CIVIL AND RELIGIOUS LAW CONCERNING DIVORCE: 
THE CONDITION OF WOMEN AND THEIR EMPOWERMENT

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Abstract

This paper examines the condition of women in religious systems, specifically their freedom to leave a marriage in countries where marriage and divorce are ruled by personal status laws (such as Israel and Islamic countries), and the efforts to accommodate religious specificities and practices in different legal contexts, which adopt a secular, multicultural approach. First, the paper considers the nature of religious and civil divorce, comparing a private, a public, and a mixed private/public approach. Second, it analyzes the forms of dissolution of marriage in both religious systems (identifying some aspects of gender disparity) and secular systems (where gender equality is constitutionally required). Finally it compares the juridical tools for civil enforcement of religious divorce and for solving family disputes that are offered in different legal contexts (in Israel, Islamic countries, Europe, and the USA) and that are intended to rebalance the exercise of a woman’s freedom to leave a marriage and its conditions.

I. INTRODUCTION

Historically, marriage has been at the center of a tension between religious and secular systems, although the relationships between those systems generally lean towards influence and cooperation rather than exclusion and separation.1 Traditionally, religious law has played a key part in emphasizing the importance of an individual’s right to self-determination in marriage matters and in promoting the equality of women within marriage.2 Moreover, religious systems anticipated secular law with regard to the marriage crisis, sometimes (and through varying measures) granting “exit freedom” from a marriage, even when secular systems did not, or granted it under very restricted

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1 See Edoardo Dieni, Introduzione al Tema, 2 DAIMON 3, 9 (2002).

circumstances.  Divorce is, of course, an exception to marriage stability in all religious systems.

Since the mid-twentieth century, several Western secular systems have adopted an institutional idea of marriage where individual freedom is protected only if it matches a more important state interest. For this reason, public agencies have been charged with authorizing (or not) both the creation and dissolution of marriage and governance of the life of a marriage. More recently, civil marriage has developed a secularized and private trend, departing from the Christian/religious model. In this way, full freedom to marry is connected to a wider freedom to withdraw from an unsatisfying marriage for many reasons. Marriage is, therefore, losing its role as a means of social cohesion, as a place to “learn citizenship,” as a “seminarium rei publicae”; and the greater weakness of marriage makes a person more vulnerable and more excluded from the social context in which he or she participates.

In addition, modern Western systems must address the competing needs of both accommodating a plurality of new religious cultural peculiarities and also determining the limits of the reception of different identities within their own value systems. A critical point is marriage freedom, specifically divorce freedom and the costs of the exercise of this freedom for a woman. Some religious models seem to refuse the “modern” paradigm that implies that different gender does not mean different roles; these models promote systems founded on an “asymmetric polarity.” In such systems, marriage is important not only for the individual but also for the community; it gives a benefit not only to the individual but also to the wellbeing of the group. Women are burdened with the social expectation of the perpetuation of the specific identity of a community. For this reason, they are subject to more rules and forms of control, they have a status of inequality and dependence within their own community, and their marriages are not stable (resulting in polygamy, separation, or divorce) when they are not able to perform the function towards which they aim.

Both in Israel and in Islamic countries a woman’s condition, her role, and her expectations are at the crossroads between tradition and modernity,

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3 See A. Marongiu, Divorzio (Storia), in 13 ENCICLOPEDIA DEL DIRITTO 482, 482–504 (Giuffrè, 1964).
4 See Andrea Bettetini, La Secolarizzazione del Matrimonio Nell’Esperienza Giuridica Contemporanea 21 (Cedam, 1996).
7 See Kari Elisabeth Borresen, Modelli di Genere Nelle Religioni e Diritti Umani Delle Donne, in DONNE, DIRITTI, DEMOCRAZIA 121, 122 (Giovanna Fiume ed., XL Edizioni SAS 2007).
8 See Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights 78–80 (Cambridge Univ. Press 2002).
universal and specificities. These systems are open, albeit in different measure, to the impact of globalization, to the affirmation of human rights at an international level, and to the elimination of every form of discrimination; but a woman’s position cannot yet be considered equal. Even though, because of Western influence, secularization is being applied to various branches of law, in the field of marriage law the liberty to free oneself from the rules of religious belonging is not recognized. A patriarchal and male-centered model of the family continues to predominate, thus tending to perpetuate the distinction of gender roles between public and private spheres. This occurs within the ambit of the specific dynamics of the relationship between the state, groups, and individuals, where typical community identities prevail over individual ones, and the state is not able to offer an effective secular alternative. The presence of elements of gender disparity is nevertheless not wholly due to the complex relationship of the integration of secular and religious law but also to historical, political, and social factors that tend to direct social praxis, creating pockets of resistance. The distinction between the cultural and religious element is not easily defined.

From a multicultural perspective, the comparison, and sometimes the conflict, between a plurality of norms develops within the framework of the fundamental values of religious freedom, pluralism, democracy, equality, and equal dignity of every individual, without regard to sex, race, language, culture, or religion. From a Western perspective, these fundamental values are rooted not only in state juridical systems but also in the framework of European Union and international principles, specifically in human rights legislation, which protection cannot be limited by forms of cultural or religious relativization.9

Problems relating to human rights arise in two main situations. First, in a model of weak multiculturalism, in some instances the state is likely to enforce foreign decisions (not always viewed as compulsory in the West) in the light of a system increasingly modified to accommodate new needs. Second, problems occur when doubt is cast on the principle of the unity of jurisdiction by the admission of forms of private, including religious, jurisdiction (either de facto or de jure) and contractualization of aspects of marriage—including the conditions of its dissolution or its non-dissolution (covenant marriage).

II. EXIT FREEDOM WITHIN DIFFERENT RELIGIOUS SYSTEMS

The recognition of exit freedom (in varying measure) from marriage is connected to the view of marriage as a contract, lacking a sacramental dimension. Whether marriage is viewed as a public or private institution has an impact on the level of recognition of the partners’ autonomy and on the role of the judicial/religious authority. The rules concerning the “exit freedom”10 are a useful parameter for evaluating the model of marriage (“strong” or “weak”) adopted in a juridical system; they also allow consideration of the costs of “exit

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10 See Dieni, supra note 1, at 3.
freedom” for a citizen of faith, which are connected to the choices of access to marriage in accordance with his or her own religious law.

In Jewish law, a view of marriage as a contract prevails: there is a wide freedom to dissolve marriage; yet, at the same time, religious authorities have limited powers to resolve difficult situations (e.g., when the husband refuses to give the ghet (divorce paper) to his wife) and to settle disputes. In Roman Catholic canon law, where the marriage is also seen as a sacrament, the religious system offers a model of marriage whose basic characteristics and purposes are not modifiable by the two partners. The power to dissolve marriage comes from the religious authority, albeit with the necessary participation of the parties. The dominant role of the authority is coherent with its power to declare a marriage invalid, not only for the benefit of the parties involved but also in the superior interest of ascertaining the truth. Islamic law, as adopted in modern Arabic countries, recognizes divorce both in a private form (by the decision of one or both parties) and in a public form (by judicial decision). Modern legislations tend to accommodate divorce in forms that require the participation or at least supervision of religious and/or judicial authorities.

Religious systems have different levels of recognition of equality between partners regarding divorce. Some gender differences need to be contextualized in the light of the social, historical, juridical, and religious principles, values, and disvalues that characterize marriage within the ambit of specific religious laws. All of the systems, though at different stages of evolution, have tended to move from a male-centered concept of marriage towards a perspective that increasingly recognizes female dignity and the equal role of the wife.

Unilateral exit freedom from marriage is more commonly recognized when religious law adopts a contractual/privatistic approach to marriage; otherwise, dissolution is permitted only when it is in accord with a superior interest of the religious system (e.g., favor fidei in Catholic canon law) and has its basis in the divine project of salvation.

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12 See Enrico Vitali & Salvatore Berlingò, Il Matrimonio Canónico 10 (Giuffrè 2007).
III. DISSOLUTION OF MARRIAGE UNDER JEWISH LAW

In Jewish law, divorce, while it is permitted, is viewed negatively because of the positive value of the stable bond of marriage. Through the centuries, Jewish marriage has adopted different models, according to the level of influence of different religious systems. These models have tended to alternate between the recognition of a unilateral (mainly male) exit freedom from marriage (perceived as a sort of “free association”) and acceptance of an exit freedom strongly restricted either by the necessity of the consent of both spouses or by other requirements, with marriage therefore developing in a “corporative direction.” In some of these models there is a disparity between the spouses’ positions: one appears involved in an associative bond, while the commitment of the other has the character of the charter of a corporation.

A rebellious woman is one who requests her exit freedom from marriage because of repulsion for her husband. The exercise of this freedom meets different levels of recognition, depending on the marriage model adopted, which either places the individual freedom of spouses on an equal level or privileges the husband or favors marital unity. In all models there is a common trend to impose correctives to the disparity in the spouses’ positions. This may be achieved by extending female exit freedom, making it equal to men’s, and also admitting the possibility of unilateral divorce for women; by restricting men’s freedom (divorce by mutual consent); or by imposing dissolution of a failed de facto marriage religiously “in law,” by granting and accepting the ghett.

Monogamy has never been a strongly typical aspect of Jewish marriage; different expressions of sexuality have traditionally been accepted for men (both polygamous marriage and extra-marital relationships). However, the monogamous, strong corporative, more difficult to dissolve, model of marriage has prevailed in Ashkenazi tradition, since it fulfills the need of an efficient and functional model.

The divorce paper (ghett) is always required. A man grants the ghett and a woman accepts it in the presence of two witnesses, thus granting both parties free status once again. This procedure underlines, if only from a formal point of view, male dominance in the conceptual understanding of marriage.

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16 See BROYDE, supra note 11, at 15–28.
17 Id. at 17.
18 Id. at 23.
20 See Deuteronomy 24: 1–2 (King James).
21 See Rabello, supra note 15, at 81.
dissolution in Jewish law. The aim of the procedure is to protect the certainty of the status of a marriage, exercising a form of control over women.

From the biblical perspective, divorce was viewed as being the same as repudiation: it was out of normative control and an arbitrary act of a man, as a “déclaration de désamour”; a man could also demand reconciliation and take a woman again, if she did not marry in the meantime. The Torah grants a unilateral male the right to divorce, without the woman’s consent and with a restricted duty to repay a dowry; a woman could seek divorce only if there was evidence of grave fault on the part of her husband. Such male dominance resulted in the admission of polygamy. In the Talmudic period, there was movement towards equality in divorce: a woman’s right to divorce as the result of a number of circumstances caused by her husband was admitted, while she maintained a total or partial right to her dowry; a man’s right to divorce was restricted by appropriate use of the ketubah (marriage contract) clauses. In the rabbinic period, even though the man’s unilateral right was maintained, his patrimonial duties were increased when the woman was not at fault in a divorce; the definition of patrimonial duties was made a compulsory part of the marriage contract.

According to the Geonim perspective, marriage is closer to a free association; dissolution can happen by each spouse’s will or by mutual consent. A woman can obtain divorce if she has abandoned her family for a certain period, without losing her dowry. Religious authorities have the power to decide compulsory divorce and annulment (retroactive divorce) of marriage for the sake of parity; the ghett is not required in the case of annulment. When marriage contract clauses have not been observed, annulment can be granted. This marriage model is “weak” (one of partnership), and maintenance of the marriage depends on a continuous consent, freely revocable by each spouse.

The Geonim model (which gave more power to rabbinic authorities) was subsequently abandoned and replaced by a plurality of options that emphasize the autonomy of the parties rather than the intervention of religious authorities. Sometimes the unilateral freedom to divorce is emphasized, with the two spouses having equal right to that freedom spouses; sometimes a

24 See Atlan, supra note 23, at 53.
25 See Deuteronomy, supra note 20.
26 See Brody, supra note 11, at 17.
27 See Brody, supra note 11, at 18.
28 See Brody, supra note 11, at 19.
29 Id.
30 Id. at 19.
31 See Brody, supra note 19, at 93.
33 See Brody, supra note 11, at 19.
34 See Brody, supra note 19, at 93.
contractualistic approach founded on mutual consent is affirmed; sometimes the female position in the marriage contract is strengthened; sometimes failure of a marriage is used to declare a divorce.\textsuperscript{35}

The predominant model—adopted in Europe, Israel, and the USA, after a decree of Rabbi Gershom—denies either spouse the ability to free themselves unilaterally from the marriage bond: divorce can only be obtained by the mutual consent of both parties, with the exception of the instance of gross fault.\textsuperscript{36} In the case of a marriage prohibited by religious law, each spouse can obtain a divorce, even if the other spouse does not grant consent or was not conscious of the prohibition.\textsuperscript{37}

The agreement between parties to a divorce concerns not only the exercise of the freedom to leave a marriage but also the specific conditions.\textsuperscript{38} In this “strong” model, spouses are set on an essentially equal footing, by a reduction of the rights that formerly pertained predominantly to the husband.\textsuperscript{39} The model is strengthened by the prohibition of polygamy, enforced by the same decree.\textsuperscript{40} The concept of fault is redefined in a stricter way, excluding cases of slight fault.\textsuperscript{41} Only in the case of gross fault can one of the spouses, at the request of the other, be forced to dissolve their marriage, by a procedure directed by rabbinical authorities.\textsuperscript{42}

Some scholars believe that Rabbi Gershon’s decrees simply formalized well-established social praxis.\textsuperscript{43} In any case, various factors favored the establishment of a strong form of marriage: externally, the influence of the European Christian tradition, which affirmed a marriage model founded on consent and a strict condemnation of polygamy; internally, the Ashkenazi aspiration to maintain the Palestinian monogamous model; finally, the wish to grant increased stability to marriage and certainty to a woman as to the enjoyment of her marriage status in the context of central Europe.\textsuperscript{44} An institutional ideal of marriage developed, whereby the family becomes a microcosm of society, protecting social structure and guaranteeing its perpetuation.\textsuperscript{45} Concern for family unity prevails, even though it is not always coherent with the individual needs of its members; marriage and divorce become, to a certain extent, “public” institutions, through community approval and rabbinical supervision.\textsuperscript{46} This concern for family unity is gradually placed

\textsuperscript{35} See BROYDE, supra note 11, at 20–23; BREITOWITZ, supra note 32, at 5–40.
\textsuperscript{36} See Rabello, supra note 15, at 61–79.
\textsuperscript{37} Id. at 79.
\textsuperscript{38} Id.
\textsuperscript{39} See BROYDE, supra note 11, at 21.
\textsuperscript{40} See ATLAN, supra note 23, at 38.
\textsuperscript{42} See Rabello, supra note 15, at 62.
\textsuperscript{43} See Michael S. Berger, Maimonides on Sex and Marriage, in MARRIAGE, SEX AND FAMILY IN JUDAISM, supra note 19, at 128.
\textsuperscript{44} Id. at 129–30.
\textsuperscript{45} Id. at 132.
\textsuperscript{46} Id. at 131.
in a higher position than the traditional procreative function, typical of Jewish marriage.47

IV. DISSOLUTION OF MARRIAGE UNDER ROMAN CATHOLIC CANON LAW

The Roman Catholic Church has traditionally promoted the affirmation of an equal dignity for women. The strict restriction of (mainly male) exit freedom from marriage (*bonum sacramenti*, “for the good of the sacrament”); the Augustinian prohibition of discrimination against women because of infertility (which was often used to legitimate repudiation); the affirmation that access to marriage should be founded only on free consent of spouses, without any family, social, or economic conditioning; the rejection of polygamy (*bonum fidei*, “for the good of the faith”)—all are signs of a process of female emancipation that developed in the second half of the twentieth century and that the Church anticipated.48

In canon law, indissolubility implies an everlasting bond and the prohibition of dissolution of a valid marriage contract through the private will of the spouses or the public power of the Church for any reason.49 Consent cannot be revoked and spouses cannot request dissolution.50 Because of this system of consent, spouses acquire a permanent status; in contrast, in secular systems a spouse can erase the effects of marriage through divorce.51 In secular systems, consent is continually subject to verification, having to be confirmed day by day, because it is connected with the maintenance of the common material and spiritual life of the spouses.52 Repudiation (divorce by unilateral declaration) is prohibited.53

There are, in fact, two exceptional reasons for dissolution in canon law: dispensation for non-consummation, and dissolution for a privilege of faith (*favor fidei*).54 All canonical marriages are intrinsically indissoluble, but some of them are not absolutely extrinsically indissoluble.55 Marriage *ratum et consummatum* (“established and consummated”)56 is absolutely extrinsically indissoluble; thus dissolution is only possible if one of these conditions is absent.57

For marriage *ratum*, Catholic doctrine takes the example of the union of the soul with God; for marriage *consummatum*, the mystic union of Christ with

47 Id. at 130.
48 See Dieni, supra note 1, at 10–15.
49 See VITALI & BERLINGÒ, supra note 12, at 18–19.
50 Id. at 10.
52 Id. at 33.
54 See 1983 CODE cc.1142–43.
55 See VITALI & BERLINGÒ, supra note 12, at 10.
56 See 1983 CODE c.1141.
57 See Ermanno Graziani, *Divorzio (Diritto Canonico)*, in 13 ENCICLOPEDIA DEL DIRITTO, supra note 3, at 535–47.
his Church. The first can be dissolved as the result of a contrary disposition; the second cannot be dissolved. A non-consummated marriage (ratum et non consummatum) has not completely realized its purposes, yet even this type of dissolution requires the presence of a fair reason. Dissolution in these cases can be requested by both spouses or by one of them, but not unknown to the other. The spouses do not have a specific right to dissolution: the decision is a pontifical concession and at his discretion, since marriage ratum et non consummatum can only be dissolved by the Pope.

Other possible instances are those where the rule of favor fidei permits an exception to the rule of the indissolubility of marriage. The increasing presence of a plurality of religions in civil society makes these cases more frequent. Canon law answers not only to the need of the faithful that the final failure of his or her marriage is accepted but also to the superior interest of the Church to protect the salus animarum. For this reason, the faith must be favored over the marriage (favor fidei rather than favor matrimonii), even when there is doubt about the presence of one or other legal requirements. The Church’s interest includes the possibility that a new marriage may give some spiritual benefit.

Marriages between non-baptized people may be dissolved by Pauline privilege when one spouse has converted to the Christian faith and been baptized and the other one—when interrogated by the local Ordinary on his or her intentions (whether he or she wishes to receive baptism or at least to cohabitation)—does not answer or departs or answers negatively, unless the baptized party gave the other a just cause for departure. In such an event, the converted party may contract a new marriage; the previous marriage is considered as dissolved ipso jure, without a formal ecclesiastical decision. The intervention of ecclesiastical authority is required for the validity of the new marriage, in the form of the interpellation of the local Ordinary, unless a dispensation has been granted.

The 1983 Code of Canon Law grants two other specific instances of dissolution by Pauline privilege of a marriage contracted by a non-baptized person. The first instance arises when a spouse is baptized and is not able to

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58 See VITALI & BERLINGO, supra note 12, at 10.
59 See EDOARDO DIENI, TRADIZIONE “JUSCORPORALISTA” E CODIFICAZIONE DEL MATRIMONIO CANONICO 250–61 (Giuffrè 1999).
60 See 1983 CODE c.1142.
61 Id.
63 See VITALI & BERLINGO, supra note 12, at 135.
64 See 1983 CODE c.1150.
67 See VITALI & BERLINGO, supra note 12, at 208; P. Moneta, Lo Scioglimento del Matrimonio in Favore Della Fede Secondo una Recente Istruzione Della Santa Sede, 1976 DIR. ECCL. 230, II.
68 See 1983 CODE c.1144.
resume cohabitation because of external events (captivity or persecution); in these cases he or she may contract a new marriage, even if the other party has been baptized in the meantime.69 The second instance concerns the conversion of a polygamous husband: after being baptized, he may keep one of his wives while dismissing the others, and he does not have to remain with the first person he married if it is difficult for him to do so.70

A further instance of dissolution in favor of faith is permitted by Petrine privilege, in which instance dissolution is conceded by pontifical dispensation alone; this case has been reformed by the 2001 “Norms to Complete the Process for the Dissolution of the Matrimonial Bond in Favor of the Faith.”71 A marriage between a non-baptized person and a baptized person in a faith different from the Catholic one may be dissolved when one of the spouses converts to Catholicism, if the impossibility to restore common life between spouses is ascertained and there is a just cause (e.g., the wish to enter a second marriage with a baptized person).72 Another condition is that the spouse who asks for dissolution must not be partially or totally responsible for family disintegration.73

Nowadays, the equality between men and women under secular law in all aspects of the marriage relationship and that law’s legitimization of an increasingly large number of possible reasons for dissolution of a marriage cause a clash between secular and canon law, which permits only limited cases in which an insoluble crisis in marriage may be taken into consideration.74 There is a divergence between the ways of addressing marriage breakdown, which gives life to a number of alternative scenarios within the ambit of a pluralistic society. The traditional canonical model is subject both externally and internally to a continuous process of remission in discussion, which risks weakening it.75

Some scholars suggest that the expression “divorce” should not be used when dissolution happens through procedures that do not actively and completely involve both parties, but rather privilege the spiritual wellbeing of the faithful party.76 Others recognize an “existential” consummation, which involves not only the carnal union but also the progressive realization of a complete and mature communion of life between the spouses.77 Yet, others suggest that canonical marriage might not be the only marriage form in conformity with the divine project but simply the canonization of a specific

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69 See 1983 CODE c.1149.
70 See 1983 CODE c.1148, § 1.
71 See Normae, supra note 65, at 1139–44.
72 Id. art. 4 § 1; art. 7 § 1, at 1142.
73 Id. art. 4 § 2, at 1142. See also Paolo Moneta, Le Nuove Norme per lo Scioglimento del Matrimonio in Favore Della Fede, 2002 DIR. ECCL. 1131, II.
74 See Ferrari, supra note 51, at 33.
culture, if we may permit ourselves to consider that divine project as not strictly fixed, or even the possibility of a plurality of divine projects. Finally, still other scholars enlarge the scope of the study, and emphasize indirect instruments to reach an aim (freedom from a failed marriage) that may not be reached directly under the canonical system.

V. DISSOLUTION OF MARRIAGE UNDER ISLAMIC LAW

The Islamic tradition attributed to the Prophet considers that “of all the things permissible the most displeasing to Allah is divorce.” Nevertheless, Islamic law, as it is acknowledged in modern Arabic countries, permits dissolution of marriage both in a private form (based on the will of either one or both parties) and in a public form (as the result of a judicial decision). Repudiation was originally conceived as a private act of a man aimed at freeing himself unilaterally from marriage, though a man may also authorize his wife or another person to act. The husband may grant this authorization in the marriage contract or in a following act; the wife’s consent is required in order to include this clause, otherwise the contract will be valid but the clause will be void.

Even though repudiation is considered as a blameworthy act, in some cases it can be considered as “recommendable,” “licit,” or even “compulsory.” It must take place as a completely free act of will and not be subject to coercion, thus a man must have total mental competence. He is permitted to change his mind twice: first and second repudiations are revocable, when they happen during the legal retirement of the wife (iddat), but the third repudiation causes the definitive dissolution of the marriage and the man will not be able to marry the same woman again. Revocation of repudiation can be explicit or implicit, as when a man resumes ordinary life; it is a further right of a man, within the scope of his discretion, and neither another payment of dowry (mahr) nor the wife’s consent are required. Repudiation must be pronounced in specific periods, in order to be consistent with sunna; otherwise it will result in “prohibition.” Triple repudiation (the pronouncement of three repudiations at the same time) is viewed negatively,

78 See Weber, supra note 75, at 181.
81 See Nasir, supra note 14, at 106-33; Özdemir, supra note 14, at 163.
82 Lois Lamy’s Ibsen al Faruqi, Marriage in Islam, in PERSPECTIVES ON MARRIAGE, supra note 22, at 397, 406.
83 See Nasir, supra note 14, at 108.
84 See Roberta Aluffi Beck-Peccoz, Il Matrimonio nel Diritto Islamico, in IL MATRIMONIO, supra note 15, at 181, 220.
85 See Nasir, supra note 14, at 107.
86 See Ibsen al Faruqi, supra note 82, at 405.
87 See Beck-Peccoz, supra note 84, at 221.
88 Id. at 222.
and religious law recommends the presence of two witnesses. In modern Arabic countries, this institution is subject to a process of reduction as an act of private autonomy, and there are attempts to include it either in a judicial procedure or in a specific form, in order to guarantee that a woman is at least informed of the dissolution of her marriage. In some countries, repudiation is drafted by a notary and the woman is notified; in other countries, a judicial decision or authorization is required. Courts must first attempt to reconcile the spouses and they can order a payment to be made by the husband, in order to guarantee maintenance to both wife and children.

Other forms of unilateral dissolution of marriage are the vow of abstention from marital relations pronounced by a man (ilā’) and the offensive oath (zihār). In the first case, there is a waiting period of four months; some Islamic schools of thought affirm that the repudiation then becomes irrevocable; according to other schools, a unilateral act (such as repudiation or judicial petition) is required. In the second case, a woman is likened to a forbidden one. After a time the husband must choose between reconciliation with his wife (through expiation) and repudiation. Expiation is recommended, to favor resumption of life in common and to avoid female poverty. In both cases, modern Arab state legislation provides the option for a woman to become an active party: when her husband does not make a choice she can ask the juridical authority to fix a time limit; after its expiration, divorce will be declared, thus avoiding leaving the woman in uncertainty as to her marital status.

A mutual cursing oath is a form of dissolution of marriage that involves the participation of both spouses. In the past, this option also offered a man the means to disclaim paternity of a child. In this case, a man charges his wife with adultery but he avoids the corporal punishment that he would receive if his accusation were unfounded. A woman avoids the penalty connected with adultery because she refuses the charge under oath. The marriage is dissolved by this double oath and the woman is forbidden to that man forever.

Dissolution can also happen by mutual consent, through a sort of consensual repudiation with immediate effect (hul’). In this case, the woman presses her husband for the dissolution of the marriage, offering him either a payment of compensation or the return of her mahr; she loses all the rights that

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89 Id. at 220.
90 See NASIR, supra note 14, at 106.
91 See Beck-Peccoz, supra note 84, at 224.
92 Id. at 224-26.
93 See NASIR, supra note 14, at 111-15.
94 Id. at 114.
95 See Beck-Peccoz, supra note 84, at 234.
96 See NASIR, supra note 14, at 114.
97 See Beck-Peccoz, supra note 84, at 235.
98 Id. at 234.
99 See Ibsen al Faruqi, supra note 82, at 406.
100 Id.
101 See NASIR, supra note 14, at 118.
102 See Beck-Peccoz, supra note 84, at 236-38.
she acquired with the marriage contract (dowry and maintenance).\(^{103}\) In some states, \textit{hul}' laws verify that \textit{hul}' is required because of a woman’s free choice, without any form of pressure or coercion, in order to give better protection to the woman;\(^{104}\) she must be assisted by her guardian, if she is under age, in order to protect her financial interests.\(^{105}\) Maintenance during her \textit{iddat} cannot be renounced.\(^{106}\) In some states, it is not permitted for this procedure to be self-managed by the two parties: mutual consent must be authorized by judicial authority and the presence of two witnesses is required.\(^{107}\) The financial compensation may be decided by the judicial authority if the parties do not define it, but its amount cannot exceed the \textit{mahr}.\(^{108}\) A dispute can be deferred to two arbitrators when the parties disagree on financial aspects.\(^{109}\)

Finally, there is the possibility of judicial dissolution at the request of either party. In some states, divorce now always requires a judicial decision; some forms of private and unilateral divorce will also be enforced by judicial registration.\(^{110}\) Judicial divorce is not homogeneous in character because the Islamic schools have different opinions about the role of judicial authority, the right of a woman to seek divorce, and the acceptable reasons for divorce (because of grounds that either make continuation of conjugal life excessively hard or otherwise hinder conjugal relationships, such as mental insanity, physical defects, ill treatment, or conflict between spouses).\(^{111}\) Some legislative systems guarantee a woman the right to seek divorce even when contract conditions have not been respected.\(^{112}\) Some factors, which in other religious systems are considered from the point of view of the validity of marriage, in Islamic law make divorce possible;\(^{113}\) thus, the very nature of this act appears to be fluid.

A contractual vision of marriage, typical of Islamic law, seems to justify a woman requesting termination of her marriage because of her husband’s financial difficulties. These may be expressed in failure to pay either dowry or maintenance. Nowadays, the balance of these provisions seems aimed at better protection of the weaker party. Courts will also try to reconcile parties or to defer the claim to arbitrators in such instances.\(^{114}\) In addition, a woman may request the termination of her marriage because of the absence or imprisonment of her husband; these situations are recognized as causing damage to women, who risk being subjected to illegal conduct by third parties.\(^{115}\) In this respect, Islamic law differs from Jewish law, which is not

\(^{103}\) Id.
\(^{104}\) See \textit{NASIR}, \textit{supra} note 14, at 116.
\(^{105}\) Id.
\(^{106}\) Id.
\(^{107}\) Id. at 115.
\(^{108}\) See \textit{Beck-Peccoz}, \textit{supra} note 84, at 237–38.
\(^{109}\) Id.
\(^{110}\) See \textit{NASIR}, \textit{supra} note 14, at 107.
\(^{111}\) Id. at 118–33.
\(^{112}\) See \textit{Ibsen al Faruqi}, \textit{supra} note 82, at 406.
\(^{113}\) See \textit{NASIR}, \textit{supra} note 14, at 123–28.
\(^{114}\) See \textit{MIR-HOSSEINI}, \textit{supra} note 14, at 71.
\(^{115}\) See \textit{NASIR}, \textit{supra} note 14, at 131–33.
able to give a solution to the problem of a woman de facto separated from her husband, even in circumstances that he is powerless to alter.\footnote{See Rabello, supra note 15, at 83–91.}

VI. LAWS GOVERNING DISSOLUTION BECAUSE OF RELIGIOUS DIFFERENCES OR NON-CONSUMMATION

In secular systems, a change of religion or differences in religion have no influence on divorce, unless they cause a division in the common life of the couple that cannot be bridged.\footnote{See Silvio Ferrari, Post-fazione, in IL MATRIMONIO, supra note 15, at 247, 252; Silvio Ferrari, Matrimonio e Alterità: la Rilevanza Interordinamentale del Matrimonio nei Sistemi Giuridici Religiosi, 5 DAIMON 193–216 (2005).} However, in religious systems, even when one or both spouses does not consent, forms of dissolution of marriage may be justified by the necessity of retaining religious homogeneity.\footnote{See 1983 CODE c.1142.}

As we have seen, in Catholic canon law dissolution can happen by privilege of faith, if there is a just cause.\footnote{See 1983 CODE c.1143-46.} In Jewish law, a man’s apostasy permits his wife to require the ghett.\footnote{See Post-fazione, supra note 118, at 252.} Rabbi Caro’s view was that, if the husband refuses to grant the ghett and rabbinic authority does not succeed in imposing its authority, the woman may petition a secular court, which can use coercion to obtain the release.\footnote{See Rabello, supra note 15, at 75.} According to other views, coercive instruments may be used only when a man’s behavior leads his wife to disregard the obligations imposed by her religion.\footnote{Id.}

In Islamic law, if a Muslim man abandons his religion, the marriage is considered to be automatically dissolved, without necessity either of repudiation or judicial divorce; such external interventions are only required if the parties do not comply with the obligation to divorce.\footnote{See NASIR, supra note 14, at 133–34.} A woman who becomes an atheist, or abandons Islam for either the Christian or the Jewish faith, will be divorced ipso jure.\footnote{See Ferrari, supra note 51, at 43.} The apostate woman loses all rights to her mahr; however, an apostatized man must only return half of the contracted dowry.\footnote{Id.} If a woman converts to Islam, and her husband refuses to do the same, the marriage will be dissolved.\footnote{Id.}

Dissolution for non-consummated marriages is recognized by Catholic canon law.\footnote{See 1983 CODE c.1143-46.} However, only Jewish and Islamic law give indirect importance to non-consummation, allowing it simply as a factor that may influence other conditions (such as financial ones) for dissolution of a marriage.\footnote{See Post-fazione, supra note 118, at 252; NASIR, supra note 14, at 93–94.}
VII. DISPARITY BETWEEN SPOUSES IN JEWISH LAW

In Jewish law, one aspect of gender disparity arises when one of the spouses does not give consent to the divorce. Dissolution requires the husband’s release of the *ghet* and the wife’s acceptance; this is a religious obligation, which requires strict observance. However, Jewish law recognizes the possibility of a unilateral divorce for men, through a complex procedure (known as the “procedure of one hundred rabbis”), when the wife does not cooperate or she is insane.

By contrast, when a woman does not obtain a *ghet* she acquires the status of *agunah* (a woman who is ‘chained’ to her husband), even though she is either separated from or abandoned by her husband. She has a right to be divorced, in order to celebrate a new religiously valid marriage and to grant legitimacy to children born from the new marriage, but for various reasons she cannot reacquire free status. In such a situation, religious authority may not overrule the husband’s actions, and he may be coerced only in limited cases.

Within secular juridical systems, this discrepancy leads to an inconsistency between the right to dissolution of a marriage in secular law and the connected reacquisition of free status on the one hand and the non-correspondence of the same status in religious law on the other. There are other instances that may also lead to this inconsistency. For instance, in the past a woman could be chained to what was a marriage in name only because the husband could not give the *ghet* (in the case of mental insanity), or because he had disappeared and it was not certain if he was still alive, or because he had converted to another faith and could contract a new marriage without dissolving the previous one, since that earlier one was considered invalid. Another instance was the levirate case, when the deceased husband’s brother (who was obliged to marry the widow) abandoned his religion or disappeared or emigrated to another continent. This plurality of situations prevented a uniform solution being reached. Rabbinical concern for the difficult position of the widow was shown by the alleviation of the probative burden for women, through allowing the sufficiency of a witness (even if apostate or gentile) to prove the death of a husband.

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129 See Ferrari, supra note 51, at 46.
130 See BROYDE, supra note 11, at 24.
131 See Rabello, supra note 15, at 83.
132 Id.
134 See BROYDE, supra note 11, at 32.
136 See BROYDE, supra note 11, at 59.
accepted as sufficient, if the spouses were known to have lived together in harmony.138

Nowadays, the most common situation is a man’s refusal to release a ghett, thus placing him in a stronger position for negotiating over the post-marital financial settlement or over the right to visit his children.139 The uncertainty of the woman’s position is worsened in secular states, where rabbinical authorities have no state-enforced power to coerce a husband to release the ghett.140 In some states (such as France and the USA), there is a strong pressure to assimilate the causes of dissolution in religious law with those provided in secular law; this would imply renouncing the claims of autonomy of religious law concerning personal status.141

VIII. RELIGIOUS LAW AND THE FINANCIAL COSTS OF DISSOLUTION

Religious systems do not adopt a uniform solution concerning the regime of financial protection in the event of dissolution. Whether marriage is viewed only as a contract or also as a sacrament has a bearing on how much the religious system will govern this largely secular matter. Nevertheless, a gradual recognition of equal female dignity in marital relationships seems to be emerging. Institutions that originally caused a de-subjectification of women in a marriage contract now ensure that there is a commitment to obligations of post-marital financial settlement in favor of the weaker party in the relationship.142 These institutions address the choice of one of the spouses over the exercise (or non-exercise) of exit freedom from a marriage; they also carry out an indirect function of stabilizing marriage, in contrast with the arbitrary exercise of power to divorce by a unilateral act (such as Islamic repudiation).

Catholic canon law tends to affirm its competence regarding the spiritual aspect of marriage, that concerning its institution by divine law and its sacramental dimension; for other aspects, the Church cooperates with the provisions in civil law.143 This cooperative wish is seen in the norm stated by the ecclesiastical judge declaring a marriage void, warning the parties to observe the obligations deriving from civil law.144 Other norms express the Church’s concern for the observance of obligations set by the post-marital settlement ruled by a civil court in the case of divorce: for example, the prohibition against being a witness to a marriage that does not comply with natural obligations towards the spouse and the children of a previous marriage now declared invalid or dissolved.145 Canon law states that, during separation, the obligation to maintain and educate children remains;146 the converted polygamous man who chooses to keep one of his wives must provide for the

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138 See Rabello, supra note 15, at 85.
139 See BROYDE, supra note 11, at 8.
140 See Rabello, supra note 15, at 88-89.
141 See ATLAN, supra note 23, at 211–38.
143 See VITALI & BERLINGO, supra note 12, at 143–44.
144 See 1983 CODE c.1689.
145 See 1983 CODE c.1071, § 1.
146 See 1983 CODE c.1154.
needs of the other wives; and the norms governing Petrine privilege lay on the ecclesiastical authority the burden of interrogating the party who petitions for dissolution about his or her civil and moral obligations towards the spouse and their children.147

On the basis of both Islamic and Jewish law, a woman has the right to maintenance by her husband during marriage, even after separation; she loses this right after divorce.148 However, in both systems she can lose this right because of “rebellious behavior” (for example, abandonment of the family home or refusal to fulfill her marriage duties).149

The access of women to the job market has changed their traditional role of total dedication to the marital home, husband, and children, and softened the paternalistic approach to family law.150 It has also introduced new needs for balancing rights and duties, even post-marital ones.151 Provisions concerning the conjugal and post-conjugal financial regime between spouses (absence of an equal distribution of assets between spouses in the case of démariage in Jewish law; strict separation of each spouse’s wealth in Islamic law) may prove to be unsuited to the changed social context, but may reveal the poor care of the weaker party in the marriage, specifically in the broken phase of the relationship.152 In this case, both spouses may appear to demonstrate a wish for both relational and financial “disinvestment”: each of them tries to reappropriate what he or she either brought about or acquired during the marriage.153

In Jewish law in the past, the ketubah (marriage contract) stated the amount that the husband had to pay to his wife in the event of termination of the marriage or death, in order to reimburse to the wife what she brought to the marriage; this is the policy in contemporary Israel.154 Ketubah made the dissolution of marriage easier for men, since women were only granted financial compensation if the fault was not on their side; if the woman was found to be at fault, she lost all financial rights, as a punishment.155 She also lost every right from the ketubah when she petitioned for divorce if there was an indication that she sought her exit freedom in order to make a financial profit from the marriage.156 In the Talmudic period, if the husband was not able

147 See Normae, art. 20, § 2, at 1144.
149 See Rabello, supra note 15, at 77; NASIR, supra note 14, at 100–01.
150 See MIR-HOSSEINI, supra note 14, at 120–21; Greenberg, supra note 22, at 388–89.
152 Id. at 124; HALPERIN-KADDARI, supra note 133, at 252–54.
153 See MIR-HOSSEINI, supra note 14, at 119.
156 Id. at 210–11.
to comply with the financial obligations laid out in the *ketubah*, he could not free himself unilaterally from the marriage.\(^{157}\)

*Ketubah* has also been viewed as a factor promoting marital cohesion and reconciliation between spouses, a sensible instrument of prevention (and repression) of behaviors not coherent with the maintenance of common life.\(^{158}\) Reduction of *ketubah* was seen as sanctioning inappropriate female conduct, while its increase pressed men to comply with their duties.\(^{159}\) As we have seen, Rabbi Gershom’s decrees made the positions of the two spouses more equal, since consent became necessary for dissolution of a marriage and the woman was given the possibility to refuse divorce.\(^{160}\)

In Islamic law, a dowry has to be given by the man to the woman in the event of marriage.\(^{161}\) This payment gives a man the possibility to free himself unilaterally from the marriage (through repudiation), in which case the wife retains the *mahr*; when divorce is caused by the woman, her husband can claim the return of the *mahr*.\(^{162}\) The dowry can also function as an instrument of persuasion, useful when a woman wishes to obtain “repudiation by consent,” in which case she may offer the partial or total return of the *mahr*.\(^{163}\)

*Mahr* has been qualified either as an effect of marriage (Hanafi school) or as a constitutive element of the marriage contract (Maliki school).\(^{164}\) Originally, in pre-Islamic Arabia, it was considered a “bride price” (when a man seduced a virgin he had to marry her and pay the dowry); now it is a form of financial support for a woman in the event of divorce or the death of her husband.\(^{165}\) This understanding is confirmed by the increasingly widespread custom of deferring the payment of the *mahr*, either totally or partially, when a marriage is dissolved.\(^{166}\) A deferred *mahr* acts as a deterrent from the exercise of the male right to repudiation (as happens in Jewish law with the *ketubah*), but it also limits a woman’s option to petition for *hul’*, which implies the return of the dowry.\(^{167}\)

A woman also has the right to maintenance and accommodation during her *iddat* following repudiation; her position is more firmly protected when repudiation is not definitive.\(^{168}\) In the past, in the event of repudiation, Islamic law recognized the “moral damage” to women, providing a “consolation gift” in order to compensate the woman for the pain suffered from abandonment.\(^{169}\) This form of compensation was only “recommended,” but it was compulsory...
in the event of a non-consummated marriage.\textsuperscript{170} State legislators have now extended this repayment to cases of both unjustified and illegal divorce, confirming its compensatory nature.\textsuperscript{171} Sometimes it is provided whatever the cause of divorce, and is a form of post-marital financial assistance.\textsuperscript{172} The consolation gift now acts not only as an instrument of financial protection for women but also as a means of condemning unacceptable male behavior.\textsuperscript{173}

IX. RELIGIOUS JURIDICAL POWER WITHIN THE STATE

In secular states, the actual juridical instruments of religious law are not enforceable, so they have little impact on individual behavior. In states that adopt a paradigm of religious specificity and grant religious groups the possibility of self-rule, the cost in return is the placing of more vulnerable individuals (or groups) at risk.\textsuperscript{174} On the other hand, juridical systems that impose normative uniformity, even though they formally grant equality of treatment, risk discriminating against the values of minorities that are not able to integrate within the dominant culture.\textsuperscript{175}

There is an inevitable clash between secular and religious laws concerning the position of religious rules as public or private, so the attempt to subject them to forms of public secular control essentially means their desacralization. In Jewish law, the need to find a convergence between civil and religious law includes the formation of juridical instruments that permit a woman’s release from the condition of agunah.\textsuperscript{176} In Israel, rabbinical courts have jurisdictional (and sometimes coercive) powers and can enforce their decisions, imposing financial sanctions and sometimes imprisonment.\textsuperscript{177} In secular systems, however, rabbinical jurisdiction is merely voluntary: the parties can freely decide to submit to it and to comply with its decisions, but sometimes religious communities have an attitude of distrust towards the bet din, whether because of the absence of a juridical hierarchical system or because of the fear that local rabbinical authorities do not respect the authentic meaning of religious law and lack effective authority.\textsuperscript{178}

The bet din is bound to religious law; its decisions may sometimes not be coherent with the parties’ wishes and it can limit aspirations to divorce, as Jewish law does not always impose the release of a ghet or sanctions for not releasing it.\textsuperscript{179} For these reasons, a party may sometimes be resistant to submitting to religious judicial authority.\textsuperscript{180} Islamic judicial authorities

\textsuperscript{170} Id. at 231.
\textsuperscript{171} Id.
\textsuperscript{172} See NASIR, supra note 14, at 135–36.
\textsuperscript{173} See Beck-Peccoz, supra note 84, at 230–32.
\textsuperscript{174} See SHACHAR, supra note 8, at 78–85.
\textsuperscript{176} See ATLAN, supra note 23, at 211–64.
\textsuperscript{177} See HALPERIN-KADDARI, supra note 133, at 236–39.
\textsuperscript{178} See BRODY, supra note 11, at 43–44; Rabello, supra note 15, at 86.
\textsuperscript{179} See BRODY, supra note 11, at 43–58.
\textsuperscript{180} Id.
encounter the same difficulties where sharia is not enforced by judicial state authorities and imams are not appointed or recognized by the state.\footnote{See Asifa Quraishi & Najeeba Syeed-Miller, No Altars: A Survey of Islamic Family Law in the United States, http://www.law.emory.edu/tfl/cases/USA.htm (last visited May 8, 2010).}

In a secular system, the possibility of dissolving an unsatisfactory marriage using the instruments offered by a religiously neutral law (thus exercising an exit freedom from religious law) implies a weakening of religious expectations, especially on the part of the woman (the release of a ghet for a Jewish woman or the payment of a mahr for an Islamic woman, when she petitions for divorce on grounds that are not permitted to her by religious law).\footnote{See Estin, supra note 175, at 586; Jessica Davidson Miller, The History of the Agunah in America: A Clash of Religious Law and Social Progress, 19 WOMEN’S RTS. L. REP. 1, 1–15 (1997); Lindsey E. Blenkhorn, Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women, 76 S. CAL. L. REV. 189, 189–234 (2002).} There is no substitute means by which these expectations can be protected, either totally or partially, by state judicial authority.

X. STATE ROLES IN THE DISSOLUTION OF MARRIAGE

Almost all Western systems have admitted the possibility of dissolving marriage; both marriage and divorce are subject to the same process of “de-institutionalization.”\footnote{See Louis-Léon Christians, L’Indissolubilité du Mariage et ses Limites à la Jonction du Droit Canonique et du Droit Civil Comparé, in MARIAGE—DIVORCE—REMARRIAGE, supra note 6, at 51–52.} Some forms of religious divorce (private divorce or unilateral divorce) can only be classified as lying within the ambit of civil divorce with great difficulty; however, laws and jurisprudence take into consideration the transformation from divorce associated with sanction and responsibility to models of dissolution founded on mutual consent, on recognition of an irreparable division of common life, on mutually agreed separation for a certain period of time, and on the admission of forms of substantial unilateral divorce (no-fault divorce).\footnote{See Ruiz & Méndez, supra note 5, at 322; Vivian Hamilton, Principles of U.S. Family Law, 75 FORDHAM L. REV. 31, 65 (2006).} In these cases, the role of judicial authority is reduced to a guarantee of the legitimacy and equity of the procedure, and in some juridical systems they may only have an administrative role. Autonomy of parties and negotiation of divorce, even its financial aspects, are emphasized and the development of a plurality of forms of exercising exit freedom is favored.\footnote{See Christians, supra note 183, at 63.}

A “neutralization” and uniformity of post-marital settlements tends to develop, unconnected to the reasons and forms of divorce, whereas, in the past, these differences limited the exit freedom.\footnote{Id. at 66–67.} Scholars think that secular systems tend not to realize “the transition from de-institutionalization to de-
juridicization of divorce.” Intervention of a third (judicial or administrative) authority remains the factor that characterizes all forms of divorce; a public authority continues to be (more or less) required, and it indicates the difference between a more or less veiled “institutional” and a more or less marked “existential” perspective. The latter emphasizes the social dimension of marriage and divorce.189

In secular systems there is a need to find and update juridical mechanisms that protect both access and exit freedom, in a way that is coherent with each person’s religious position. Exit freedom encounters more difficulties to be overcome because states maintain their monopoly regarding the dissolution of marriage.190 Secular states, even when they recognize the possibility of celebrating marriages in religious forms, state their exclusive jurisdiction regarding dissolution of marriage.191 Exit freedom, legally exercised in a secular system, is set within the sphere of state-imposed principles; religious forms of dissolution of marriage have no effect.192 However, a more open approach is present in laws that govern de facto unions, where consent is revocable unilaterally and at will.193

Some states’ systems (such as that of Italy) that in the past recognized a specific religious regime only, have now eliminated canonical dispensation from the number of decisions that can be enforced in the state system.194 There is a “negation of protection” of exit freedom from marriage in a religious form, which distances such a system from other traditionally concordat juridical systems (such as Spain and Portugal), which continue to recognize forms of canonical divorce.195

On the other side, religious marriage cannot be dissolved by civil divorce. The clash between secular and religious systems is due to the non-negotiability of the values proper to each one: canon law considers marriage as indissoluble, but secular systems recognize greater autonomy for the parties regarding the effects of marriage; Jewish and Islamic law admit divorce but consider it an act of private, often unilateral, autonomy (the latter in a less marked way) rather than the decision of an external authority, which grants equal participation to both spouses; furthermore, Islamic law admits forms of revocable dissolution/repudiation that are not comparable to the reconciliation of spouses as ruled in secular systems.196 For these reasons, a conflict can occur between the civil and religious status of a citizen of faith, underlining a disagreement between state and religious norms.

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188 Id. at 63.
189 Id.
190 Id. at 52.
191 See SARA DOMIANELLO, I MATRIMONI “DAVANTI A MINISTRI DI CULTO” 452 (Giuffrè 2002).
192 Id.
193 See Ferrari, supra note 51, at 34–35.
194 See DOMIANELLO, supra note 191, at 452.
196 See Zoila Combalía, Ripudio Islámico y la Modernización del Derecho en el Mundo Islámico, 2006 DERECHO Y RELIGIÓN 221, 236 n.1.
Both a “universalistic” and a “relativistic” approach reveal their limits. The former implies a process of homogenization of civil society into the values of the majority, demanding a restriction of different values and identities into the categories provided by civil law, and rejecting accommodation of the needs of specific groups.\(^{197}\) The latter sometimes implies, in reaction to the former, acceptance of a specific and incomplete interpretation of religious law, which does not take into consideration the plurality of schools and opinions within it.\(^{198}\)

XI. RELIGIOUS MARRIAGE LAW IN EUROPEAN STATES

Within Europe, both states that follow an “assimilation” approach (such as France) and states that have long adopted a self-affirmation of “ethno-cultural differentialism” (such as Germany) have attempted to reach an accommodation of the needs of Islamic communities through the instruments of international private law and bilateral agreements.\(^{199}\) There is an increasing awareness that, today, cultural homogeneity within a normative area has been replaced by a multicultural society, where particularity and universality both have an effect on the definition of a national identity.\(^{200}\)

Islamic repudiation and Jewish *ghet* pronounced in a country of the European Union will not be directly and automatically enforced, even if pronounced in front of the consular authority of a state that permits these forms of dissolution.\(^{201}\) However, this position is weakened regarding the recognition of foreign decisions: forms of “consensual repudiation,” pronounced by the husband at the request of his wife or with her acceptance (on a par with consensual divorce), and divorces where a woman is given fair financial compensation are enforced, even though they are not judiciary acts.\(^{202}\) However, in that case, the system is prejudiced against the weaker party because the woman has to renounce the *mahr* in order to obtain divorce.\(^{203}\) States impose different conditions in order to ensure that the repudiation occurs abroad: some stricter jurisdictions require that all the phases of the procedure must take place abroad; other jurisdictions are more flexible.\(^{204}\)

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197 See Shachar, *supra* note 8, at 72–78.


201 See Ferrari & Ibán, *supra* note 117, at 104.

202 Id.


When spouses are subject to different jurisdictions the question arises as to which law should prevail. There is a common trend to uphold the principles of equality of spouses and the right of defense of women as non-renounceable; every clash with these principles implies an insuperable conflict with public order. The increasing subjection of Islamic repudiation to forms of judiciary and public control has to be taken into consideration, because it favors an easier enforcement in Western systems.

**XII. CONCLUSION**

Some juridical systems give no juridical importance or effect to religious divorce; others—in a mistaken spirit of strengthening religious laws—swing between not always justifiable limitations of state jurisdiction in favor of religious law and the recognition of state power to enforce religious obligations. The risk of violation both of individual freedom of conscience and religion and also of religious autonomy appear. Alternative models for dispute resolution in a non-judicial forum are now developing. These include: a form of “collaborative law” (arbitral commissions in the USA, sharia courts in the English system); civil enforcement of agreements where parties have committed themselves (in marriage contracts or in separation agreements) to religious obligations; and the possibility to negotiate pre-marital agreements to define those areas of marriage that the state leaves to the autonomy of the parties (e.g., the USA). In some states, laws that impose the removal of strictures against entering a new marriage, or that impose financial pressure on the spouse who is reluctant to grant a divorce, have been enforced (e.g., Canada and New York). An intermediate solution between intervention and abstention is one that imposes compensation of civil law damages as the result of non-performance of religious acts when there is an intention to harm the weaker party in the marriage, since this is an abuse of that party’s rights (e.g., France and Holland). The various solutions swing between the need to satisfy community demands for the protection of religious needs and the state duty to abstain from unlawful interference in religious matters, which also leads to a secularized interpretation of religious laws.

The necessity of balance between protection of religious choices and respect of the principle of neutrality implies the need to establish a difficult

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205 See MA. DEL CARMEN GARCIMARTÍN MONTERO, EL DIVORCIO JUDÍO EN ESTADOS UNIDOS 107–64 (Grupo Difusion 2008).
equilibrium between, on the one hand, a partial de-structuring of the secular marriage model, delegating to civil society the duty to create, in reasonable measure, the rules of alternative models of common life (and the connected forms of post-marital settlement), and, on the other hand, the definition of the correct measure of state intervention in order to protect non-negotiable values in a secular, pluralistic, and democratic system.211

The conflict between civil and religious law and the search for forms of accommodation of religious interests is understandable in a contractualist perspective, typical of separatist systems, which protect only “negative” religious freedom.212 In these contexts, spouses can make use only of a civil marriage model, and they must use the instruments offered by civil law to guarantee themselves conformity between their personal civil and religious status.

The recognition in some systems, which adopt bilateral agreements, of marriage models alternative to the secular one, should imply a deeper coherence: a citizen of faith can choose a religious marriage project without renouncing the civil effects of a religious act, and he or she can opt not to use the secular model offered by the state to all citizens without distinction. This should mean that, at the same time, the civil recognition of acts of religious divorce from a religious marriage should be guaranteed, where there are civil effects involved.213

Openness towards a system where a plurality of normative (both religious and cultural) experiences are welcomed implies thinking about the hazy border between the recognition, in the constitutional framework, of reasonable peculiarities and exceptions to civil law provided for all citizens and the danger of introducing, perhaps indirectly, a system of differing personal status, sometimes connected to a non-equal budget of rights and duties founded on specific identity.214

Financial protection of the weaker spouse has to be given peculiar attention: direct or indirect recognition of forms of religious divorce accommodates religious needs but these cannot become an instrument to free oneself from the financial effects of the civil post-marital settlement; the same or equivalent cost should burden all forms of divorce, whether civil or religious. To this end, there should be a doctrinal and jurisprudential effort aimed at promoting an evolution of state laws on marriage dissolution towards

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212 Id.

213 See DOMIANELLO, supra note 191, at 455.

a parity of advantages and disadvantages consistent with the options of religious or secular marriage. A democratic realization of an amicable competition between civil and religious marriage should be enforced in this way. 215