

Protection of spouses in informal marriages by human rights

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1. Introduction

In order to enter into a valid marriage, states can and do prescribe the way in which a marriage must be concluded. Several states, like the Netherlands, only recognize civil marriages. Other states also recognize marriages only in their civil effect; nevertheless, they allow religious ceremonies as a formal part of the marriage as long as the marriage is civilly registered in the end.

It is well known that in multicultural and multireligious societies different groups of people will adhere to other ways of concluding a marriage than a civil one. Within those groups norms, values and traditions exist that do not correspond with the formal and official rules of the society they live in. An informal legal order exists within or next to the formal one. Within this informal order people marry in accordance with their cultural or religious traditions, after which for the spouses themselves as well as within the personal community such a couple are in fact considered to be married. If this marriage is not recognized by the state's legal order because the formal requirements are not met, I shall refer to such a marriage as an informal marriage. The marriage has no civil legal status in the formal legal order.

Since many people often do care about obtaining such a civil status because of the status itself and because this status offers several facilities and rights, they often enter into a civil marriage as well. As a result, people will quite frequently conclude two different marriages: a civil one and one in accordance with their religious or cultural traditions.

However, situations where people only live within an informal marriage still occur. Two different situations can be distinguished. The first situation is that parties have only entered into an informal marriage, without realizing a formal marriage. Although from a legal point of view those spouses are not regarded as a married couple, they consider themselves to be so. In the second situation the spouses who previously entered into a religious or traditional marriage have split up. If they also concluded a formal marriage, the formal marriage can be dissolved. However, the informal marriage cannot be dissolved by a formal divorce and will continue to exist. As a result, the parties are still chained to each other within this informal marriage.

With regard to the first distinguished situation one may wonder whether the spouses in informal marriages should in any way be protected by law; not immediately by granting a legal status to the marriage, but by treating them as spouses in certain respects, e.g. by offering them certain legal entitlements as if they were marital spouses.

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With regard to the second distinguished situation one of the parties, usually the wife, might suffer from still being chained to her informal marriage. The question which then emerges is whether the wife should be protected against this situation of remaining socially dependent on her ex-husband.

This paper will in particular examine whether and to what extent human rights could and possibly should serve as a means to attach this kind of legal protection to spouses in informal marriages. In 2009 two different cases concerning the question of the protection of informal marriages were brought before the European Court of Human Rights (ECtHR). It concerns the cases of *Şerife Yeğit v. Turkey*¹ and *Muñoz Díaz v. Spain*.² The second situation of the chained wife has not yet given rise to a decision by the ECtHR. However, legal issues with regard to the chained wife had to be decided upon by the national courts in several migration states during the last few decades.

The human rights that come into play when an informal marriage has been concluded are: the equality principle (equality with validly married couples), the protection of family life (since the couple often have such a family life), freedom of religion (if the informal marriage has been established by entering into a religious marriage), and rights related to the ‘chained women’ (where the wife is socially kept in her informal marriage), such as a right to personal development, a right not to be traded, a right not to be humiliated, a right to start a new family, a right to equality (equality of spouses), and a right to freedom and security.

The problem that will be described is a global one. However, it will be illustrated by describing the legislation of the Netherlands as an example.

I will start by describing the motives people have for entering into an informal marriage. It will be shown that the reasons can be found either in the cultural traditional or religious characteristics of the informal marriage, or in the purpose of avoiding the realization of a formal marriage, or in the impossibility of entering into a formal marriage. From the perspective of legal plurality within the multicultural society, the first category of motives predominates the second one. In the following I will therefore stick to informal marriages which have been concluded for cultural, traditional or religious motives.

I will then turn to the position of cultural and religious marriages in national legal systems. It follows from the national family laws and from rules on private international family law which marriages are given a civil status. What position in that regard is given to cultural and religious marriages?

In the following section I will examine which human rights could possibly be invoked to protect spouses in an informal marriage. The case law of the European Court of Human Rights with regard to the protection of informal marriages will be described in this regard. Finally, it will be examined which human rights could be invoked to protect the position of the wife in an informal marriage who has been abandoned by her husband, but is still chained in her informal marriage.

2. The motives of people for choosing a way of marrying each other that deviates from the formal way

Recently a small-scale and inventory research commissioned by the Dutch Government into informal marriages in the Netherlands was carried out. Both the question whether people enter

1 ECtHR 20 January 2009, application no. 3976/05.

2 ECtHR 8 December 2009, application no. 49151/07.

into an informal marriage, the frequency with which people enter into such a marriage as well as the motives of those to do so were examined. The results have been published in a report on informal marriages.³ Various other research projects on the practice of informal marriages are being conducted as well.⁴ The results of the latter projects have not yet been published. It follows from those research projects that the motives of people can be aimed at either the informal character of a marriage or the religious or cultural character thereof.

People can enter into an *informal* marriage for various reasons. Firstly, it is possible that they want to avoid the existence of a formal marriage and nevertheless have a socially legitimized relationship. The avoidance of a formal marriage might be interesting if they want to prevent the loss of social security provisions (e.g. the pension claims of the surviving spouse can be lost if he or she legally remarries) or to avoid tax implications or other financial obligations (e.g. maintenance obligations especially after divorce). A formal marriage can also be avoided as an act of resistance against the secular legal order. Secondly, informal marriages are concluded if there is an impediment to enter into a formal marriage. This can either be a legal impediment (e.g. because one of the spouses, often the man, is still married to another spouse) or a practical one (e.g. a lack of documents, especially in cases of migrants who experience difficulties in obtaining the required documents evidencing their personal status). Thirdly, the informal marriage can be used as a trial period before taking the decision to enter into a formal marriage.

If people enter into a *religious* or *cultural* marriage, this can also result in the existence of an informal marriage. That will be the case if they do not at the same time enter into a formal marriage, or, in states in which religious or cultural marriages are allowed and can become formal marriages after registration, if the marriage was not registered.

Religious marriages are concluded because of, first of all, people's religious conviction. Furthermore, because that is the only marriage that really counts for the partners, on account of it being the traditional one, and because it is the socially accepted one. It therefore opens the door to, and legitimizes, sexual relations between the partners (without violating one's own or the family's honour) and makes it possible for people to live and travel together, to book a hotel room together et cetera.

Cultural marriages, like Roma marriages, can often simply be justified by existing tradition.

3. Legal status of marriages under national law

It follows from national family laws and from rules on private international law which marriages are given a civil status. Therefore primarily the rules on the validity of marriages of the state where the marriages are concluded will be described (Section 3.1). Since it is quite easy for people to move abroad and enter into a marriage abroad, the recognition of foreign marriages will also be discussed (Section 3.2). Since I concentrate on the way people marry (cultural, religious, or civil), the focus is on the *procedural* aspects of the realization of a marriage and not on the substantive aspects thereof.

What can be said about the legal status of religious and cultural marriages and about their protection under national law? The objective of this section is at least threefold: 1. to clearly define which marriages are considered to be informal marriages; 2. to moderate the monopoly

3 J. van der Leun & A. Leupen, *Informele huwelijken in Nederland; een exploratieve studie*, Universiteit Leiden, in opdracht van WODC 2009, *Kamerstukken II* (Parliamentary Papers) 2008-2009, 31 700 VI, no. 160 Bijlage.

4 *Inter alia* by Annelies Moors, University of Amsterdam (Muslim marriages), and by Annemeik Schlatmann, Utrecht University (marriages amongst shi'ites in the Netherlands).

of the exclusive civil marriage and to dispel the existing preoccupied and negative views on religious and traditional marriages; and 3. to show that, already under national law, the formal validity of a marriage is not always a prerequisite for offering the spouses a certain legal protection as spouses (Section 3.3).

3.1. Procedural requirements under national law

In the Netherlands the formal validity of a marriage is governed by the *lex fori* or *lex loci celebrationis*: the Dutch rules on marriage. This follows from Article 4 of the Marriages (Conflict of Laws) Act (*Wet conflictenrecht huwelijk*) in conjunction with the provisions of Book 1 of the Civil Code (C.C.).

Under Dutch family law only the civil marriage is regarded as a valid marriage (Article 67 Book 1 C.C.). It is even forbidden to enter into a religious marriage before concluding a civil marriage (Article 68 Book 1 C.C.).⁵ It has not been specified what aspects make a marriage a religious one. The legislator uses the words ‘no religious ceremonies may take place’ (*geen godsdienstige plechtigheden zullen mogen plaats hebben*) prior to the civil marriage. If they nevertheless do take place, the clergyman or other religious authority who has celebrated the marriage risks criminal prosecution (Article 449 Criminal Code). Do Islamic marriages fall within this category? In Islamic law and tradition, marriage is a contract concluded by agreement between the two intended spouses. One can argue that such a marriage is of a religious nature because it stems from religious concepts, but usually no solemnization or consecration or other religious ceremony takes place. Cultural marriages that cannot be linked to a religion do not fall within the scope of the forbidden category. They nevertheless cannot be regarded as a valid marriage since the law only recognizes a civil marriage.

The only exception to the civil marriage is the consular marriage. Consular marriages concluded in accordance with the law of the represented state can be recognized in the Netherlands, as long as none of the future spouses possesses Dutch nationality (Article 4 Marriages (Conflict of Laws) Act).

Several other European states also require a civil marriage prior to entering into a religious one. Amongst those states are Belgium, France, Luxembourg, Austria, Switzerland, and Turkey. Germany recently abolished its prohibition on entering into a religious marriage prior to a civil marriage. Many other states allow religious marriages and only require a subsequent civil registration or another civil ceremony in order for it to be valid. This holds true for Poland, Italy, Spain, Portugal, Greece, the United Kingdom, and Croatia,⁶ and also for some of the Scandinavian states.

3.2. Recognition of foreign marriages

The validity of marriages concluded abroad is not automatically governed by national law, the *lex fori*, of the state where its validity has to be determined. states can use either rules on recognition or choice of law rules so as to determine the validity of foreign marriages. Rules on recognition are usually accompanied by a public policy exception clause. As a result, the recognition of foreign marriages can be refused where public policy principles are violated.

5 However, the conclusion of a religious marriage before entering into a civil marriage does not constitute a criminal act by the spouses themselves.

6 *Kamerstukken I* (Parliamentary Papers) 2001, 26 672, no. 92a, p. 23. The information in those parliamentary reports relied on the results of research carried out by the International Commission for Civil Status in 2001.

In the Netherlands marriages concluded abroad will in principle be recognized *ex lege* if they meet the requirements of the *lex loci celebrationis*, the law of the state where the marriage has taken place (including rules on PIL) (Article 5 Marriages (Conflict of Laws) Act). This, in turn, implies that the Netherlands recognizes the validity of religious marriages if they are validly concluded abroad.

3.3. Protection of partners without a valid marriage

Being validly married gives rise to all kinds of rights and obligations. One may think of certain consequences in family law: maintenance claims and obligations, inheritance claims, rights with regard to children, such as legal descent. Consequences may also arise in other fields of law such as revenue law. Being a spouse may include being entitled to a residence permit, social security claims et cetera. In all those situations where marriage or being a spouse of someone is required, there must be a formally valid marriage in existence.

However, not being married or not being validly married does not automatically imply that one is deprived of all those rights.

Certain claims may also be granted to non-married partners. The existence of family life or equal treatment for marriages and marriage-like relationships may have resulted in the 'expansion' of rights to unmarried relationships.

Besides, the validity of a marriage itself is not always decisive for the rights that can be claimed, even if those rights are in principle linked to the marriage.

On the one hand, some rights can be protected although there is no valid marriage. On the other hand, certain rights can be denied although there is a valid marriage.

An example of the first category is the following: according to Dutch law, if a marriage has been annulled because it did not meet all the substantive requirements, the rights of the children, the rights of the spouse who married in good faith, and the rights of third parties who have acted in good faith are protected (Article 77 Paragraph 2 Book 1 C.C.).

Something similar can be found with regard to foreign marriages that have not been recognized when, for example, foreign marriages, although infringing public policy, are nevertheless granted certain rights because of their mere existence. Examples can be found in France (*Cour de cassation* 14 February 2007⁷) where pension claims and assurance claims were granted to a second wife in a polygamous marriage that was not recognized; and in the United Kingdom, where polygamous marriages can be accepted for certain purposes, like different property rights (succession, the dower) and social security claims.⁸

We can therefore observe that legislators and/or the judiciary show a certain willingness, first, to protect also informal relationships and, second, to allow the attribution of rights to be disconnected from the status of the marriage in certain circumstances, therefore also granting legal consequences to a marriage which is in itself invalid.

The question may arise what consequences this will have for informal marriages. A few decisions on this topic have recently been delivered by the European Court of Human Rights. Those decisions will be described in the next section.

⁷ *Revue trimestrielle Lexis. Nexis Jurisclasseur* 2007, pp. 933-943.

⁸ J. Fawcett et al., *Cheshire, North & Fawcett: Private International Law*, 2008, pp. 932-937; A. Scolnicov, 'Multi-religious Societies and State Legal Systems: Religious Marriages, the State and Implications for Human Rights', in Th. Wilhelmsson (ed.), *Private law and the many cultures of Europe*, 2007, p. 411.

4. Protection of spouses in informal marriages by human rights

After having shown the existing legal position and the legal protection (or the lack thereof) of religious marriages and informal marriages under national law, the question which will now be discussed is what protection should be given according to international human rights standards?

This section will examine which human rights have been invoked before the European Court of Human Rights in an attempt to protect the rights of spouses in an informal marriage.

As has been mentioned in the introduction to this paper, there are several human rights that come into play: the equality principle (equality with validly married couples), the protection of family life (since the couple often have such a family life), and the freedom of religion (if the informal marriage has been established by entering into a religious marriage).

What distinguishes spouses in an informal marriage from partners in non-marital relationships is that spouses *are* in fact married. The question which emerges in this paper is whether spouses in informal marriages should therefore be treated *as* spouses in one respect or another. This is a different question to the one that can be raised on behalf of non-marital partners, who in fact are not and do not claim to be spouses, when they require the granting of certain rights that are awarded to spouses because they can claim that their situation is, with regard to relevant aspects, comparable with the situation of spouses.

This means that with regard to the equality principle I will *not* discuss the case law in which unmarried couples invoke the equality principle to acquire the same rights as married couples. With regard to family life, this means that I will only investigate whether spouses in an informal marriage should be given protection *as spouses*. I will take it for granted that spouses in informal marriages do have a family life and undoubtedly can already successfully invoke all the rights granted by Article 8 ECHR to unmarried partners. Although it is important to ascertain that spouses in informal marriages can in fact invoke this family life protection, this protection is not specifically linked to the marital aspect of the relationship and will therefore not be generally discussed.

4.1. *The prohibition of discrimination*

Are states allowed to restrict the awarding of civil status and rights following from this status to only (formal) marriages, or should the same status and effects be given to spouses in informal marriages?

In 1994 the European Commission of Human Rights had delivered a rigorous and negative decision.⁹ The marriage concerned was found to be invalid since it had been concluded by a religious authority which, according to the law, was not competent to conduct the marriage ceremony. The Commission considered that the alleged violations of rights under Article 8 of the Convention and Article 1 of Protocol No. 1 were all consequences of the invalidity of the marriage as such. *Consequently*, the Commission considered that the case did not disclose any appearance of a violation of these provisions either. What is the opinion of the European Court of Human Rights fifteen years later?

9 European Commission of Human Rights 12 October 1994, application no. 20402/92 (*Spetz a.o. v. Sweden*).

Şerife Yeğit v. Turkey: Family life and the prohibition of discrimination (Article 8 in conjunction with 14 ECHR)

On January 20, 2009, the European Court of Human Rights decided, on the basis of Article 8 ECHR, on rights that can be derived from a religious marriage.¹⁰ On 14 September 2009 the case was referred to the Grand Chamber, which is still to decide the case.

A man and wife entered into a religious Islamic marriage (*imam nikah*) in Turkey in 1976. Six children were born within this marriage. The husband died in 2002. The wife asked for the registration of her marriage in the Turkish register and for the registration of the children as being the children of the deceased husband. The registration of the children was accepted, but the registration of the marriage was refused. In Turkey, being a secular state, only civil marriages are recognized as valid marriages. Entering into a religious marriage before or without a civil marriage has even been criminalized in the Turkish Criminal Code. The wife requested her deceased husband's pension and health benefits both after and up until the refusal to register the marriage. Those claims were also refused. The wife argued that the refusal of those benefits constituted a violation of, or at least a lack of respect for, her right to family life. The Court considered that there was a *de facto* existing family life that fell within the protection of Article 8 ECHR. However, the claim of the wife was eventually dismissed.

The Court considered that, although there are Member States of the Council of Europe which recognize other stable relationships alongside the traditional marriage, Turkey cannot be obliged to do the same. It is acceptable because it pursues a legitimate aim, as well as having an objective and reasonable justification, when restricting its protection to the officially recognized marriage,¹¹ which in this case is only a civil marriage. The distinction made between married and non-married persons is in this context therefore justified. It is noteworthy that the decision had been reached by a narrow majority of four votes against three.

The conclusion of the ECtHR for the time being is clear: states are not obliged to recognize other relationships alongside marriage as a result of which they are not obliged to protect informal marriages on the same level as formally valid marriages.

Muñoz Díaz v. Spain: Right to marry and the prohibition of discrimination (Article 12 in conjunction with 14 ECHR)

The point of view of the ECtHR in *Şerife Yeğit v. Turkey* was more or less confirmed by the ECtHR in its decision in the case of *Muñoz Díaz v. Spain*.¹²

Two members of the Roma community were married in Spain in November 1971 according to their community's own rites. The marriage was solemnized in accordance with Roma custom and cultural tradition. Six children were born within the marriage. The husband died in December 2000. The wife was refused a survivor's pension claim following the death of her husband. The wife then complained that the failure in Spain to recognize Roma marriage as having civil effects entailed a breach of her right to marry.

In Spain two forms of marriage are recognized: the canonical form and the civil form (Article 42 of the Civil Code). When she married in 1971 according to Roma rites and traditions, it was not possible, except by making a prior declaration of apostasy, to be married otherwise than in accordance with canonical law rites. However, the Courts observed that civil marriages in Spain had been open to everyone, including the Roma, since 1981. From that moment onwards

10 Application no. 3976/05, *Serife Yigit v. Turkey*, only published in French.

11 With reference to the decision in *Antonio Mata Estevez v. Spain* (10 May 2001), application no. 56501/00.

12 ECtHR 8 December 2009, application no. 49151/07.

the wife could have opted for a civil marriage. The Court finally held that the fact that the Roma marriage has no civil effects ‘as desired by the applicant’ does not constitute discrimination.

Muñoz Díaz v. Spain: Right to enjoy one’s possessions and the prohibition of discrimination (Article 1 of the First Protocol to the ECHR in conjunction with Article 14 ECHR); protection of marriages in good faith

In the case of *Muñoz Díaz v. Spain*, the husband had been working and paying social security contributions to the Spanish State for more than nineteen years before he died. Although their marriage was not a formally valid one, the couple had always believed, in good faith, that they had concluded a valid marriage. This belief had been strengthened and confirmed by the Spanish authorities which had recognized the wife in a number of official documents¹³ as being the man’s spouse and giving her this status.

Under Spanish law the granting of a survivor’s pension is not restricted to the official surviving spouse. It follows from the legislation and from Spanish case law that such a claim is also granted:

- where there had been a belief, in good faith, in the existence of a marriage that was in fact null and void;
- in the event of an impediment to marriage in the canonical form (from the case law: because of the impossibility of divorce, or on account of a conflict with the freedom of conscience or religion); and
- in the event of a canonical marriage where the marriage had not been registered in the Civil Register and therefore the statutory conditions had not been met.

In this situation the Court takes the view that the refusal to recognize the wife’s entitlement to a survivor’s pension constituted a difference in treatment in relation to the treatment afforded to other situations equivalent in terms of the effects of good faith. The Court found that in the specific circumstances it is disproportionate for the Spanish State, when it concerns the survivor’s pension, to refuse the effects of the Roma marriage. The Court declared those complaints admissible and concluded that there had been a violation of Article 14 taken together with Article 1 of the First Protocol.

What follows from this case law of the ECtHR with regard to granting legal protection to informal marriages is twofold:

1. The principle of equality cannot successfully be invoked so as to acquire a civil legal status for the marriage. This follows from both the *Şerife Yeğit* and the *Muñoz Díaz* cases.
2. In special circumstances the principle of equality *can* be invoked to rely successfully on certain legal provisions despite the informal (and thus unlawful) status of the marriage. This follows from *Muñoz Díaz*. It seems that this exception can only be applied in very specific situations. At least the following circumstances were taken into account by the Court in order to come to its positive conclusion:
 - a. The law of the state concerned provided a certain legal protection to specific informal relationships;

¹³ Certain social security documents, in particular a registration document showing her as a wife and the mother of a large family, and a family record book.

- b. The informal marriage at issue was comparable with other relationships with regard to the relevant aspects (in *Muñoz Díaz*: the existence of good faith concerning the status of the marriage);
- c. The expectations of the spouses that they had entered into a valid marriage;
- d. Confirmation of those expectations by the attitude and acts of the state authorities; the expectations of the spouses were justified by the attitude and acts of the state with regard to the informal marriage; and
- e. Refusing protection would be disproportionate in the given circumstances.

Considering those factors we can conclude that the door has only been slightly opened.

If we look at the law in the Netherlands, it can be concluded that in at least two situations relationships without a legal status are given a form of protection by the law: firstly, marriages in good faith (Article 77 of Book 1 of the Dutch C.C.), and, secondly, as far as legislation gives rights to partners in informal relationships, e.g. on the basis of cohabitation. However, this will not be enough to successfully invoke the equality principle. Most persons who only enter into an informal marriage will realize that their marriage will not be recognized as a valid marriage. And if they expect that their marriage will be treated as a valid marriage by the Dutch authorities, this will usually not be confirmed by the authorities nor will the Dutch authorities themselves give any hint that it will be treated as a valid marriage. This fear by the Dutch authorities of possibly giving people the impression that they would be validly married was even invoked by the Dutch Government when it refused to abolish the prohibition in Article 68 of Book 1 C.C. (on Article 68 see below under Section 4.2).¹⁴ It is therefore unlikely that the Netherlands will be willing to treat formal and informal marriages equally.

It is not inconceivable that certain persons will believe in good faith that they are validly married in cases of informal marriages especially when this concerns some migrant communities which are new in a society that is unknown to them. An example can be seen in a case decided by the Dutch Supreme Court in 2005.¹⁵ A couple with Saudi Arabian nationality (the wife also possessed Dutch nationality) were married in Belgium by an imam. A child was born and registered. The question had to be answered whether this marriage could be recognized in the Netherlands. The Dutch Court of Appeal determined that this marriage was valid according to the law of Saudi Arabia. It considered that the wife had thought that she had entered into a valid marriage. The marriage was concluded on Belgian territory. In answering the question whether or not to recognize the marriage in the Netherlands, the Court of Appeal had to determine whether the marriage was valid in Belgium. It considered that according to Belgian law a couple either have to conclude a civil marriage or a marriage at a consular or diplomatic agency. This was not the case with the imam marriage. However, the Court continued, the wife thought, and she was believed to have thought this in good faith, that she was legally married. In those circumstances a marriage exists according to Belgian law, but it can be annulled. The Supreme Court considered that this decision implied a decision as to the validity of the marriage in the sense that the Court of Appeal regarded the marriage as being valid since, and for as long as, it had not been annulled. The result of this decision was that this marriage, by its recognition in the Netherlands, was in fact given the status of a formally valid marriage.

¹⁴ *Kamerstukken II* (Parliamentary Papers) 2001-2002, 28 078, no. 1. See Para. 4.1.

¹⁵ HR 17 June 2005, LJN AS9035.

4.2. Freedom of religion

The next principle that comes into play is the freedom of religion. This principle is given a legal basis in many constitutions and human rights conventions. For European states the most important article will be Article 9 of the ECHR. Since people usually choose to enter into a religious marriage because they adhere to a certain religion, in general such a marriage can be considered as an expression of one's religion as required by Article 9 ECHR. Restrictions are only allowed if they can be justified under the Convention or in certain circumstances under the Constitution.

The separation of religion and the state allows states to require a civil marriage or a civil registration in order to attribute legal status to a marriage. This notion was already decided upon by the European Commission of Human Rights in 1975 in the case of *X v. Germany*,¹⁶ where the refusal to register a religious marriage did not constitute a violation of Articles 9 and 12 ECHR. This position has been confirmed by the ECtHR in the case of *Şerife Yeğit* (see above). States are therefore not obliged to attribute legal status to religious marriages as such.

However, are states also allowed to prohibit people from entering into a religious marriage before they conclude a civil marriage? Such a prohibition will definitely be regarded as an infringement of the freedom of religion. Although people are still allowed to conclude a marriage in a religious fashion, they are first required to follow the civil procedure before using their freedom of religion. A discussion on retaining or abolishing Article 68 of Book 1 of the C.C. in the Netherlands took place at the beginning of the 1990s and again in 2001.

Already in 1971 the Dutch Supreme Court had decided that criminalizing the fact that a priest or clergyman had concluded a religious marriage without there being a civil marriage (Article 449 Criminal Code) could be regarded as being necessary in a democratic society in order to serve public order and this can therefore be accepted as a restriction on the freedom of religion in the sense of Article 9 ECHR.¹⁷

In 1992 the Permanent Commission for Civil Status advised that Article 68 of Book 1 C.C. should not be repealed since doing so would create misunderstandings about the legal status of religious ceremonial marriages and, furthermore, a marriage could presumably be recognized as a valid marriage in the state of origin.¹⁸ The Dutch authorities followed this advice.

In 2001 the Dutch Government again accepted Article 68 as a justified exception to the freedom of religion. The reasons advanced by Dutch Government to retain the prohibition in Article 68 were: legal certainty, a careful and complete registration of marriages, and the protection of the future spouses.¹⁹ This protection could either prevent misunderstandings amongst spouses regarding the validity of their marriage or protect against religious marriages that violate human rights, such as polygamous marriages and child marriages.

Legal certainty requires civil registration. If marriages are not registered their existence can be disputed or even unknown. Secret marriages, cultural marriages, and religious marriages without registration cannot be invoked against third parties and cannot profit from legal protection.

The marital status is a legal status and opens the door to all kinds of rights, obligations, possibilities and prohibitions. It is therefore important both for spouses themselves as well as for the Government and authorities to have a complete overview of existing marriages. If the state would allow people to enter into religious or cultural marriages prior to concluding a civil

¹⁶ Application no. 6167/73.

¹⁷ HR 22 June 1971, *NJ* 1972, 31.

¹⁸ Advice of 3 November 1992, E. Lukacs & D. van Iterson, 'Adviezen over afschaffing verbod religieuze huwelijksplechtigheid vóór het huwelijk', 1992 *Het Personeel Statuut*, no. 11/12, pp. 21-23.

¹⁹ *Kamerstukken II* (Parliamentary Papers) 2001-2002, 28 078, no. 1, p. 9

marriage, there is a risk that this religious marriage will not be followed by either a civil marriage or civil registration. As a result, all kinds of unknown marriages would exist whereas parties themselves could have the (justified) expectation of being validly married. The experiences of, *inter alia*, Poland and the United Kingdom confirm this practice.²⁰

If religious marriages were allowed, people could be given the unjust impression that they have entered into a valid marriage. The Minister of Justice mentioned that it would be imaginable that this would especially be the case for foreigners with their own cultural and religious traditions and backgrounds.²¹ The Minister furthermore feared that if people expected their marriage to have legal consequences, practice would possibly follow this expectation.²²

In the literature it is argued that Article 68 violates the freedom of religion as guaranteed by Article 9 ECHR.²³

Authors also describe alternatives which make it possible to implement the ceremony of a religious marriage into the formalities that establish a marriage.²⁴ Wortmann proposed that the intended marriage should be entered in the civil register before a religious ceremony is conducted.²⁵ Vlaardingerbroek refers to the importance of checking the procedure and of civil registration.²⁶

In fact many European states already accept religious ceremonies as part of the conclusion of a marriage (see Section 3.1).

If acceptable alternatives would be available, which is not yet unanimously accepted, a prohibition like the Dutch Article 68 would not be proportionate and could not successfully be advanced to justify a restriction on the freedom of religion.

5. Protection of the chained wife

A wife can be chained to an informal marriage after she and her husband have split up in two situations: there has only been an informal marriage, or the parties had concluded both a formal as well as a religious or traditional marriage, and only the formal marriage has been dissolved by a divorce. An example of the first category is a woman who entered into an *urfi* marriage with a Muslim man only to legitimize their relationship and to enable them to behave like spouses, and who was subsequently abandoned by her husband. The husband departs to somewhere abroad, for example Egypt, and the wife is left behind. The other way around is where the abandoned woman only entered into an informal marriage and saw her husband leave for Europe.

The second category, where only the civil marriage is dissolved, is known to be problematic for Jewish women. It became known as the problem of the so-called chained wife: the wife whose husband is not willing to cooperate in a religious Jewish divorce.²⁷

20 *Kamerstukken II* (Parliamentary Papers) 2001-2002, 28 078, no. 1, p. 7.

21 *Kamerstukken I* (Parliamentary Papers) 2001, 26 672, no. 92a, p. 22.

22 *Kamerstukken I* (Parliamentary Papers) 2001, 26 672, no. 92a, p. 24.

23 J. de Boer, "'A whole code of family law': boek 1 BW getoetst aan het EVRM", in K. Blankman & W. Robert (eds.), *het EVRM en het Nederlandse en Belgische personen- familie- en jeugdrecht*, 1987, pp. 13-15; A. Vonken, 'Multiculturaliteit, IPR en mensenrechten', in P. Cliteur (ed.), *Sociale Cohesie en het Recht*, 1998, p. 123.

24 A. van der Hoeven, *Religieus recht en minderheden*, 1991, p. 261; P. Vlaardingerbroek, 'De plaats van huwelijksvoltrekking in een pluriforme samenleving', 1990 *Het Personeel Statuut*, no. 5, pp. 5-9; S. Wortmann, 'Kroniek van het personen- en familierecht', 2000 *Nederlands Juristenblad*, p. 1593.

25 Wortmann, *supra* note 24.

26 Vlaardingerbroek, *supra* note 24.

27 *Inter alia* G. Atlan, *Les Juifs et le divorce. Droit, histoire et sociologie du divorce religieux*, 2002; J. Kusters, *Rechtshandhaving van de joodse gemeenschap van Antwerpen*, PhD thesis 2008; S. Rutten, 'Het recht van de gescheiden vrouw om verlost te worden uit het huwelijk', 2008 *NJCM-Bulletin*, pp. 755-769; N. Spalter, 'Gevangen in het huwelijk', 2007 *Tijdschrift voor Familie- en Jeugdrecht*, pp. 37-43; E. Tager, 'The Chained Wife', 1999 *Netherlands Quarterly of Human Rights*, pp. 425-457.

The continuing existence of an informal marriage will only become problematic in the following circumstances.

- The wife is not able to bring about the dissolution of the informal marriage herself. The informal marriage should be dissolved in a traditional or religious way. This often requires the cooperation of the husband, which the wife cannot obtain if the man refuses or if he has disappeared.
- Secondly, the wife suffers socially from the situation of still being informally married. Many women do not care about the continuance of their religious marriage if the official marriage has ended in a divorce. Often they will not even be aware of it. However, there are religious communities where it is a real problem. The best known and best described in this respect is the Jewish orthodox community.

If a wife wants to divorce according to Jewish rituals, she needs a so-called *get*, a letter of divorce, to be handed over to her by her husband. As long as she does not receive the *get*, a divorce will not be possible, and the marriage continues to exist. The wife is not allowed to enter into a new relationship. If she nevertheless does so, according to Jewish values she is guilty of committing adultery. A child born within this new relationship will not be accepted within the Jewish community nor will it belong to this community. In other words, the wife is socially chained to her first marriage.

Should the law provide the wife with a way to be released from this marriage? Are human rights at stake which could be invoked by the wife when asking for the intervention of the state? And, if so, should a state offer to protect those human rights by implementing them in this informal, religious and private setting? Because that is what in fact is asked by the wife. At least three dilemmas will have to be overcome.

The first dilemma: the wife is socially chained to her marriage which prevents her from starting a new relationship. The law has provided her with the formal provision of a civil divorce; after the civil divorce, legally there is no longer an impediment to entering into a new relationship. However, this civil divorce does not suffice in solving the social and religious impediment. Should a state intervene by offering the wife legal provisions deriving from the *formal* legal order to solve her social problems in the *informal* legal order?

The second dilemma: should a state intervene with legal secular measures in a religious dispute? Is such an intervention in accordance with the idea of the separation of religion and the state?

The third dilemma: should a state, being a public authority, intervene in a private family dispute? Especially with regard to human rights, the question arises whether these rights can be invoked at all in private relationships, and consequently compel not the state, but a private person him/herself, in this case the husband, to cooperate in a private act.

In 1982 the Dutch Supreme Court already had to decide a case in which a chained Jewish wife asked the Dutch Court for protection by means of secular law.²⁸ In 2007 an interesting decision was delivered by the Canadian Supreme Court.²⁹ Both the Canadian and the Dutch Supreme Court came to an affirmative answer in the question at hand. However, the reasoning leading up to this result differed between both Courts. The Dutch Supreme Court restricted its

²⁸ HR 22 January 1982, *NJ* 1982, 489.

²⁹ Canadian S.C. 14 December 2007, No. 31212, *Bruker v. Marcovitz*.

reasoning and found its solution completely in internal civil law rules; whereas the Canadian Supreme Court also referred to human rights to support its arguments.

Furthermore, what the former husbands were ordered to do also differed. With that, the extent of the protection which the wife finally received was also different.

Both cases concerned a Jewish woman who was divorced by a secular court under civil law and who subsequently wanted to obtain a divorce under Jewish law. In both cases the ex-husband refused to hand over the necessary *get*.

In the Canadian case the spouses had agreed that after the civil divorce the parties would appear before a Rabbinical court in order to obtain a Jewish divorce. The agreement was laid down in a written contract. After the civil divorce the wife had waited for fifteen years to get this Jewish divorce, but the man constantly obstructed the process. Finally, the wife claimed damages because of the man's failure to fulfil the agreed contractual obligation.

In the Dutch case there was no such contract between the spouses. The wife argued that the man, by not cooperating to bring about a divorce according to Jewish law, should be considered to have neglected his duty and thus to have acted unlawfully against her. She therefore based her claim on tort. In fact, she did not claim for an indemnification to be paid by her ex-husband, but requested the Court to order the man to deliver a *get*. By delivering a *get*, the man could rectify the unlawful situation that he had caused.

The most important considerations of the Canadian court can be cited as follows:

'Paragraph 12 of the agreement at issue satisfies all requirements under the Civil Code to make it valid and binding under Quebec law. The promise by the husband to provide a *get* was part of a voluntary exchange of commitments intended to have legally enforceable consequences, negotiated between two consenting adults, each represented by counsel. The court is not asked to determine doctrinal religious issues, and there is nothing in the Civil Code preventing someone from transforming his or her moral obligations into legally valid and binding ones.

Nor is the husband entitled to immunity from damages for his unilateral contractual breach by invoking his freedom of religion under s. 3 of the Quebec Charter. The claim to religious freedom must be balanced and reconciled with countervailing rights, values, and harm, including the extent to which it is compatible with Canada's fundamental values. Determining when such a claim must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise.

In this case, the husband's claim does not survive the balancing mandated by the Quebec Charter and this Court's jurisprudence. Any impairment to the husband's religious freedom is significantly outweighed by the harm both to the wife personally and to the public's interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce. (...)'

The following considerations were made by the Dutch Supreme Court:

The mere fact that the Rabbinical authorities in the Netherlands are not able to use force in order to bring about the delivery of a *get*, which is necessary in order to obtain a rabbinical divorce, does not alter the fact that the refusal of the man to cooperate with such a divorce can be unlawful towards the wife, since it can violate the duty of care which a man, according to the usual standards, should take into account with regard to his ex-wife. Whether or not such negligence will be regarded as unlawful will depend on the circumstances of each case. Amongst those circumstances the following will *inter alia* be relevant: the extent to which the wife, as a

result of not being religiously divorced, will be restricted in her further development in life; the nature and the importance of the objections of the man to cooperating and the costs that the man should have incurred in cooperating to obtain a rabbinical divorce.

Both decisions demonstrate many similarities. In both situations the case is dealt with as a civil law case: the non-fulfilment of a contractual obligation in the Canadian case, and tort in the Dutch case. Both Supreme Courts accepted the possible existence of an obligation on the part of the man towards his ex-wife to cooperate with an informal religious divorce. For the Canadian Supreme Court this obligation can primarily be derived from the man voluntarily and deliberately entering into a contract; for the Dutch Supreme Court it was an expected duty of care to be taken into account towards the ex-wife. Neither Court formulated the obligation of the man as an absolute one. The Canadian Court examined whether the freedom of religion could justify the non-fulfilment of the contractual obligation, and balanced this freedom with countervailing rights, values, and harm, including fundamental values. The Dutch Court considered that both the interests of the wife as well as the interests of the man should be taken into account in the process of balancing the various interests.

It is interesting to note that the Canadian Court considered it to be among its tasks to care about human rights, and to invoke those human rights in order to enforce, via civil and secular means, the agreed upon contractual obligation. It stated:

‘The fact that a dispute has a religious aspect does not by itself make it non-justiciable. Recognizing the enforceability by civil courts of agreements to discourage religious barriers to remarriage, addresses the gender discrimination those barriers may represent and alleviates the effects they may have on extracting unfair concessions in a civil divorce. This harmonizes with Canada’s approach to equality rights³⁰, to divorce and remarriage generally, to religious freedom, and is consistent with the approach taken by other democracies.’

The three earlier described dilemmas are thus dealt with and more or less decided upon as follows. Yes, a state should use human rights to protect a wife who suffers from her informal and religious social legal order. Yes, a state can intervene with secular means so as to resolve social disturbances within an informal and religious legal order. And finally, yes, human rights could and should be taken into account in private family affairs like the present one.

The Dutch Supreme Court, on the other hand, did not explicitly refer to human rights. However, it is not very difficult to translate into human rights terminology that the interests of the wife, according to the Supreme Court, should be taken into account by the husband. The Court referred to the interests of the wife in her future development. The right to (re)marry and to start a family (Article 12 ECHR) and to have this new family life protected (Article 8 ECHR) will definitely be amongst those rights. But one could also think of other rights she would be refrained from exercising due to her dependency on the marital power of her ex-husband, like the general right to develop as a person (Articles 3 & 10 CEDAW), the right not to be humiliated (Article 3 ECHR), and the right to freedom and security (Article 5 ECHR).

The decision of the Dutch Supreme Court dates from 1982. Human rights have continued to develop since then. The importance of human rights has equally extensively increased. The decision of the Canadian Supreme Court from 2007 demonstrates and teaches us that nowadays human rights can be invoked by Jewish women wanting to enforce their rights.

30 Compare Art. 16 CEDAW, and Art. 5 7th Protocol to the ECHR, both concerning the equality rights of spouses during their marriage.

To what level can human rights protection lead? In the Canadian case the man was ordered to pay damages to the wife. In the Dutch case the man was ordered to cooperate in obtaining a divorce. This last decision seems to infringe upon the personal and private sphere in a much more far-reaching way than the decision to pay financial indemnification. In the Dutch literature the dominant opinion seems to be that if a relationship and legal acts, like the decision to cooperate in a divorce, concern more the private sphere of the parties concerned, then intervention by public authorities in order to oblige civilians to respect human rights towards each other will be less self-evident.³¹ Because of its very nature the CEDAW, and especially its Article 16, is more or less accepted as functioning as a tool to be used in private relationships. However, with regard to the anti-discrimination principle in general, a horizontal functioning is not yet generally accepted. When Article 1 of the Twelfth Protocol to the ECHR came into force, it followed from the explanatory report (Paragraph 26) that the anti-discrimination principle could only function in the private sphere if a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might clearly engage the responsibility of the state.

In that perspective it would probably be going too far to accept the existence of an obligation to divorce as deriving from human rights. Such an obligation was not accepted by the ECtHR in the *Johnston* case,³² where the existence of a previous marriage of the mother prevented the establishment of legitimate descent with the biological father, with whom the mother had started a new relationship. The Irish authorities could not be forced to introduce a divorce possibility in their law, neither on the basis of Article 8 ECHR nor on Article 12 ECHR. Nor can a right to divorce be derived from Article 5 of the Seventh Protocol to the ECHR.³³ An obligation to divorce has never been recognized by the ECtHR.

If not directly, human rights could nevertheless indirectly strongly sustain the claims of a wife for measures that intrude less in the private sphere of the parties and that do not belong to the autonomy of the parties themselves. In that way human rights can be invoked to strengthen and enlarge the importance of the violated interests of the wife. As a result, in balancing the interests of both parties, the refusal of the ex-husband will probably be less often justified, and will sooner be regarded as constituting an unlawful act (tort) towards the wife.

6. Conclusion

From the preceding sections several conclusions can be drawn with regard to the use of human rights as a means to protect the informal legal order, more specifically to protect spouses who have married in accordance with their religious or cultural traditions.

The first conclusion is that, following the case law of the ECtHR, human rights cannot be successfully invoked to give rise to civil effects to an informal marriage. I think that this is not a surprising result. However, since the Netherlands allows the existence of all kinds of extramarital relationships, it is remarkable that people are not free to enter into a religious marriage, and that religious marriages (without a civil marriage) are even prohibited.

The question whether informal marriages should nevertheless be characterized as a marriage for certain (financial) purposes requires a more nuanced answer.

Human rights do not in general oblige states to provide spouses in an informal marriage with the same provisions as spouses in a formally valid marriage. According to the European

31 L. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy*, 1992, pp. 174 *et seq.*

32 ECtHR 18 December 1986, application no. 9697/82 (*Johnston v. Ireland*).

33 Explanatory report to Article 5.

Court of Human Rights (both in *Şerife Yiğit as Muñoz Díaz*) states are to a large extent free to restrict such legal protection to formally valid marriages. For the Dutch authorities legal certainty, as well as the possibility to exercise control over marriages, constitute important elements to enhance a restrictive policy. That does not prevent states from choosing a more liberal approach and offering, to a certain degree, protection to informal relationships, for example to that of the informal marriage.

Only in specific circumstances where the law already affords certain rights to relationships that in relevant aspects are equal to informal marriages, can the prohibition of discrimination possibly, according to the ECtHR in the case of *Muñoz Díaz*, be successfully invoked as having certain similar rights granted to the informal marriage.

The situation of chained wives has been translated into better protection by human rights. Although there is no case law by the ECtHR and it is not clear to what concrete claims invoking human rights could lead, the Canadian Supreme Court has shown that human rights can be helpful to sustain the claims of a woman wanting to be released from her chained situation. The fundamental principle of gender equality and the fundamental idea of empowering women in life have played an important role in coming to this result. In protecting those fundamental rights a state serves a public interest.

What we cannot conclude with certainty, but what possibly could also have played a role is that the protection of the wife should finally not be an obligation for the state authorities but for the husband himself.

A general conclusion that can be drawn is that human rights can indeed be invoked to protect the situation where spouses have been brought within the informal legal order. It has furthermore become clear that the existence of informal norms and values should not be radically and principally rejected nor approved; it rather concerns the question whether social reality amongst religious and cultural communities can be protected and to what extent.

I agree with Scolnicov that a state that respects human rights cannot ignore religious marriages within its pluralistic society.³⁴ The recognition of the existence of those marriages is the first and necessary prerequisite to understand the problems of spouses in an informal marriage within a stratified legal order. Protecting the fundamental rights of spouses, even if they are at stake in a private and religious sphere, can be considered to form part of the fundamental responsibility of the authorities in a democratic society.

³⁴ Scolnicov, *supra* note 8, p. 416.