It has even been submitted that "the fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine".[81] This secular approach is exemplified by the opinion of the Committee on the Elimination of Discrimination against Women (CEDAW), which gave expression to its strong feelings on the issue of religious law when it condemned, in unequivocal terms, Israel's reservations on Articles 7 and 16 of the Women's Convention. It held:

> "The Committee suggested that in order to guarantee the same rights in marriage and family relations in Israel and to comply fully with the Convention, the Government should complete *the secularization of the relevant legislation*, place it under the jurisdiction of the civil courts and withdraw its reservations to the Convention" (emphasis added).[82]

Religion, especially in its orthodox garbs, is seen as a threat to human rights, especially to the principle of equality.

One gets a similar impression of the approach of the Human Rights Committee (HRCttee), which held that the secular emancipatory ideal prevails over a religious interpretation of human rights: "Article 18 [ICCPR: freedom of religion] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion."[83] From this it can be concluded that, in the opinion of the Committee, the prohibition of discrimination against women prevails over freedom of religion. That is of course only the case if we assume that this freedom protects the right to apply religious law, which does not comply with the secular equality principle.

In conclusion, the CEDAW and HRCttee tend towards a conclusion that international human rights law is opposed to religious law, especially when its requirements may interfere with the equal rights of women. These general remarks lead us to a brief discussion of specific human rights at issue.

To begin with, it is held that the Jewish law on *get* refusal is contrary to freedom of religion and conscience. At first sight, that is the case where the refusal of a *get* is a blockade for the spouse to remarry under Jewish law. There is, however, a paradoxical element in this reasoning. The recognition of a religious rule is criticised in order to be able to benefit from the application of other religious rules. It illustrates that there might be a friction between convictions of individual believers and the tenets upheld by other believers, or the representatives of the religious community, due to different interpretations of the sacred texts concerned.

In addition to that, the rights of (former) spouses, related to marriage and divorce, are protected as human rights in, for example, Article 12 ECHR, Article 23 ICCPR and Article 16 CEDAW. These treaty provisions all stress the equal rights of men and women in the field of marriage and divorce.[84] Where religious law interferes with the fundamental right to equal treatment, the latter should prevail according to several international supervisory organs in the field of human rights, as we have seen above. Finally, the right to family life and the rights of children may be relevant, in cases where their position is an issue: think of *mamzerin*. Article 2 of the Convention of the Rights of the Child provides that states parties have to ensure that children are not subjected to discrimination *inter alia* based on birth or other status.

Finally

The preceding reflections on the human rights aspects of the application of religious law in a secular state do not provide for an easy "solution" to the problems that result from the coexistence of the two spheres of law, as is illustrated by the problem of the *get* refusal. It was not my purpose to provide such a solution, but rather to explain the complexity of the issue. This complexity cannot be reduced by an easy reference to human rights law, having regard to the sometimes strongly diverging views on the meaning of human rights. What has been said may hopefully contribute to a critical reconsideration of the easiness of the common, human rights approach to the problems of collision between religious and secular law. The preference for secular law over religious law is the outcome of an interpretation of human rights law from a secularist perspective; which by no means is the only perspective possible. Perhaps that may inspire national courts and international supervisory bodies with some modesty, when it comes to the judgment of cases where religious law and secular law collide, as in the difficult case of *get* refusal.

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81 RADAY, *supra* note 68, at p. 668.

82 Report of the Committee on the Elimination of Discrimination against Women 16–17 Sessions, 1997, at p. 91. See also HALPERIN-KADDARI, R., "Women, Religion and Multiculturalism in Israel" in LAQUER ESTEIN, A., *The Multicultural Family* (Ashgate Publishing Group, 2008), pp. 267–294, at p. 274.

83 Human Rights Committee, General Comment No. 28 Equality between men and women (Article 3) UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 21.

84 See *inter alia* TAGER, *supra* note 64, pp. 425–457.

provisions."[71] It is important to realise this when interpreting the relevant human rights provisions, such as Article 9 of the European Convention of Human Rights (ECHR), which encompasses the protection of the manifestation of one's religion or belief in worship, teaching, practice and observance.[72] The precise scope of freedom of religion, as to activities motivated by one's religion or belief, is under debate.[73] That is also true for the more specific question of whether the application of religious law is protected by freedom of religion. There is a rather old decision of the (then existing) European Commission of Human Rights (6 December 1983) in which it held that a refusal of a Jewish husband to hand over the *get* was not to be recognised as a manifestation of his religion in observance. Therefore the Commission did not have to answer the question whether the decision of the French court in question, to order the refusing husband to pay damages, was justified by the second paragraph of Article 9.[74] The question may be asked whether this isolated admissibility decision still has to be regarded as the authoritative ruling on this issue. In a more recent judgment, the European Court of Human Rights accepted the observance of Jewish law in another field as a manifestation of a religion by observance, in terms of Article 9; namely in the case of *Cha'are Shalom ve Tsedek*, which concerned ritual slaughter according to Jewish law.[75] It should be noted that the case for religious law, as protected by freedom of religion, does not show the way to an easy solution of the problem of *get* refusal. Both the husband who refuses to deliver the *get* and the wife who needs the *get* in order to enter into a new religious marriage, have a claim to the application of religious law under freedom of religion.[76]

In addition to the individual aspect, freedom of religion has a collective aspect, which protects the rights of a religious group to uphold its religious principles. That is also illustrated by the *Cha'are Shalom ve Tsedek* case, which originated in an application not from an individual, but from a religious association. The Court held that "a religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9".[77] In this connection, Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) is also relevant. It includes in religious liberty, the freedom to establish and maintain charitable or humanitarian institutions,

71 Quoted by MAOZ, *supra* note 3, p. 678 (emphasis in the original).
72 Article 18 ICCPR uses similar terms.
73 See DE BLOIS, M., "Two Cities in Conflict" in LOENEN, M.L.P. and GOLDSCHMIDT, J.E. (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007), pp. 167–183, at pp. 172–174.
74 Application 10180/82, *D v France*, *Decisions and Reports* 35, February 1984, p. 199.
75 ECHR 27 June 2000, *Jewish Liturgical Association Cha 'are Shalom ve Tsedek v France*, ECHR 2000-VII, paras. 73 and 74.
76 Compare the case of *Bruker v Markovitz*, *supra* note 51.
77 *Supra* note 75, para. 72.

thereby implying the right to provide services in this field based on the principles and tenets of the religion or belief involved. That is an argument for the respect of religious rules within the community concerned. This may also be applied to the recognition of religious law applied within a specific religious group.

In addition to freedom of religion, the rights of minorities should also be mentioned, in connection with states where religious minorities exist.[78] These rights entail the right of members of the minorities to profess and practise their religion with other members of their group. In this framework, the application of religious law is also relevant.

Finally, when it comes to the level of states, which provide for the application of religious law within the broader framework of their national legal system, even the right to self-determination is at stake.[79] This right includes the right of a people to determine its cultural identity. This includes fundamental issues like the relationship between "Church" and State or of secular and religious law in the state concerned. In the case of Israel, the Jewishness of the state is *inter alia* expressed by the fact that part of its law has a religious nature, especially the part we have been discussing. Like any other state it may in principle decide on the contents of its law.

... against the recognition of religious law

It should on the other hand not be overlooked that, from a human rights perspective, the application of religious law may also be very problematic. Is not the whole idea of religious law contrary to human rights? A religiously inspired view of human rights has since the first formulations of human rights been rivalled by a secular one, inspired by the Enlightenment. It appears that this view is now popular in both theory and practice of human rights law. Secularism, far from being a neutral stand towards religion in society, has been defined:

> "as an ideology [that] denotes a negative evaluation towards religion and might even be appropriately seen as a particular 'religious position' in the sense that secularism adopts certain premises *a priori* and canvasses a normative (albeit negative) position about supernaturalism."[80]

78 Article 27 ICCPR.
79 Article 1 of both ICCPR and ICESCR.
80 Quotation from WILSON, B., "Secularisation: Religion in the Modern World" in SUTHERLAND, S. and CLARKE, P. (eds.), *The World's Religions, the Study of Religion, Traditional and New Religion* (Routledge, 1991) at p. 196, in BOYLE, K., "Human Rights, Religion and Democracy: The Refah Party Case" (2004), *Essex Human Rights Review*, Vol. 1, No. 1, pp. 1–16, at p. 14.

basic tenets of religious law on the one hand and Enlightenment inspired secular law on the other? Both the source of the law – divine or human – and its contents, are at issue. The principle of equality is crucial in that respect. Religious law, in many cases, while recognising the equal worth of human beings, tends to stress different roles for men and women in the framework of marriage. Against that background, the differences as to the rights of men and women in the Jewish law on divorce can be explained.

It should be added that what has been said applies to the orthodox interpretations of religious law. There are, of course, also more liberal approaches, which are inclined to incorporate more or less the values that dominate the secular law in the countries discussed. Often there are strong tensions within the religious communities and debates between factions of the same religions as to the correct interpretation of the divine prescriptions. The fact that some versions of religious law may be in conformity with the prevailing notions of equality does not, however, solve the problem of the clash with the orthodoxy, which sticks to the traditional approach. The only solution would be to impose on a religious community a specific interpretation of its sacred texts. But that will be at odds with other principles, such as religious freedom.

Human rights…

That brings me to a second reflection on the relevance of human rights. It is frequently submitted that the problem of the *get* refusal should be solved by application of human rights law, which almost by definition is presumed to prevail over conflicting religious or secular law.[68] The problem is that "human rights" does not refer to a fixed body of law; an unambiguous set of norms, with an unequivocal meaning. On the contrary: its meaning is floating and often controversial. Divergent and often competing approaches of human rights as such may also lead to different views as to the degree of acceptability of religious law.

.. in favour of the recognition of religious law

There are strong human rights arguments for the prevalence of religious law, in the issue of *get* refusal, over secular law and, in that connection, for a reticent approach where the issue becomes controversial in terms of religious law (think of the financial "penalties" in the case of *get* refusal).

We should remember that traditionally human rights had strong religious connotations. Sometimes human rights are even seen as originating from religious sources. The central notion of human dignity is seen as the translation of the biblical idea that man is created in the image of God, as stated in Genesis 1: 26–27: "And God said: 'Let us make Mankind in our image after our likeness … So God created Mankind in his own image, in the image of God created he him; male and female he created them."[69] Already the biblical context makes clear that this approach to human dignity points in the direction of equal dignity of men and women, in terms of respect for them as human beings, but does not exclude different roles of the spouses in family law, as follows from the basic text on divorce in Deuteronomy discussed above.

This approach may lead in principle to a positive evaluation of the role of religious law, in general, and in the field of family law, in particular. The Jewish law on the issue of marriage and divorce, based on *Torah* and *Talmud*, has been developed over the centuries and its precise contents have been debated on this basis ever since. It plays an important role within the religious community and is accepted by its observant members as the law that should be followed. It is obvious that its enforcement should be entrusted to courts that are themselves not only versed in the law but also, from an internal perspective, convinced of its divine character. That is the case with the religious courts. Of course there is the issue of dissent within religious communities, as well as diverging views on the proper interpretation of the sources concerned. Also within religious communities, a more egalitarian interpretation of human dignity is defended.[70] Respect for religious law requires that these issues should in principle be solved within the community itself, by the authorities concerned. Secular authorities who want to intervene in favour of or against one of the opposing groups, will inevitably have to make a choice between diverging religious views. Should that not be in general outside the realm of the secular state? In addition, it should be noted that the membership of religious communities is not compulsory. It always remains possible to quit the religious community concerned.

Respect for religious law can be based on freedom of religion, if we take for granted that this freedom not only protects the right to have and to express a belief, but also the right to live in accordance with its tenets. That is especially relevant for religions which stress the unity of life, in the sense that acts of worship *per se* and obedience to religious rules are both indispensible parts of the manifestation of a religion. That is *inter alia* true for Judaism, as is illustrated by the words of Freiman: "Jewish religion and law are a single entity. The *Torah* makes no dogmatic distinction between religious teachings and legal

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68 See for example RADAY, F., "Culture, Religion and Gender", 1 *I.Con*, (2003), pp. 663–715, at p. 668.

69 Translation from The Koren Jerusalem Bible (2008). See further MAOZ, *supra* note 3, pp. 691–692.

70 See *inter alia*, MAGID, S., "Is egalitarianism heresy? Rethinking gender on the margins of Judaism", *NASHIM: A Journal of Jewish Women's Studies and Gender Issues*, 2004, pp. 189–229 and LONGMAN, C., "Waar een rabbijnse wil is, is er een halachhische weg?", *RoSa. Uitgelezen*, Vol. 10, No. 4, 2004, pp. 1–9.

follows that the execution of such acts by way of coercion is not within the reach of the State."[64]

More recently, in 1973, the *Oberlandesgericht* of Cologne took the same approach. It rejected the claim for compulsory measures by a husband, who sought the cooperation of his wife to accept the *get*. The court held that this would mean enforced participation in a religious ceremony, which was held contrary to the freedom of religion.[65]

This approach was basically also behind the minority opinion of the two judges of the Canadian Supreme Court who dissented from the majority decision in the case of *Bruker v Markovitz*. They held: "contract law cannot be relied on to enforce religious undertakings" and stressed the neutrality of the state, which is "indispensable in a pluralistic and multicultural society."[66] The claim of the wife should be rejected. The secular judge should therefore not award damages as a consequence of the refusal to perform an act prescribed by religious law, provided that there was not any barrier to remarriage under the secular law of the state.

5. EVALUATIVE REFLECTIONS

5.1. GENERAL

It is an understatement that the preceding lines show the complexity of the relationship between religious law and secular law in general and of the issue of *get* refusal in particular. First of all, we have discussed the example of the integration of the religious law as such into the legal system – the case of Israel. But, as we have seen, only a limited part of the Israeli family law is religious in nature. Next to that, there exists secular private law relevant to family relations. Therefore, a clash between religious law and secular law could not be evaded, leading to a stalemate.

The legislative adaptations in some Western states, to a certain extent found ways and means to solve in some, but not all, cases the problems of the *get* refusal. There remains a tension between the requirements of religious law as to the validity of a divorce on the one hand and the interest of one of the spouses concerned to be divorced in accordance with religious law on the other hand. Not all secular solutions seem to be compatible with the religious law concerned.

Furthermore, the judicial ways of tackling the problem of the get refusal display a spectrum of approaches. They vary from making a secular divorce dependent on complying with the requirements for a religious dissolution of the marriage, to the enforcement of contractual obligation and finally the establishment of tort liability. As we have seen, there are also examples of courts and judges refusing to enforce in any way an obligation which, in their view, is a religious one, referring to the separation of "Church and State". That may preserve the integrity of the religious law, but it is of no avail to parties faced with the reluctance of their partners to comply with religious law.

What we see are efforts to achieve partial solutions to the problem, which seems to be insoluble in a definitive way. That, to begin with, is related to the uneasy cohabitation of religious and secular law.

5.2. RELIGIOUS LAW AND SECULAR LAW

The integration of religious law and secular law appears to be complex. As we have seen, marriage and divorce are not only important concerns of Jewish law, but also of secular law. We can even say that the fact that the marital relationship became a matter of public concern in secular law in Western countries is a direct consequence of the long predominance of religion, more specifically Christianity in the West. On the Continent, until the French Revolution, marriage and divorce remained strongly determined by religious law. This was enforced by the state, by the church or, in the case of the Jews living in several countries, to a certain extent by their own authorities. The Enlightenment, however, inspired the development towards a secularised family law in many countries; although the contents of the law was or is (depending on the degree of secularisation of the society) to a certain extent influenced by religious morality, which is the consequence of the democratic process. It is remarkable that the whole idea of marriage as a legal concern is, in general, not questioned in even the most liberal of states, although its meaning and content is different from the original religious roots.

As a consequence of that, there may be tensions or a clash between the religious law and the secular law on these issues, as exemplified here by the problem of *get* refusal. Such a clash is, as such, not surprising. It is to a certain extent even inevitable.[67] Is there not in principle a fundamental incompatibility between the

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64 RG 16 February 1904, *RGZ* 57, 250 at p. 257. Translation in TAGER, E., "The Chained Wife" (1999), *Netherlands Quarterly of Human Rights*, Vol. 17, No. 4, pp. 425–457 at p. 450.

65 See GLENN, H.P., "Where Heavens Meet: The Compelling of Religious Divorces" (1980), *The American Journal of Comparative Law*, Vol. 28, pp. 1–38, at p. 17.

66 See *supra* note 51, paras. 180 and 181 (dissenting opinion of DESCHAMPS, J., joined by CHARRON, J.).

67 See COHN, *supra* note 29, p. 68. She uses similar terms.

that, having regard to a letter of the Supreme Rabbinate of Utrecht, it had no means to force the husband to procure a *get*. According to the Court of Appeal, it is unacceptable to assume that a civil court possesses powers in the field of a religious marriage that are lacking to the religious court concerned. The claimant submitted a cassation request against this judgment before the Supreme Court. This court chose a completely different approach. On the point at issue, it observed that the fact that the Supreme Rabbinate had no powers to force the husband to procure a *get*, did not exclude the possibility that such a refusal may be qualified as an unlawful act. It could be a violation of a rule of unwritten law pertaining to proper social conduct vis-à-vis his divorced wife. If that is the case, the Dutch court can order him to cooperate. Whether the refusal of a *get* is unlawful has to be determined, having regard to special features of the case concerned. The court mentioned, in that connection, the extent to which the wife is restricted in the free development of her life, the nature and seriousness of the objections of the man against cooperation in the procedure and the costs involved, having regard to the financial position of the parties and the preparedness of the woman to pay the costs. In other words, the Supreme Court tried to reduce the problem to a balancing of interests within the framework of the law on unlawful conduct (tort). The Supreme Court referred the case to the Court of Appeal at The Hague, which condemned the man to cooperate under threat of a judicially imposed penalty ('*dwangsom*'), in other words, an *astreinte*. The *Hoge Raad* apparently did not share the scruples of the *Cour de cassation* with respect to this remedy. The judgment has also been criticised in other respects. First of all, the Supreme Court did not, unlike the District Court and the Court of Appeal, respect the principle of Jewish law that is opposed to the application of this law by a non-Jewish court.[58] An expert in the field of Jewish law also remarked that the compliance of the man, with the order of the court to procure a *get* under the threat of the penalty imposed, will result in a forced *get* (*get me'useh*') which, according to Jewish law. is invalid. Therefore the *Beth Din* will not cooperate.[59]

The judgment of the Supreme Court has been followed in several decisions of district courts and a court of appeal.[60] In these cases, the courts referred to a letter of the Supreme Rabbinate, from which they inferred that it was prepared to cooperate in the divorce procedure based on an order of the civil court. Wolf underlines, in this connection, that in these cases the husbands could be coerced to cooperate also according to Jewish law. As we have seen, that is not always the case. It should be observed that the Supreme Court rather easily overstepped the requirements of Jewish divorce law in order to reach a result that was considered

58 See VAN DER PLAS, C.G., *De taak van de rechter en het IPR* (Kluwer, 2005), p. 161.

59 WOLF, *supra* note 13, pp. 178–183.

60 See Gerechtshof (Court of Appeal) Amsterdam, 31 August 1989, *NJ* 679.

to be in conformity with Dutch tort law. The Supreme Court's decision of 1982 has not always been followed, as is illustrated by a judgment of 28 May 1986 of the District Court of Middelburg.[61] It opted for a slightly different approach, maybe inspired by the criticism of the Supreme Court's ruling. It held that the refusal of a *get*, to which the (former) wife was entitled according to Jewish law, and which restricted her in her options in life, might lead to the conclusion that the (former) husband acted unlawfully. The court continued by stating that it was not competent to judge on this issue, apparently considering this to be within the competence of the religious courts. That was, however, not the end of it, because the court held that the refusal of the (former) husband to cooperate in a procedure before a rabbinical court was unlawful, having regard to the weighty interest of the wife. Her claim to order her (former) husband to cooperate in the religious divorce proceedings was granted.[62] In other words, the court made a subtle distinction between the provision of the *get* as such and the participation in the procedure which possibly could result in the provision of the *get*. This is a more cautious approach, which acknowledges both the value of religious law and the competence of the religious courts, while at the same time recognising the plight of the woman.

4.3.4. Rejection of the claim

There are also examples of courts which have rejected claims to force, by any means, a recalcitrant party to cooperate in the religious divorce procedure. In an old case from Pennsylvania, a court refused to impose an obligation to deliver a *get* because "civil tribunals are certainly without authority to order one to follow the practices of his faith".[63]

German courts have a long tradition of rejecting such claims on similar grounds. In 1904, the German *Reichsgericht* declared impossible the enforcement of agreements to cooperate in the religious divorce, having regard to the separation of Church and State. It held:

> "We must dismiss the Appellate Court's idea that the declarations and the acts prescribed by the Jewish religion for the ritual divorce are 'by and large or 'predominately' or even 'exclusively' of a legal nature. From that fact it immediately

61 There is no formal rule of binding precedent in Dutch law.

62 Rechtbank (District Court) Middelburg 28 May 1986, *Nederlands Internationaal Privaatrecht* (*NIPR*) 1986, nr. 413.

63 16 District and County Reports 290 (Pa. County Ct. 1932, quoted by Leo PFEFFER and Alan PFEFFER, "The Aguhnah in American Secular Law", *Journal of Church and State* 31 [1989], p. 487–525, at p. 496.

Subsequently the Court examined the claim of the husband that such an order would violate the Establishment of Religion Clause of the First Amendment. That was, according to the Court, not the case, while the specific performance of the obligation to provide a *get* simply required the defendant to do what he had agreed voluntarily to do. Basing its decision on the testimony of several rabbis, the Court held that the acquisition of a *get* is not a religious act: it did not require participation in a religious ceremony nor action contrary to religious beliefs. Especially in America, it has become a practice to add a clause to the traditional *ketubah* including the obligation of the parties to appear before a *Beth Din* and accept its orders when it comes to abiding by the standards of Jewish law, including in the case of a dissolution of marriage. This device was developed in the circles of Conservative Jewish community and met initially with opposition from the Orthodox side. However, in 1993, the orthodox Rabbinical Council of America advised couples to sign such a prenuptial agreement.[50]

The contractual approach is of course also likely where parties, in the framework of their civil divorce proceedings, have accepted an obligation to appear before a *Beth Din* in order to provide or accept a *get*. An example of this is the Canadian case of *Bruker v Markovitz*, already referred to in the introduction.[51] In this case the parties agreed to a Consent of Corollary Relief to settle their matrimonial disputes, including the obligation to appear before the rabbinical authorities to obtain a *get*, immediately after the granting of the *decree nisi* (the provisional decision on the divorce). As we have already noted, the husband refused and the wife started (after nine years) proceedings claiming damages. Eventually, after 15 years, the husband appeared before the rabbinical Court at Montreal to deliver the *get*. The court of first instance awarded a considerable amount of damages This decision was quashed by the Quebec Court of Appeal, holding that a religious obligation could not be enforced by a secular court. The Supreme Court of Canada, in its turn, allowed the appeal in a majority judgment and found that in such cases damages should be awarded. Madam Justice Abella, who gave reasons for the majority, held:

> "I do not see the religious aspect of the obligation in Paragraph 12 of the Consent as a barrier to its civil validity. It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones."[52]

50 See ZORNBERG, *supra* note 34, pp. 767–768.

51 Supreme Court of Canada 14 December 2007 http://scc.lexum.unmontreal.ca/

A minority of two Justices in the court, however, agreed with the Court of Appeal.[53]

4.3.3. Tort

In several countries we find judgments qualifying the refusal to deliver a *get* as a tort. This is the common approach in French law.[54] The *délit* or *quasi-délit*, sometimes appears in the shape of an abuse of right (*abus de droit*): the husband abused his right under religious law to withhold the *get*. To prove such an abuse, an intention to harm has to be established. The judgments have sometimes been enforced by the imposition of partly conditional damages: the defendant has to pay an amount, which would be reduced considerably if he delivered the *get*. The use of an *astreinte* (a judicially imposed penalty) to enforce the judgment, of which we find examples in decisions of lower courts, was ruled out by the *Cour de Cassation* in 1982.[55] It held that deliverance of a *get* falls within the scope of freedom of conscience. Therefore, the use of the *astreinte*, as a means of enforcement, was apparently excluded. This decision was confirmed in a later decision.[56] This approach seems to be in line with Jewish law which excludes in principle a forced *get*. It may be doubted whether that is also the case with the acceptance by the *Cour de cassation* of the imposition of an obligation to pay damages.

In Dutch civil law, which traditionally has been close to the French system, we find a similar approach. The judgment of January 22, 1982 of the Dutch *Hoge Raad* (Supreme Court) is looked upon as the leading authority on the issue of *get* refusal.[57] In a divorce request a woman *inter alia* claimed that her husband should be ordered by the court to cooperate in a procedure before a rabbinical court in order to procure a divorce, in accordance with Jewish law. The District Court, in its decision of 4 December 1979, declared this claim to be inadmissible. It observed that, according to Article 1:30 of the then Civil Code, marriage should only be considered in its civil aspects. The court could therefore not decide on the consequences of the divorce which have a religious nature. The Court of Appeal at Amsterdam upheld, on 4 March 1981, the decision of the court of first instance. It observed in an *obiter dictum* on the question at issue

53 See for a discussion of this case, CARTER, T.S. and MIX-ROSS, D.B., "Supreme Court of Canada Decision Permits Judicial Interference in Religious Disputes", *Church Law Bulletin* No. 21, 20 December 2007 (revised 8 January 2008); KLEEFELD and KENNEDY, *supra* note 35 and DE BLOIS, M., "Respect of neutraliteit? Over de omgang met religieus recht in een seculiere staat" in DOORNBOS, N., HULS, N. and VAN ROSSUM, W., *Rechtspraak van buiten* (Kluwer, 2010), pp. 237–242.

54 See RENUCCI, *supra* note 47.

55 Cour de cassation (chambre civile), 21 April 1982, *GP*, 1983, p. 590.

and the defendant and to both religious and non-religious marriages. This second piece of legislation has been criticised because the procurement of a *get*, due to the financial pressure resulting from the legislation, would amount to a nullification of the free will of the husband.[41] That would make the *get* involuntary and as a consequence void. Of course there are also other voices.[42] The disagreement on this issue will lead to insecurity as to position of the spouses and their children in religious law.

4.3. JUDICIAL APPROACHES

In global terms, the legislative adaptations to cope with the problem of *get* refusal are exceptional. We find more examples of the various ways courts have addressed the problem of *get* refusal. The examples from different legal systems display a great variety of approaches. There are examples of decisions where courts without specific legislation used their judicial powers to make the granting of a civil divorce dependent on cooperation in the religious divorce proceedings. In other cases, the refusal to provide or accept the *get* has been approached as a breach of contractual obligation. Next to that, *get* refusal is accepted as a tortious act, as is the case in Israeli law, as we have seen. In these contract and tort cases, the question arises as to which remedies may be imposed: specific performance, *astreinte* or damages. Finally, there are instances where national courts simply reject the possibility of a remedy for the failure to cooperate in the religious divorce procedure. Their argument is that they, as secular courts, may not impose the performance of religious duties.

4.3.1. Civil divorce proceedings

In English law, before the amendment of the Matrimonial Causes Act 1973 by the Divorce (Religious Marriages) Act 2002, courts used the application of the civil law on divorce to address the problem of *get* refusal in various ways. Courts tried to find ways and means to make the refusing spouse cooperate in the religious divorce. In the case of *Brett v Brett*, where a husband refused the *get* as a weapon in the struggle with his wife on her maintenance demands, the Court of Appeal increased the sum payable as a strong incentive for the former husband to grant a *get*.[43] Another judgment concerned the consent required for a divorce after two years of separation. In that case the wife had made her consent subject to the grant of a *get*; this was approved by the court.[44] A third approach was

followed in a decision of the Watford County Court. It refused to grant a *decree absolute* (the final decision on the divorce) in a case where the husband refused to give a *get*.[45] Michael Freeman, commenting on this decision, assumed that it would be seen, in terms of Jewish law, as unjustified coercion resulting in the *get* being invalid.[46] This can be doubted, however, having regard to the high degree of acceptance also from the side of orthodox experts on Jewish law of the amendment of the Matrimonial Causes Act in 2002, which basically accepts the direction chosen by the County Court.

4.3.2. Breach of contract

There is a rather old French judgment which qualified the refusal to deliver a *get* as a breach of contract.[47] The reasoning is that, once you enter into a religious marriage in accordance with Jewish law, you accept at the same time the obligation to comply with the rules for the dissolution of the marriage in Jewish law. It is very doubtful whether this reasoning is taking sufficiently seriously the, in principle, voluntary nature of the deliverance of the *get*. It has in any case not been followed by more recent French case law.

Some American courts have derived an obligation to cooperate in the dissolution of the religious marriage from the *ketubah*; the religious marriage contract entered into before solemnisation of the marriage.[48] In that contract there is a reference to "the law of Moses and Israel" and the idea is that this reference to Jewish law implies cooperation in the divorce proceedings prescribed by that law. A very clear example is the judgment of the New Jersey Superior Court of July 22, 1981 in the case of *Minkin v Minkin*. The Court held that:

> "The parties were married in a Jewish ceremony where they entered into a contract, called a 'ketuba' in which they agreed to conform to the provisions of the laws of Moses and Israel. These laws require the husband to give his wife a get when he alleges an act of adultery on his wife's part. In the instant case the husband counterclaimed for divorce on the ground of adultery, giving rise to the wife's claim to require her husband to secure a get."[49]

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45 Judge Viljoen of the Watford County Court, *O v O* (Jurisdiction: Jewish Divorce) [2000] 2 FLR 147, referred to by FREEMAN, *supra* note 19, p. 373.

46 FREEMAN, *ibid.*, p. 373.

47 Tribunal civil de Metz, 27 April 1955, referred to by RENUCCI, F., "Les solutions aux conflits en matière de divorce religieux du XIXe siecle a nos jours. Le cas de refus de deliverance du

terms, was adopted primarily in respect of the *get* problem.[34] Section 253 of the Domestic Relations Laws of New York State provides that a claimant can only obtain a divorce if he or she has done everything to remove any barrier to the defendant's remarriage after the divorce. It is specified that the concept of barrier includes:

> "any religious or conscientious restraint or inhibition, of which the party ... is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act."

The legislation is restricted to marriages solemnised in a religious ceremony. In its 1983 version (which was amended slightly in 1984), it only addressed the problem created by a claimant who refuses to be cooperative in obtaining a religious divorce. If the problem is the result of a refusal by the defendant there is no remedy.

In 1990 a similar provision was introduced in the Canadian Divorce Act, in section 21.1, which empowers the court to withhold the granting of a divorce if it has not been made clear that the claimant has removed the barriers to remarriage based on religious law. The Canadian Federal Law differs from its New York equivalent in that it allows the court to refuse to exercise its power in a case where the refusing spouse has genuine grounds of religious or conscientious nature for refusing to remove the barrier (section 21.1(4)(b)).[35] That addition underlines the complexity of the issue and illustrates that, in addition to concerns in the field of equality, privacy and the right to marriage, freedom of conscience and religion is also involved.

More recently a similar legislative approach was taken in England. Where the previous examples of legislation only referred to religious law in general terms, the English law refers explicitly to Jewish law. The Divorce (Religious Marriages) Act 2002 amends the 1973 Matrimonial Causes Act to the extent that the grant of the final decision on the divorce (*decree absolute*) can be made dependent on the cooperation in the procedure that leads to a divorce under religious law. In terms of section 10A of the amended legislation it is applicable where parties:

> "were married in accordance with – (i) the usages of the Jews, or (ii) any other prescribed religious usages; and (b) must co-operate if the marriage is to be dissolved in accordance with those usages. (2) On the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court."

The Act implies that a relevant religious authority confirms the compliance with the religious usages concerned.[36] That may be a rabbinical court of the various Jewish 'denominations': Orthodox, Masorti (Conservative) or Reform, as well as the Rabbinic Board of the Union of Liberal and Progressive Synagogues. It should however be realised that only a *get* granted under the auspices of an Orthodox *Beth Din* is recognised universally.[37] Finally, the court *may* suspend the *decree absolute* in case of *get* refusal, but it is not obliged to do so. It has discretionary powers. It will also be possible for the English judge to take into account religious concerns similar to those included in the Canadian legislation. The Act received support from representatives of the various branches of the Jewish community, among them the British Chief Rabbi, Dr Jonathan Sacks and the presidents of the most important religious courts.[38] The other examples given so far of legislative interventions have also been welcomed by experts on Jewish law and representatives of the Jewish community.[39] These solutions apparently do not create problems from the perspective of religious law. While there is of course an incentive for the refusing spouse to cooperate in the divorce proceedings, there seems to be no improper coercion. The legislation does not interfere with the freedom of the husband to grant or not to grant a *get*. He is not obliged to do so. The only consequence is that there will not be a civil divorce.[40]

Next to the legislation that makes the civil divorce conditional on cooperation in the religious divorce there are other legislative approaches that have met more opposition from the side of the experts in Jewish law. An example is the legislation adopted in 1992 in New York to adapt the Domestic Relations Laws in order to cope with the limitations of the previous amendment of this Law in 1983 already discussed. The 1992 law introduced section 236B(5)(h) and (6)(d), which concerns the equitable distribution of marital assets and alimony after the dissolution of marriage. It is provided that, in taking decisions in this field, the court shall, where appropriate, consider the effect of a barrier to remarriage as defined in the 1983 legislation. This provision is applicable to both the claimant

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36 This follows from Rule 3 of The Family Proceedings (Amendment) Rules 2003. See on this FAITH, S. and LEVINE, D., "Religious Divorce" (2003), *Family Law Journal* (May), pp. 11–14 at pp. 13–14.

37 LEVINE, D. and FAITH, S., "Divorce, religion and the law", *Family Law Journal*, December 2002/January 2003, pp. 18–20.

38 See Divorce (Religious Marriages) Bill. House of Lords debates, 10 May 2002, www.theyworkfor you.com/lords/?id=2002-05-10a.1401.3, p. 3.

39 ZORNBERG, *supra* note 15, p. 749; see also the majority opinion in the case of *Bruker v*

obligation decree. The judge stated in an *obiter dictum* that he would also have awarded the damages in harsh cases that only had led to a *recommendation decree*. This was used in a subsequent case decided by the Tel Aviv Family Court in 2008. The development did not stop there. In the same year the Jerusalem Family Court assumed the principle of liability for negligence irrespective of a decree by a rabbinical court, although there was in that case an obligation decree issued by the High Rabbinical Court. The husband's refusal to give a *get* was regarded as negligent in this case as from the time of one year after the woman started her divorce action.[32]

The question is whether the secular courts have not overplayed their hands by using the means of secular law to induce parties to perform an action governed by religious law. It is in any case clear that the rabbinical courts do not accept the use of tort law to cope with the problem of *get* refusal. On March 11, 2008, the Supreme Rabbinical Court held:

> "All petitions filed outside the rabbinic court – like petitions to civil courts for damages – that relate to *get* refusal, whose practical consequence is to accelerate the delivery of the *get*, are an interference with the laws of the Torah regarding divorce, and effectively preclude the possibility of the execution of a [kosher] *get*..." (J. Algrabli).[33]

Apparently, in the view of the Supreme Rabbinical Court, it is within the exclusive powers of the religious courts to cope with the problem of *get* refusal. The intervention of secular courts in the realm of religious courts has led to a stalemate. It illustrates the clash between religious and secular law and, as a consequence, the unresolved competition between secular and rabbinical courts when it comes to efforts to solve the problem, for the parties concerned, that the *get* refusal creates.

4. THE APPROACH TO THE *GET* PROBLEM IN WESTERN SECULAR JURISDICTIONS

4.1. GENERAL

The legal order of Israel is, as compared to (other) Western states, unique for the integral incorporation of Jewish law in its legislation in the field of family law.

[32] BLECHER-PRIGAT and SHMEULI, *supra* note 30, pp. 286–287.

[33] File 7042–21–1. See WEISS, S., *From religious "Right" to Civil "Wrong": Using Israeli Tort Law to Unravel the Knots of gender, Equality and Jewish Divorce*, www.brandeis.edu/hbi/pubs/SusanWeiss.doc.

family law. I say almost complete because many systems give civil effect to marriages solemnised in a religious context, although many other systems do not (for example Dutch law). An example of integration of religious law as to the conclusion of marriages is the English system which knows both religious and non-religious marriages. The first category is even subdivided into three sub-categories: In the first, there are marriages solemnised in the Church of England, in the second, are so called non-Church of England marriages and, in the third sub-category, both Quaker and Jewish marriages; the latter defined in section 26 of the Marriage Act 1949 as follows: "a marriage between two persons professing the Jewish religion according to the usages of the Jews". Also, in for example the United States, civil marriages may be solemnised in religious communities, in front of an officiating religious functionary. On the other hand, there are many Western countries where only a marriage solemnised by a state official has effect in civil law. It is up to the parties themselves if they afterwards will enter a religious marriage as well or if they want to receive a blessing in a religious service. While marriages may be solemnised according to religious rites, divorce is now – in England as well as in other Western countries – exclusively a matter for the civil courts.

Many Western countries do have communities that live in accordance with their own religious law, *inter alia* Jewish communities. As in Israel, they have to cope with the problem of *get* refusal. They are facing the question whether the law should, in one way or the other, address this problem, in order to accommodate their Jewish citizens who will otherwise be affected by the consequences in religious law of the failure of one of the parties to cooperate in the religious divorce proceedings. Without any pretension to completeness we will try to give an impression of the great diversity in approaches in various Western countries: England, the United States, Canada, France, the Netherlands and Germany. A general subdivision can be made in legislative and judicial approaches.

4.2. LEGISLATIVE APPROACHES TO RELIGIOUS DIVORCE LAW

Recently the legislation on divorce of some countries has taken religious law into account, specifically to cope with the problem of *get*-refusal. We will not give an exhaustive overview, but restrict ourselves to some striking examples.

First of all we see instances of legislation, which makes the granting of a divorce dependent on cooperation in religious divorce proceedings. The State of New York in the US has enacted legislation which, although drafted in neutral

> "With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law."

Article 23 protects *inter alia* the right to marriage. The formulation of this reservation, which refers next to Article 23 to "any other provision" is interpreted by Margit Cohn to extend also to Article 18 (freedom of religion) and Article 26 (Prohibition of discrimination).[29]

When ratifying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Israel made several reservations. The first is in connection with article 7 (b) on the participation of women in the political and public life of a country:

> "The State of Israel hereby expresses its reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel. Otherwise, the said article is fully implemented in Israel, in view of the fact that women take a prominent part in all aspects of public life."

The second reservation concerns the prohibition of discrimination against women in the field of family law:

> "The State of Israel hereby expresses its reservation with regard to article 16 of the Convention, insofar as the laws of personal status binding on the several religious communities in Israel do not conform with the provisions of that article."

3.3. THE ISRAELI APPROACH TO THE *GET* PROBLEM

As we have seen under Jewish law, it is impossible for a court to decree a divorce. It is up to the husband to provide his wife with a *get*. It has been accepted that the wife herself may request the court to order the husband to provide one, in cases where there are good reasons to do so. The *get* must not, however, be provided under pressure which has the effect of precluding the free will of the husband. In order to see how courts in Israel have coped with the problem of *get* refusal it is necessary to make a distinction between religious courts and secular courts.

So far the rabbinical courts have developed several ways to coerce a husband to grant a *get* in cases where they think he should do so. Similarly they can coerce the wife to accept a *get*. Rabbinical courts are however rather reluctant to impose such sanctions. If they do not, the husband may continue his refusal to provide a *get* or, in the case of a non-cooperative wife, she may persist in the refusal to accept one. It is nevertheless important to specify the several instruments at the disposal of the rabbinical courts to apply degrees of pressure and coercion in the case of *get* refusal.

The first option is that a court *recommends* the parties to divorce. The strength of such a *recommendation decree* is primarily of a moral nature. It assumes that there are reasons for a divorce under Jewish law. The second possibility is that the court issues a decree stating that there is an *obligation* (for the man) to give or (for the woman) to accept the *get*. Noncompliance with this *obligation decree* may lead to the imposition of a larger sum of spousal support for the wife. Next to that, pressure from the community may play a role. This type of decree is not often imposed. The most serious intervention of the court is the order of a *compulsion decree* imposed on a party to give or accept a *get*. Such an order may be accompanied by sanctions such as fines or imprisonment, without consequences for the validity of the *get*. These orders are even rarer than the previous category.[30]

Although divorce as such is exclusively within the jurisdiction of the religious courts, secular courts in Israel also have dealt with issues related to divorce. They have, since 2004, introduced a device to enforce rulings of rabbinical courts on *get* refusal by accepting a tortious liability for *get* refusal. In 2004, the Family Court of Jerusalem awarded damages because it considered a husband to be negligent by not complying with a rabbinical *obligation decree*. It held that,

> "refusal to grant a get constitutes a severe infringement on her [the wife's] ability to lead a normal life, and can be considered emotional abuse lasting several years. (...) [T]his is not another sanction against someone refusing to give a get, intended to speed up the process of granting a get, and this court is not involving itself in any future arrangements for the granting of a get, but rather, it is a direct response to the consequences that stem from not granting a get, and the right of the woman to receive punitive damages."[31]

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30 BLECHER-PRIGAT, A. and SHMEULI, B., "The Interplay between Tort Law and Religious

consequences for her husband are less serious. Remarriage is not completely excluded, and the children born from a new relationship are not regarded as *mamzerim*.[22]

Not infrequently, interested parties have invoked secular law to solve the problems created by the *get* refusal. That, of course, brings the relationship between religious law and secular law to the fore. There are a wide variety of approaches to this problem in Western legal orders which share the principles of religious freedom, equality and the rule of law. We will start with the specific case of Israel.

3. LEGISLATIVE INCORPORATION: ISRAEL; RELIGIOUS LAW AS LAW OF THE STATE

3.1. GENERAL

Israel, both a Jewish and a democratic state,[23] is not a theocracy in the Biblical sense. Its legal system shows influences of several legal traditions, reflecting its complex history. For the greater part Israeli law has a secular character. Religious law plays a role in a limited field.[24] Several aspects of family law are governed by religious law, while religious courts have jurisdiction in these matters. In these fields Israel recognises legal pluralism, not unlike the situation under the Ottoman Empire and during the Mandate period before 1948 (the *Millet*-system). The pluralism concerns both the substantive law to be applied and the courts which have jurisdiction to apply the law. Different religious communities have their own religious law and their own courts. In that connection Israel recognises 14 religious communities: Jewish, Muslim, Druze and Christian (various denominations).[25] The members of their religious courts are appointed by the President of Israel. There are variations as to the jurisdiction of these courts. Jewish rabbinical courts have exclusive jurisdiction in matters of marriage and divorce for Jews. As to other aspects of the law of personal status and family law the jurisdiction of religious courts and state courts is concurrent. In these cases religious law may only be applied with the consent of the (adult) parties. State (family) courts have jurisdiction in areas that are not exclusively within the jurisdiction of religious courts. To make the situation even more complex it has

22 FREEMAN, *supra* note 19, p. 371.

23 See its Declaration of Independence of 14 May 1948 and Basic Law: Human Dignity and Liberty of 17 March 1992.

to be underlined that religious courts are to a certain extent subject to (secular) Israeli law, while state courts may have to apply religious law in questions of personal status, family law and inheritance law.

3.2. THE LAW OF MARRIAGE AND DIVORCE

This area of family law is governed by the religious law of the parties. Therefore their religious affiliation is decisive for the law applicable. Recently the Israeli Parliament, the Knesset, adopted a Civil Union Bill, which provides for the possibility of civil marriage in case both parties have no legal affiliation with a recognised religion.[26] It is assumed that the effect of this legislation will be limited. It is not applicable in cases of religious intermarriage or where one of the parties has a recognised religious affiliation. Israelis without a religious affiliation (or a religious affiliation not recognised for the purposes of family law) traditionally have the possibility to conclude their marriage elsewhere (e.g. in Cyprus). Such a marriage is recognised under Israeli law.

The law concerning Jewish marriage is determined by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953. It holds that:

> "(1) Matters of marriage and divorce of Jews who are Israeli citizens or residents will be under the exclusive jurisdiction of the rabbinical courts.
> (2) Marriage and divorce of Jews will be carried out in Israel according to the law of the Torah."

What the Torah entails in the field of marriage and divorce has already been summarised above. It is worthwhile to underline in addition that in Israeli legal practice there is an officiating rabbi present at the solemnising of a marriage. He is responsible for registration of the marriage.[27] It is ensured that only orthodox rabbis will conduct marriages.[28] A marriage solemnised by a non-orthodox rabbi is not recognised.

It has to be remarked in this connection that the religious nature of the law of marriage and divorce has led the state of Israel to make a reservation upon ratifying the International Covenant on Civil and Political Rights (ICCPR) with the following text:

two separate legal acts can be distinguished. In the first place an agreement, the *kiddushin* or betrothal (symbolised by the exchange of rings) and, secondly, the *nisu'in*, leading the bride under the *chuppah* (wedding canopy). They are performed in the presence of two witnesses.[8]

While the ethical ideal of the Torah is against the dissolution of marriage, Jewish law, taking into consideration the circumstances of life, knows the possibility of divorce.[9] This is based on Deuteronomy (*Dewarim*) 24:1:

> "When a man has taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he has found some unseemliness in her: then let him write her a bill of divorce, and give it in her hand and send her out of his house."[10]

The divorce document, the *sepher kerithoth*, is referred to in the *Talmud* as *get*, which is now a common expression. The text quoted endows the husband with discretionary power to divorce from his wife by giving her a *get*.

This discretionary power is restricted in the *Torah*,[11] the *Mishnah*, the *Talmud* and in later rabbinical ordinances, both as to the substance of the law (grounds for divorce) and concerning the procedure. Later developments have introduced the requirement of the approval of the wife for the divorce (Rabbenu Gershom, 11th century), except in certain specific cases.[12] It is also assumed that the husband may sometimes be obliged to divorce: his wife may ask a rabbinical court (*Beth Din*) to order her husband to divorce. Some important reasons are the lack of material support, the refusal of sexual intercourse or frequent instances of adultery.[13] The *get* should be given voluntarily in order to be valid.[14] Otherwise it is a *get me'useh*, a coerced get, which is void.[15] However, it is assumed that in some cases a husband may be compelled by a rabbinical court, depending on the grounds for the divorce. It has to be added that there are controversies among the experts as to which grounds qualify for the use of compulsory measures. Coercion to provoke an action that should be voluntary, is defended by the assumption that every Jew wants to submit to religious law

8 See AL, *supra* note 4, pp. 39–42.
9 MIELZINER, *supra* note 5, pp. 15–19 and 115–129.
10 Translation from The Koren Jerusalem Bible (2008).
11 Compare Deuteronomy 22:13–19 and 28–29. See, for the tradition followed in the New Testament, Matthew 19: 3–9.
12 MIELZINER, *supra* note 5, p. 120.
13 *Ibid.*, pp. 123–124; AL, *supra* note 4, pp. 146–154 and WOLF, D.A., "Het joodse echtscheidingsrecht in Nederland en de New York Get laws', *Familie- en Jeugdrecht* 1995–8,

and that each refusal to do so is the consequence of his free will having been temporarily affected by bad inclinations. The coercion restores the free exercise of the will.[16] The procedure is nowadays that the spouses appear before a rabbinical court, where the husband gives the *get*, prepared by a specially appointed writer, to his wife, who accepts it. That act constitutes the divorce. A rabbinical court is required because, according to Jewish law, only a Jewish religious court is competent to decide on issues of religious law. Decisions of secular courts applying religious law are therefore not acceptable. It is, however, not excluded that secular courts are used to enforce the decisions of religious courts.[17]

2.2. THE PROBLEMS OF *GET* REFUSAL

We have seen that, in general, divorce under Jewish law is dependent on the will of both parties. The husband should deliver the *get* and the wife should accept it. If either of them refuses, the marriage cannot be dissolved. Also, only in exceptional cases, the *Beth Din* may interfere either to force the husband to give the *get* or to grant the divorce, notwithstanding the wife's refusal to accept it.[18] It is appropriate to add here that many assume that, at least in our days, frequently the refusal to grant or to accept a *get* is motivated by other than religious concerns. It is sometimes used as a means to put pressure on the other party to agree to less favourable arrangements in, for example, the financial field.[19] Therefore, the *get* refusal is also seen as a problem in the circles of the experts of religious laws. They have perused the sources of the tradition to cope with this problem.

If the husband refuses to give the *get* to his wife, she cannot remarry according to Jewish law because, in religious terms, she remains married to her husband. She becomes an *agunah*, a "chained wife". If she enters into a new relationship, she commits adultery. The children born from this new relationship are regarded as *mamzerim*, a term referring to those born of incest or adultery.[20] This entails social stigma as well as restrictions under Jewish law as to marriage. According to Jewish law, they may only marry other *mamzerim*.[21] As we have seen, the wife's approval is also required for a divorce. However, if she refuses the

16 See for this reasoning from Maimonides (1135–1204), AL, *supra* note 4, p. 155; WOLF, *supra* note 13, p. 179 and ZORNBERG, *ibid.*, pp. 709–710.
17 NOVAK, *supra* note 6, p. 217 and WOLF, *supra* note 13, p. 179.
18 MIELZINER, *supra* note 5, pp. 120–121.

well as secular law, may have a multi-faceted character. We are sometimes confronted with different interpretations, as to the precise meaning of its concepts. For many modern states and religious communities the question is how to cope with the tensions between the religious law of a specific community and the secular law of the state. In this connection the perspective of human rights is a rather obvious one. It shows, however, not an unequivocal direction. It is evident that a community may invoke the freedom of religion. But is that also a guarantee against interferences by state law motivated by other rights, such as the right to equal treatment?

Legislators and judges in different states, all adhering to the rule of law and the protection of human rights, are approaching the relationship between religious law and secular law in diverse ways.

The purpose of this contribution is first to analyse the Jewish law of divorce and more specifically the issue of *get* refusal.[1] Next to that we will discuss the various approaches to this issue in legal systems. It is worthwhile to start with the special case of the incorporation of the Jewish law on marriage and divorce as such in the legal system of Israel. Next to that we discuss examples of secular legislation on divorce, which include provisions to cope with the problem of *get*-refusal. A third category consists of examples of ways and means developed by courts to address this problem. Some courts appear to be inclined to take the religious law into account when deciding in a conflict on the *get* refusal; other courts prefer to ignore the religious law, while stressing their own exclusively secular role. Finally some evaluative reflections on the relationship between religious law and secular law and on the relevance of human rights in this respect will be undertaken.

2. JEWISH LAW

Jewish law is religious law, more specifically God-given or theonomous. That follows directly from the description of the revelation of the *Torah* on Mount Sinai as described in the book of Exodus: "And God spoke all these words…".[2] The law is binding *ipso facto*, independent of the consent of the governed. It may be a living instrument, but is not subject to adaptation, to changing opinions or practices among those who are bound by it. It is in that sense unchangeable, although it has to be interpreted by the members of the religious community or more specifically by those endowed with the task of interpreting the law. As far

as the content of the law is concerned, religious law tends to stress *inter alia* communal values and submission to authority within hierarchical structures. It should also be underlined that in religious law there is no "public" and "private" distinction, which is so common to an Enlightenment approach to the law. It is not even possible to separate the relationship between God and man from relationships among men themselves. Violation of our obligations to other persons implies a violation of God's law and has therefore its effect on the relationship with God. The religious is not a separate sphere next to the secular. There is no secular sphere. This is especially true for Judaism, which, in Asher Maoz's words "encompasses all aspects of society and of an individual's life".[3]

Jewish law (*Halakha*) is based on the *Torah*, the first five books of the Bible (in Greek: Genesis, Exodus, Leviticus, Deuteronomy), given to the people of Israel by God at Mount Sinai. It is, in the most literal sense, God-given law, although transmitted through mediation of Moses. In the Jewish tradition this is called the *written Torah*. It includes 613 commandments (*mitzvoth*). The written Torah is accompanied by the *oral Torah*, based on the oral tradition as from Moses, which was codified in the second century (Common Era) as the *Mishnah*. It explains the written Torah and is itself commented upon in the *Talmud* written in the 5th (Jerusalem) and 6th (Babylon) centuries. On this foundation, the Jewish or Talmudic legal tradition has been developed ever since up to our times.[4]

2.1. JEWISH LAW ON MARRIAGE AND DIVORCE

Marriage is a central concern of both ethical doctrines and legal rules within the Bible and the Talmud.[5]

In Jewish law, marriage is seen not as an ordinary contract, but as a covenant with a holy character, in principle to be honoured until the death of one of the parties.[6] It is regarded as "the most important and sacred of all domestic relations" and as a "divine institution".[7] In the conclusion of a Jewish marriage

3 MAOZ, A., "Can Judaism Serve as a Source of Human Rights?", *ZaöRV (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)* 64 (2004), pp. 677–721, at p. 678.

4 See for a general overview: GLENN, H.P., *Legal Traditions of the World* (Oxford University Press, 2004), pp. 92–124. See further, AL, J.C., *Overzicht van het Joodse Huwelijks- en Echtscheidingsrecht* (Wolf Legal Productions, 2002) and VESTDIJK-VAN DER HOEVEN, A.C.M., *Religieus recht en minderheden* (Gouda Quint, 1991), pp. 127–161.

5 MIELZINER, B., *The Jewish Law Of Marriage And Divorce In Ancient And Modern Times* (Bloch publishing and printing company, 1884), Reprint Bibliolife, p. 13.

olic Church in Malta has consistently striven to impart values of solidarity
in ethic of care, replicated in the Roman law tradition of the Civil Code
still requires maintenance to the extended family as a matter of right.[83]

brief review of court judgments also reveals that judicial interpretation,
at times in keeping with the tenets of the Catholic faith, is increasingly
ing about changes in the application of the law and in the application of
which no longer necessarily reflect the terms of the Roman Catholic
ch. This may be the result of a number of factors but certainly owes a debt
impact of judgments of the European Court of Human Rights and their
vance in Maltese law.

Roman Catholic religion has had a significant effect on family law in Malta
I would argue, continues to do so, although to a decreasing extent, mainly
se its policies in promoting a family model are still protected and endorsed
ubstantial representation of Maltese society. The Diocesan Synod published
ument on Marriage and the Family, identifying the family as a special area
ncern,[84] and the Church continues to promote solidarity and support
tures to assist the family according to its values. Although practising Roman
olics of Maltese nationality may be slowly dwindling, and while increasing
bers of persons from other, both Christian and non-Christian, faiths
nue to visit Malta, the impact of Roman Catholicism on policy and law
ns significance.[85]

Laws of Malta, Chapter 16, Civil Code, Articles 7–25. Although enforcement of these Articles has dwindled and is increasingly replaced by recourse to the Welfare State structures in place.

Arcidjocesi ta' Malta, Zwieg u Familja, 2003, available on line (in Maltese) at www.maltachurch.org.mt/Dokument%Sinodu/ZwiegUFamilja.pdf.

This influence is apparent in the current debate following the divorce referendum where members of both sides of the House of Representatives have expressed their dilemma in choosing whether to respect the will of the electorate or follow their own conscience formed according to the Roman Catholic faith. *Times of Malta* 1 June 2011: "Labour MP Marie-Louise Coleiro Preca said today that after assuring herself that the Divorce Bill will be approved in Parliament, she would abstain from the vote … Another MP who had spoken against divorce, Carmelo Abela, said on Monday he would respect the will of the people and vote in favour. MP Adrian Vassallo declared before the referendum result that whatever the outcome, he would vote against." And the Chairman of the Social Affairs Committee MP Edwin Vassallo said "the referendum result had to be expected. It had been a test on religious belief. The choice was a moral one. The result showed that Christian values did not seem to be as popular as in the past … The divorce debate had started in Parliament with a free vote to MPs but now the argument shifted in a yes vote or an abstention on the Bill. While accepting that to abstain was a right, Mr Vassallo argued that parliamentarians should not do so because the issue was a question of faith. He encouraged MPs to vote according to their conscience. He said he was not embarrassed to form part of a minority on the divorce issue because it was a matter of faith and he would not mind losing his electoral seat because of this."

JEWISH FAMILY LAW AND SECULAR LEGAL ORDERS: THE EXAMPLE OF *GET* REFUSAL

Matthijs De Blois

1. INTRODUCTION

The Canadian couple Stephanie Brenda Bruker and Jessel (Jason) Benjamin Marcovitz got married in 1969. Their marriage broke down and a civil divorce was granted in 1981. Both spouses belonged to the orthodox Jewish community in Canada. The provisional decision on the divorce, the *decree nisi*, ordered the parties to comply with a previously negotiated "*Consent to Corollary Relief*" which included arrangements with respect to the custody of their children and financial support. They had also agreed to appear before a rabbinical tribunal, a *Beth Din*, in order to obtain a *get*, which is a religious bill of divorce, immediately after the granting of the *decree nisi*. To be valid the *get* should be provided by the husband voluntarily. Without a *get* the religious marriage is not dissolved and as a consequence the wife cannot remarry under religious law. The husband, Marcovitz, refused to provide the *get* for 15 years. After nine years, the wife, Bruker, started civil proceedings for breach of contract by Marcovitz. Eventually, in 1995, Marcovitz appeared before the *Bet Din* to give the *get*. Bruker continued the proceedings to receive the payment of damages, which were awarded after long proceedings ending in the Supreme Court of Canada. This case, to which we will return later, is illustrative of a collision between two law systems: the venerable Jewish law, with a history of several thousands of years and the very modern secular law of Canada.

Not only in Canada but in many other countries there appears to be a tension between the Jewish religious law and the secular law of the state in this field. It can be imagined that the coexistence of religious and secular law may lead to tensions. This becomes all the more clear when not only the origin of the law – God-given or man-made – is mutually exclusive but also the content may be diametrically opposed. The hierarchical idea of family relations collides with the egalitarian equality principle. Next to that we should realise that religious law, as