Rabbeinu Tam applies to Torah scholars. However, several important halakhic authorities (*Terumat Hadeshen, Pesakim*, end of no. 46; the Rema in *Darkhei Moshe* at the end of *Tur Even Haezer*, end of *Seder Haget*; and two rabbis quoted in *Responsa of the Rema,* end of no. 58) felt that no-one may challenge a *get*, and one who does is liable to Rabbeinu Tam's ban. Therefore, if the court in Argentina stated that the *get* was given according to Jewish law and there was no coercion, and if the court in Jerusalem gave Rachel the *get*, it is forbidden for any court to question the validity of the *get* by refusing to give Rachel the divorce certificate.

Furthermore, during the five years that Rachel waited for a divorce, the rabbinic courts should have looked into the following possibility of releasing her from her chained status as an *agunah*.

2. THE BETROTHAL WAS "A MISTAKEN TRANSACTION"

We have already proved elsewhere that when a woman finds a "defect" in her husband only after the marriage, she can claim that "I did not betroth myself with this in mind" (*Bava Kamma* 110b). The bethrothal was a mistaken one and there is no need for a divorce. [8]

According to the details submitted to the court by the *To'enet Rabbanit* (female rabbinic court pleader) and the wife's representative, when Rachel married Levi, she did not know the following facts:

A. Rachel knew that Levi had been divorced when she married him, but she did not know that he had also apparently been married to a non-Jewish woman in Argentina, that they had had a son together and that they had divorced according to the laws of that country. Had Rachel known these things before the wedding, she would probably have thought twice about binding her life to a "religious" man who had married a non-Jewish woman.

B. Furthermore, during the court hearings on the divorce suit, Rachel (and the rabbinic judges) discovered that Levi's military medical file stated that he "suffers from severe neurosis". Levi's subsequent behavior, and especially the letters he sent to the rabbinic court judges, including the last fax which claimed that he wrote the divorce "under threats, deadly torture and electric shocks", proved that he continued to suffer from that same neurosis after the

8 See additional details in *Jewish Law Watch*, Case Study Number 1, January 2000, pp. 12-13 and Case Study Number 2, September 2000, p. 16.

wedding. There is no doubt that Rachel would not have consented to marry him had she known of this illness before the betrothal.

Rabbi Moshe Feinstein ruled in *Igrot Moshe* (*Even Ha'ezer*, part 1, no. 80):

> Regarding a woman who marries a man and after several weeks he disappeared from her... because he has a mental illness that causes him to be afraid of people... and she has been an *agunah* for fourteen years and is asking the rabbis to try and correct her situation... and it is obvious that this mental illness is a serious defect and makes him unfit to be anyone's husband... it stands to reason that if she did not know her husband had this illness, and even if she did know but she thought he had been completely cured and only after the marriage did she discover he was ill and not completely cured... this should be considered a mistaken transaction and the betrothal should be annulled.

In the five years which passed between the time Rachel filed her divorce suit and Levi's signing of the *get*, when the rabbinic court rulings show that the judges all thought that Levi must give Rachel a *get*, and even asked the rabbinic court in Argentina to exert pressure on him, the judges should have looked into the possibility of freeing Rachel from her status as a chained woman without a divorce by annulling the betrothal on the grounds that it was a mistaken transaction.

3. THE BETROTHAL COULD HAVE BEEN ANNULLED

After Levi finally signed the *get*, Rachel was in an unbearable situation for an entire year: on the one hand, she was divorced according to the rabbinic court in Argentina where the *get* was prepared and written. On the other hand, she remained in her chained status and could not remarry because she did not receive a divorce certificate from the rabbinic court in Israel.

Since at Rachel's age every year counts when it comes to establishing a new family, in our opinion, immediately upon receiving the *get* from her husband, when the question of the validity of this *get* arose, the rabbinic court in Israel could and should have used its authority, in specific cases, to annul the betrothal based on the principle of ''whoever betroths [a wife], does so with the agreement of the Sages''.

The Annulment of Betrothals in the Talmud

Five Talmudic passages mention the annulment of betrothals by the Sages. These passages can be divided into two groups.

The first group (*Gittin* 33a-34a = *Yevamot* 90b, *Ketubot* 2b-3a, *Gittin* 72b-73a) consists of cases where the betrothal was done properly but the Sages sought to annul the bethrothal later on. In all of these cases, a *get* existed, but it was problematic. The Sages annulled the bethrothal in order to prevent a woman from becoming an *agunah* or her marrying another man without a divorce from her first husband or the drawing of misleading conclusions regarding the laws of divorce in general.

In the second group (*Yevamot* 109b-110a, *Bava Batra* 48b), the passages discuss cases where the Sages cancelled the bethrothal because it was not performed in accordance with their wishes. In those cases, no *get* existed at all.

In keeping with our topic, we will review only the passages in the first group, involving betrothals that were performed properly and in which a *get* of some sort existed.

A. RABBAN GAMLIEL THE ELDER'S ENACTMENT (*GITTIN* 33A-34A = *YEVAMOT* 90B)

The idea that the Sages have the ability to annul a betrothal appears in a discussion of the enactment of Rabban Gamliel the Elder regarding cancelling a divorce. We have learned in *Mishnah Gittin* 4:1-2:

> If a man sent a bill of divorce to his wife and then overtook the messenger or sent another messenger after him and said to him ''The bill of divorce that I gave to you is void'', it thereby becomes void. If he reached his wife first or sent another messenger to her and said to her ''The bill of divorce that I have sent to you is void'', it thereby becomes void. But [if he or the messenger reached her] after the bill of divorce came into her hand, he can no longer render it void. Originally [the husband] used to set up a court elsewhere to cancel [the *get*], but Rabban Gamliel the Elder ordained that they should not do so *mipney tikkun olam* [= for the sake of society].

Rabban Gamliel the Elder's enactment says that the husband may not cancel a *get* that he sent unless he is in the presence of the wife or the messenger. The reason for this prohibition is *mipney tikkun olam* – ''for the sake of society''.

The Gemara (*Gittin* 33a) explains the meaning of the words '' *mipney tikkun olam*'':

> What does '' *mipney tikkun olam* '' refer to? Rabbi Yohanan said: for the benefit of bastards. Resh Lakish said: for the the benefit of *agunot* .

The author of the passage cites two explanations for Rabban Gamliel the Elder's enactment. According to Rabbi Yohanan's explanation, the enactment prevents the birth of bastards: without the enactment, a woman may think she is divorced because she does not know that her husband cancelled the divorce, may remarry, and the children born of the second marriage will be bastards because she is still the wife of the first husband. According to Resh Lakish's explanation, the enactment was instituted in order to prevent situations in which a woman would be chained, in cases where the wife thought that her husband cancelled the divorce, but he in fact did not do so. Even though she is really divorced, the wife will not dare remarry and remains chained. [9]

Later, the Gemara quotes a dispute between Rabbi Yehudah Hanassi and Rabban Shimon ben Gamliel on what ruling should be made after the fact if the husband nevertheless cancelled the divorce before another court, not in the presence of his wife, and violated the enactment of Rabban Gamliel the Elder. According to Rabbi Yehudah Hanassi, the divorce is cancelled after the fact because according to the law of the Torah, a husband may indeed cancel a divorce, even when the wife is not present. According to Rabban Shimon ben Gamliel, a husband cannot cancel a divorce; otherwise, what power does the court of Rabban Gamliel the Elder, which instituted the enactment, have? As the Gemara puts it (*Gittin* 33a):

> Our Sages taught: if the husband cancelled it, then it is cancelled – according to Rabbi [Yehudah Hanassi]; Rabban Shimon ben Gamliel says: he cannot cancel it... because if that is the case, then what power does the court have? Is there a case where, according to the Torah, a divorce is cancelled and yet because of ''what power does the court have'' we allow a woman to live with another man [while she is still married to her husband]? Yes! Whoever betroths [a wife], does so with the agreement of the Sages, and the Sages can annul his betrothal.

In other words, the author of the passage is asking whether it is possible to cancel a Torah law in order to confirm the power of Rabban Gamliel's court. He answers in the affirmative and explains that Rabban Shimon ben Gamliel's understanding of Rabban Gamliel's enactment is based on the fact that every man who betroths a wife does so with the understanding that this action is in

9 This explanation is based on the parallel passage in *Yerushalmi Gittin* 4:2, 45c.

agreement with the Sages. Therefore, if the Sages decided to annul the betrothal, it is annulled.

When the husband betroths a wife, he accepts upon himself that if he violates the Sages' laws, for example if he cancels a divorce in his wife's absence, the Sages have the authority to cancel the betrothal, even if according to the laws of the Torah the *get* is not a *get* and the wife is still considered a married woman. [10]

B. DIVORCE AS A RESULT OF MISHAP (*ONESS*) (*KETUBOT* 2B-3A)

This passage cites cases where the husband is absolved from financial obligation when a marriage is delayed due to mishap. A statement is then quoted: ''Rava said: and with regard to divorce, it is not so''. And the author of the passage concludes from this: ''Consequently Rava thought: mishap is no plea with regard to divorce''.

This refers to cases where the husband gives his wife a bill of divorce and declares that if he does not return by a certain time, she is divorced. As mentioned, Rava does not accept any claim of a mishap in such cases; in his opinion, when the time has passed, the woman is divorced, even if the husband's failure to return within the specified time was due to mishap.

Further on, an attempt is made to find the source that prompted Rava to say what he said, because in the Torah, *oness* [= duress] exists even in divorce cases, as Rashi explains (*ibid* 3a, catchword דמדאורייתא): ''For we find the claim of *oness* [= duress] from the Torah as it is written (Deuteronomy 23:26) 'And you shall not do a thing to the maiden'''. [11]

The author of the passage then looks for a source for Rava's remarks among the Sages who preceded him, but without success. Therefore he concludes: ''Rava was expressing his own opinion because of the chaste women and because of the loose women'' (ibid.). In other words, Rava, who lived in Babylonia at the beginning of the fourth century C.E., came to innovate a halakhah without a precedent, due to circumstances similar to those which, according to Rabbi Yohanan and Resh Lakish, prompted Rabban Gamliel the Elder to institute his enactment in the first century C.E. If the argument of mishap is permitted in divorce cases, it may lead to a situation where women are chained or where illegitimate children are born.

10 The Gemara means that in this case there is no uprooting of something from the Torah. For various explanations of this passage by the *Rishonim*, see below, pp. 21-22.

11 According to Rashi, the case in Deutoronomy of a woman who was raped far from any city – so that it cannot be argued that she could have cried out for help – shows that the claim of *oness* [= duress] exists in the Torah.

Rava thought that if the halakhah permits a claim of mishap in divorces, there would be cases where a woman might think that her husband was delayed under duress and would wait for him, because she assumed the divorce was not valid, but in fact the husband is not under duress, and the wife is in a chained state. On the other hand, there could be a case where the husband really was under duress, but the wife, thinking he was not and believing that she is divorced, marries another man. The children she gives birth to by the second husband will be bastards since she is still a married woman. If the husband is unable to appear due to mishap, the divorce is cancelled according to the Torah, because the condition was not upheld, but following Rava's opinion, the divorce is valid.

As in the above passage in *Gittin*, the Gemara asks about uprooting something from the Torah (*Ketubot* 3a):

> Is there a case where, according to the Torah, a divorce is not a divorce and yet because of chaste women and licentious women a man's wife is permitted to the rest of the world?

In other words, since the claim of duress exists in the Torah, how can we uproot something from the Torah and not accept the argument of duress in a divorce case and say that the woman is nevertheless divorced? As in the case of cancelling a divorce, the answer is (*Ketubot* 3a): ''Whoever betroths [a wife], does so with the agreement of the Sages, and the Sages can annul his betrothal''. Every Jewish man who betroths a wife does so in accordance with the will of the Sages and they may annul his betrothal. In other words, even though according to the Torah the *get* is not a *get*, the betrothal is annulled and the woman is permitted to marry someone else.

C. DIVORCE FROM SOMEONE WHO IS IN CRITICAL CONDITION (*GITTIN* 72B-73A)

This case refers to a critically ill person who wants to give his wife a divorce so that she will be spared having to undergo a levirate marriage. This talmudic passage reviews the circumstances in which such a divorce is valid. *Mishnah Gittin* 7:3 states

> that if a husband says ... ''This is your *get* from today if I die of this illness'', but he rose up and walked in the street and grew ill again and died, they must estimate – if he died of the first illness, the *get* is valid; otherwise it is not valid.

If a husband died of the illness he had at the time he granted the divorce, the divorce is valid even if he recovered for a period of time from the illness. But if the husband, after his recovery, died of other causes, the divorce is not valid.

In the Gemara (*Gittin* 72b), there is a dispute between Rav Huna on the one hand, and Rava and Raba on the other. Rav Huna said: ''His divorce is like his gift; just as his gift is returned if he recovers, so too his *get* returns if he recovers''. In other words, the husband gave his wife a divorce because he was certain that he was going to die, but he did not intend to divorce her if he lived. Therefore, for Rav Huna, as in the case of a person who gives away all of his possessions because he believes he is about to die, and if he recovers, his gift is returned (see *Bava Batra* 151b), so too in a case of a *get* – if he recuperates, the *get* is not valid.

Rava and Raba do not accept this position of Rav Huna (*Gittin* 73a):

> Rava and Raba do not hold the same view as Rav Huna, lest it be said that there is a *get* that goes into effect after the husband's death.

They reasoned that if the divorce becomes valid only when the man dies, people will think there is such a thing as a posthumous divorce, because they will not know that the husband gave the divorce while he was ill and meant the divorce to take effect from the moment he gave the divorce, were he to die. Therefore, Rava and Raba prefer to say that the *get* is valid, even if the husband remains alive (see Rashi, ibid., catchword *gezeirah*).

This latter ruling again leads to the problem of uprooting something from the Torah, as the Gemara explains (*Gittin* 73a):

> Is there a case where, according to the Torah, the *get* is not valid, and because of a rabbinical decree, a married woman is permitted to the rest of the world?

In other words, according to the Torah, the *get* is not valid because the husband gave it while thinking that he was going to die, but then he did not die. So when the wife is permitted to marry, it seems as if they uprooted something from the Torah. The reason for the ''uprooting'' is only the argument of ''lest they say'', which is a less severe problem than the problems of *agunot* and illegitimacy. Nevertheless, the answer is once again (*Gittin* ibid.): ''Whoever betroths [a wife] does so with the agreement of the Sages, and the Sages can annul his betrothal''. In matters of betrothals, the Sages determine when they exist and when they do not.

We have seen three passages that cite the same principle: every man who betroths a wife does so in accordance with the Sages and they may therefore cancel the betrothal if they so decide.

Annulling the betrothal in the case under discussion

After the Talmudic era, annulling a betrothal was a subject of controversy. Many responsa were written on the subject when medieval communities wanted to

enact enactments and use the principle of ''whoever betroths'' in order to combat the phenomenon of hasty betrothals and to annul betrothals that were not performed according to their enactments. The rabbinic authorities discussed whether the sages of their generation still had the power to annul a betrothal that was not performed ''properly'' and if so, in what circumstances.

Some authorities thought that although the scholars of their generation do have the power to annul a betrothal that was not done according to their stipulations, this possibility exists only ''in theory'' and not ''in practice''.

Others claimed that annulment could be used only in cases identical to the cases described in the Talmudic passages. The Rashba (Barcelona 1235-1310), for example, was asked if a betrothal that was performed in the presence of rabbinically invalid witnesses should be considered valid or not. He replied (*Responsa of the Rashba* , Part I, no. 1185):

> It seems to me that we recognize the bethrothal... since they did not explicitly say ''whoever betroths...'' [in relation to rabbinically invalid witnesses]... but in these matters we only include cases which [the Sages] explicitly allowed... Wherever they said it, they said it; wherever they did not say it, on our own, we do not say it.

As mentioned, this responsum refers to a betrothal that was performed improperly and against the wishes of the Sages. According to this responsum of the Rashba, one can annul a betrothal that was made contrary to the Sages' wishes only in cases that precisely resemble the cases described in the Talmud. [12]

On the other hand, there is little mention in the responsa literature of the use of annulling a betrothal in order to free *agunot* in cases where the betrothal was done according to the will of the Sages. Apparently, the halakhic authorities did not suggest using this option in such cases because usually in cases of chained women, no *get* exists.

But in our case, there is a *get* and there is a doubt (according to some rabbis); as a result, we have all the ingredients of the passages we learned above (*Gittin* 33 and *Ketubot* 2-3). If Rachel asks the court in Argentina, they will tell her she is divorced. And if she asks the court in Jerusalem, they will tell her ''we have not yet eliminated all doubts''. We are therefore dealing with a problem of *agunot* and bastards: if Rachel does not marry, following the ruling of the Jerusalem court, she will remain an *agunah.* If she marries, following to the ruling of the Argentinian court, the children by her second husband will be deemed doubtful bastards in the eyes of the Jerusalem court.

12 For this note, see the Hebrew section of this booklet.

Therefore, in our case it was possible to annul Rachel's marriage by following the opinions of some of the major *Rishonim.*

A) According to Rashi's opinion, ''whoever betroths'' etc. is a social convention, i.e. every Jewish man who betroths a woman in a Jewish betrothal ceremony automatically accepts upon himself – even in a case where he acted improperly! [13] – the authority of the Sages to maintain his betrothal or to cancel it as they see fit. This means that due to the legal fiction of ''whoever betroths'' the validity of the betrothal is a social convention and as long as the authorities in that society – the Sages – agree, they can annul the betrothal retroactively. Since Levi betrothed Rachel ''according to the law of Moses and Israel'', he implicitly expressed his opinion ''that the betrothal should take place according to the laws of Moses and Israel which the Sages enacted and they said that all Jewish betrothals will be annulled *by a get such as this*, therefore the betrothal is annulled because he betrothed her on that condition'' (Rashi to *Gittin* 3a catchword *adata*). In our case, there is ''a *get* such as this'', so that even after its being given, Rachel doesn't know whether she is divorced or not, as explained above. In such a case, rabbis can annul the betrothal (cf. Rashi to *Ketubot* 3a, catchword *kol d'mekadesh*). [14]

B) The Rashbam in France (ca. 1080-1174) and the rabbis of Spain developed a theory according to which the passages in *Gittin* and *Ketubot* do not refer to legal annulment but to regular divorce. They claim that if the husband knew that in a case such as this the rabbis would annul his marriage and retroactively turn all of his sexual relations with his wife into fornication, he would decide in his heart to divorce his wife in order to avoid such a result. [15] We could apply this approach to our case as follows: Had Levi known that

13 See Rashi to *Yevamot* 110a catchword *v'ka afk'inhu* and catchword *shavyuha*. Rashi says that as long as there was a betrothal ''according to the law of Moses and Israel'', the Sages say that he relied on their opinion, for it is clear that a man who snatches a woman (ibid.) wants to betroth her even without the Sages' agreement. But since he wants his betrothal to be publicly recognized, he nonetheless accepts the authority of the Sages. Thus his betrothal is valid because ''he relied on their opinion'' and the Sages therefore uphold it. This is our intent when we say that according to Rashi the institution of betrothal is a social convention dependent on the agreement of the Sages.

14 As explained above, there was disagreement in the Middle Ages as to whether the post-talmudic Sages have the power to annul a betrothal – see, for example, the Ra'avan, *Even Ha'ezer*, Part 3, ed. Jerusalem, 1915, fol. 47b. However, that source is not discussing a case where, but for annulment, the woman would have remained an *agunah*. In our case, we should rely on those who think that it is possible to annul a betrothal even after the talmudic period in order to prevent *agunot*.

15 For this note, see the Hebrew section of this booklet.

even after he faxed the cancellation to Jerusalem, Rachel would be doubtfully divorced and the rabbinic court would retroactively annul his marriage so that all his prior sexual relations with his wife would be considered fornication, he would no longer have intended to cancel the *get*.

C) Rabbi Menahem Hameiri (Provence 1249-1316) went further; he thought that the Sages have the right to annul a betrothal **even without a *get***. And here are his words (*Bet Habehira* to *Ketubot* 3a, ed. Sofer, p. 14):

> When they said ''the Sages annul his betrothal'' they said so not only in a case such as this where there is a *get* which is not kosher, **but even in a case where there is no *get* at all**. And even though there are great [rabbis] who wrote that [one can do annulment] specifically where there is some sort of *get*, you learn our approach from *Yevamot* (110a) [where they annulled a betrothal that was done improperly even without any sort of *get*]...

According to the Meiri, the Sages have the power to annul betrothals, and they may exercise this power both in cases where the betrothal was done improperly, and in cases where there was a doubtful *get*. Since in our case some rabbis say that the *get* was perfectly valid, while others say that there was a doubtful *get*, according to the Meiri's approach, we can annul the betrothal using the principle ''whoever betroths [a wife], does so with the agreement of the Sages, and the Sages can annul his betrothal''.

IN CONCLUSION

1) For five years, Levi refused to give Rachel a divorce. In our opinion, during all those years, the rabbinic judges could have released Rachel from her status as a chained woman by cancelling the betrothal, which was clearly a mistaken transaction.

2) In March 2000, after five years of keeping Rachel chained, Levi finally wrote Rachel a *get* and then tried to cancel it by claiming in an anonymous fax that it was a forced divorce. The rabbinic courts handling the case in Jerusalem decided according to the majority opinion, that there were doubts about the validity of the *get* and refused, after giving Rachel the *get*, to issue her the certificate of divorce. But as we have seen, at that point there were two ways of freeing Rachel from her status as an *agunah*: by accepting the arguments of the *Av Bet Din* of the Supreme Rabbinical Court that the *get* was valid or by annulling the betrothal. In our opinion, the case under review justifies using the option of annulling a betrothal. Rachel was an *agunah* for over five years

and obtained a *get*, and even if someone claims that the *get* is problematic, it nevertheless exists. In this case, use could and should have been made of the power given to rabbis to annul a betrothal, based on the Talmud and the medieval authorities quoted above.