

Religious law versus secular law The example of the *get* refusal in Dutch, English and Israeli law

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1. Introduction

The revelation of the Torah on Mount Sinai as described in the book of Exodus is archetypical for religious law. ‘Then God spoke all these words (...).’¹ Religious law is God-given. The law is theonomous and is binding *ipso facto*, independent of the consent of the governed. It may be a living instrument, but it 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 contents of the law are concerned, religious law tends to stress *inter alia* communal values and a 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 those between men among each other. A violation of our obligations towards other persons implies a violation of God’s law and it therefore has its effect on the relationship with God. The religious is not a separate sphere next to the secular. There is no secular sphere. That is especially true for Judaism, which, in Maoz’s words, ‘encompasses all aspects of society and of an individual’s life.’² In this day and age we can safely assume that religious law is based on a long tradition which already existed long before the idea of a pure secular law entered the scene with the Enlightenment. Of course, also before that there was man-made law in different shapes. However, it coexisted with religious law. Think of Grotius who distinguished three categories of law: natural law (in his view also God-given), divine law (based on revelation) and man-made law.³ The real secularisation of the law was the consequence of the full application of the ideas of the Enlightenment in the field of the law. Law was no longer seen as God-given but purely as the outcome of autonomous decisions made by men. The sovereign people are seen as the supreme lawgiver. The theory is that autonomous people bind themselves. Therefore it can be changed at will by men, if thought necessary having regard to societal change. The focus of the contents of the law is, at least in a liberal state, on equality and individual autonomy.

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1 Exodus 20:1.

2 A. Maoz, ‘Can Judaism Serve as a Source of Human Rights?’, 2004 *ZaöRV* (*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*) 64, pp. 677-721, at p. 678.

3 *De Iure Belli ac Pacis*, Prolegomena and I.IX-XV.

Even when these ideas began to dominate the constitutions of the Western world the whole idea of religious law was not completely wiped out. That was the consequence of, first of all, the fact that in the developing democratic process principles derived from religious law permeated the legislation enacted by the representatives of the ‘sovereign’ people who wanted to influence the law by their religious morality. Next to that, religious groups sometimes tried to stick to their religious laws within their own community. An obvious example is of course the Jewish community. After the French Revolution their citizenship was recognized, but at the cost of the loss of their relative autonomy as a community under the law, that existed in pre-revolutionary times. Nevertheless, subject to the restrictions imposed by the state with its secular law, Jewish law was applied within the community.

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 concept of law but also its contents are increasingly diverging, having regard to the development of the ideas on right and wrong in society that influence the law. The proliferation of the egalitarian equality principle in all sectors of society is an obvious example. Next to that, we should realize that religious law may have a multifaced character. We are sometimes confronted with different interpretations as to the precise meaning of its concepts, a feature also common in the field of secular law. 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 does not show an unequivocal direction, however. 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?

Different states, all adhering to the rule of law and the protection of human rights, approach the relationship between religious law and secular law in diverse ways. To illustrate this, we will focus on the example of the *get* refusal, based on Jewish law, which grants only the husband the discretion to provide a *get* (divorce document). It will be interesting to compare the approaches to this problem in the Dutch, the English and the Israeli legal systems, respectively. These systems display a spectre of approaches to the role of specific religious law within a predominantly secular legal order. Both the substantive law and the competence of the courts deserve attention in that connection. The Netherlands and the United Kingdom adhere to an, in principle, unitary system of (family) law, but with interesting differences. Israel officially recognizes legal pluralism in the field of family law, which is governed by the laws of the respective religious communities (Jewish, Islamic and Christian).

The example may serve as an illustration of legal approaches to a potential conflict between religious and secular law in a complex multicultural society. It is submitted that this conflict has its roots in incompatible conceptions of the world and the human being. It therefore remains to be seen whether a satisfactory ‘solution’ to the problem of the *get* refusal can be found. The comparison may at least provide insights into the various approaches toward possible collisions between religious and secular law in pluralist societies.

In what follows I will start with a brief explanation of the Jewish law on marriage and divorce (Section 2). Then the relevant national legal systems will be discussed: Dutch (Section 3), English (Section 4) and Israeli law (Section 5). The approach to the *get* problem in these systems will be looked at in the broader framework of the constitutional position of religion, legal pluralism and, more specifically, the law of marriage and divorce.

After that we will compare the three systems and look for an explanation for the differences (Section 6). Finally, we will evaluate the approaches having regard to human rights (Section 7).

2. The Jewish law on marriage and divorce

Jewish law (*Halakha*) is based on the *Torah*, the first five books of the Bible (in English: Genesis, Exodus, Leviticus, Numbers, 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 the mediation of Moses. In the Jewish tradition this is called the *written Torah*. It is accompanied by the *oral Torah*, based on the oral tradition as from Moses, which was codified in the second century as the *Mishnah*. It explains the written Torah and is itself commented upon in the *Talmud* written in the 5th (Jerusalem) and 6th (Babylon) century. Based on this foundation the Jewish or Talmudic legal tradition has developed up to the present day.⁴

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.⁵ In the conclusion of a Jewish marriage two separate legal acts can be distinguished. In the first place an agreement, the *kiddushin* or betrothal (symbolized by the exchange of rings), and the *nisu'in*, leading the bride under the *chuppah* (wedding canopy), which is performed in the presence of two witnesses.⁶

Jewish law, however, recognises the possibility of divorce. This is based on Deuteronomy (Dewarim) 24:1:

‘Suppose a man marries a woman and consummates the marriage but later finds her displeasing, because he has found her offensive in some respect. He writes her a divorce document, gives it to her and sends her away from his house.’⁷

The divorce document referred to is the *get*. The quoted text endows the husband with a discretionary power to divorce from his wife by giving her a *get*.

This discretionary power is restricted in the Bible,⁸ 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 consent of the wife for the divorce (Rabbenu Gershom, about 1000). 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 for this are a lack of material support, the refusal to engage in sexual intercourse or frequent instances of adultery.⁹ It is appropriate to add here that many assume that at least in this day and age the refusal to grant or to accept a *get* is frequently motivated by reasons other than religious concerns. It is sometimes used as a means to pressurize the other party into agreeing to less favourable arrangements concerning, for example, financial aspects.¹⁰ Therefore the *get* refusal is also seen as a problem within the circles of experts in religious laws. They have perused the sources of the tradition to cope with this problem.

4 See for a general overview: H. Glenn, *Legal Traditions of the World*, 2004, pp. 92-124. See further: J. Al, *Overzicht van het Joodse Huwelijks- en Echtscheidingsrecht*, 2002 and A. Vestdijk-van der Hoeven, *Religieus recht en minderheden*, 1991, pp. 127-161.

5 D. Novak, ‘Jewish Marriage and Civil Law: A Two Way Street?’, in A. Laquer Estein, *The Multicultural Family*, 2008, pp. 209-228, at p. 213-214. See also Rabbi S. De Vries, *Joodse Riten en Symbolen*, 1968, pp. 243-248.

6 See Al, *supra* note 4, pp. 39-42.

7 Translation from D. Stern in the *Complete Jewish Bible*, 1998.

8 Compare Deuteronomy 22:13-19 and 28-29. See for the tradition followed in the New Testament Matthew 19:8.

9 Al, *supra* note 4, pp. 146-154 and D. Wolf, ‘Het joodse echtscheidingsrecht in Nederland en de New York Get laws’, 1995 *Tijdschrift voor Familie- en Jeugdrecht* 17, no. 8, pp. 178-183 at p. 178.

10 See M. Freeman, ‘Is the Jewish *Get* any Business of the State?’, in R. O’Dair & A. Lewis (eds.), *Law and Religion*, 2001, pp. 365-383, at p. 380.

The *get* should be given voluntarily in order to be valid.¹¹ However, it is assumed that in some cases a husband may be compelled to do so 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 and that each refusal to do so is the consequence of a temporary affection of his free will by bad inclinations. The coercion restores the free exercise of the will.¹² The procedure is nowadays that the spouses appear before a rabbinical court, where the husband gives the *get*, prepared by a specially appointed drafter, to his wife, who accepts it. That act constitutes the divorce. A rabbinical court is required, because only a Jewish religious court is seen as competent to decide on issues of religious law.

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*. This entails a social stigma as well as restrictions under Jewish law as to marriage. According to Jewish law they may only marry other *mamzerim*.

As we have seen, also the wife’s approval is required for a divorce. However, if she refuses the consequences for her husband are less serious. A remarriage is not completely excluded, and the children born from a new relationship are not regarded as *mamzerim*.¹³

It should finally be remarked that according to Jewish law only rabbinical courts are competent to apply Jewish law. Decisions of secular courts applying religious law are therefore not acceptable. It is not excluded, however, that secular courts are used to enforce the decisions of religious courts.¹⁴

3. The legal system of the Netherlands

3.1. In general

The Dutch Constitution is not (yet) preceded by a preamble stating the basic principles that can be considered as the foundation of the state. It is clear from the Constitution, however, that the Netherlands is a parliamentary democracy, which upholds the rule of law and the protection of human rights. It recognizes the freedom of religion and the prohibition of discrimination on the basis of *inter alia* religion. The separation of Church and State is not made explicit in written law. It is however inferred from the freedom of religion as recognized by the Constitution and the relevant human rights conventions to which the Netherlands is a party. Both Van Bijsterveld and Orlin include the Netherlands in the category of states with a separation of Church and State.¹⁵ The separation of Church and State is, however, a rather vague notion. That can already be concluded from the fact that Van Bijsterveld brings both the United States and the Netherlands under this heading, notwithstanding the fact that Dutch law generally displays a more positive

11 Wolf, *supra* note 9, pp. 178-179.

12 See for this reasoning from Maimonides (1135-1204) Al, *supra* note 4, p. 155 and Wolf, *supra* note 9, p. 179.

13 Freeman, *supra* note 10, p. 371.

14 Novak, *supra* note 5, p. 217 and Wolf, *supra* note 9, p. 179.

15 Th. Orlin, ‘Religious Pluralism and Freedom of Religion: Its Protection in Lights of Church/State relationship’, in A. Rosas & J. Helgesen (eds.) *The Strength of Diversity*, 1992, pp. 89-121, at p. 98; S. van Bijsterveld, ‘Equal Treatment of Religions? An international and comparative perspective’, in M. Loenen & J. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, 2007, pp. 103-117, at p. 106.

approach towards religious-based institutions in the public sphere (e.g. schools) than American law, which applies the separation principle more strictly.

In the internal sphere religious institutions have the right to impose and enforce rules according to their religious principles (Article 2:2 Civil Code), as long as they remain within the limits of the law. As compared to other legal persons the extent of government control is more limited. Within this framework of religious freedom and institutional autonomy the functioning of religious law and religious courts in the Jewish community is accepted, as long as it does not conflict with the legal order.¹⁶

Next to that, it should be underlined that traditionally the Dutch legal order displays a rather positive attitude towards the social role of religion in general and of religious denominations in particular. For example, in many areas the legal system recognizes the right to conscientious objection. Moreover, it provides not only for the freedom to establish denominational schools, but also in many cases finances for these schools according to the same standards as schools established by the state. The denominational schools are free to choose their teaching aids, to appoint teachers and to admit pupils (or students) as they see fit, according to their denominational tenets. This fits within the theory of sphere sovereignty (*soevereiniteit in eigen kring*) developed by Abraham Kuyper, that left a strong imprint on Dutch society.¹⁷

While the rather benign approach of the legal order to self-regulation in the framework of non-governmental 'sovereign' spheres in the Netherlands may be qualified as 'legal pluralism', it is a weak pluralism. It is nowadays at least much weaker than in the days of the Republic (from around 1588 until 1795), when groups in society in principle enjoyed the right to live in accordance with their own (religious) laws. The example is the legal autonomy of the Jewish community which was recognized to a considerable extent within the framework of regulations decreed by municipal authorities in the towns where they were allowed to live.¹⁸ Jews were obliged, however, to conclude civil marriages (before a magistrate).¹⁹ The 'Batavian Revolution' in 1795 – the Dutch version of its French counterpart – brought an end to this group autonomy. Its objective was to ensure that all citizens, irrespective of their faith, had the same individual rights.

3.2. The law of marriage and divorce

Article 1:30 Para. 1 of the Civil Code states that: 'A marriage may be entered into by two persons of a different or the same sex.' This provision is immediately followed by the following: 'The rules laid down in this Book only extend to the civil effects of marriage'. This last provision is the consequence of the Dutch model of the separation of State and Church. In the days of the Republic marriages were concluded in the Reformed Church, while members of other churches or religions (including Jews) had to marry before a magistrate. A civil marriage is exclusively the basis of the rights and duties enforceable in law.

It is of course possible that partners wish to enter into a religious marriage as well. Jews, Roman Catholics and Muslims have the religious marriage next to the civil. These may be solemnized according to the rites of the religion concerned. It is however prescribed that these celebrations take place *after* the civil marriage at the Municipal Hall.²⁰ The same is true for the

16 Vestdijk-van der Hoeven, *supra* note 4, p. 132.

17 See on this H. Woldring & D. Kuiper, *Reformatrice maatschappijkritiek*, 1980, pp. 40-42 and pp. 105-108.

18 S. Fockema Andreae, *De Nederlandse Staat onder de Republiek*, 1972, p. 151.

19 See H. Gall, 'Ontmoetingen in de rechtsgeschiedenis. Drie joodse zaken in een Romeins-Hollandse jurisprudentieverzameling', in J. van der Westhuizen et al. (eds.), *Huldigingsbundel Paul van Warmelo*, 1984, pp. 82-91.

20 See Art. 1:68 of the Civil Code and Art. 449 of the Criminal Code.

religious services where no marriage is solemnized, but where the partners receive a blessing, as occurs, for example, in Protestant churches.

A divorce may be requested by the spouses jointly or by one of them. The only ground is the permanent disruption of the marriage. For the termination of a marriage a decision by the district court is required as well as the registration of this decision in the civil registers. Whether or not the spouses have complied with the requirements for a divorce according to their religion – if there are such requirements – does not currently play any role in civil law.

3.3. *The Dutch approach to the get problem*

There has been an informal proposal to introduce a specific provision in the legislation to cope with this problem, as is the case in the United Kingdom (see below) and in some other countries, like South Africa, Canada and the US (the State of New York). The suggestion for a similar amendment to the Dutch legislation has not resulted in any adaptation of the Civil Code, however.²¹ To discover how the *get* problem is addressed in Dutch law we therefore have to study the (scarce) case law. The judgment by the Dutch *Hoge Raad* (Supreme Court) on January 22, 1982, is considered to be the leading authority and it is therefore worthwhile to discuss it more extensively here.²² In a divorce request a woman *inter alia* requested that her husband 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. In its decision of December 4, 1979, the District Court declared that this request was inadmissible. It observed that according to Article 1:30 of the Civil Code – in its formulation at that time – only the civil aspects of a marriage should be considered. The court could not therefore decide on any consequences of a divorce which had a religious nature. On March 4, 1981, the Court of Appeal of Amsterdam upheld the decision of the court of first instance. It observed in an *obiter dictum* on the question at issue that, having regard to a letter by the Supreme Rabbinate of Utrecht, it had no means to compel the husband to procure a *get*. According to the Court of Appeal it was unacceptable to assume that a civil court possessed powers in the field of a religious marriage that were not available to the religious court concerned. The claimant lodged an appeal in cassation 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 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 was the case a Dutch court could 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 was 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 willingness 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 in The Hague, which ordered the man to cooperate under threat of a judicially imposed penalty (*dwangsom*).

This judgment has been criticized in several respects. First of all, the Supreme Court did not respect, unlike the District Court and the Court of Appeal, the principle of Jewish law that

21 N. Spalter, 'Gevangen in het huwelijk', 2007 *Tijdschrift voor Familie- en Jeugdrecht* 29, no. 2, pp. 37-43, at p. 40.

22 HR 22 January 1982, *NJ* 1982, 489, annotated by WHH.

opposes the application of this law by a non-Jewish court.²³ 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 an imposed penalty would result in a forced *get* (*get me'oesa'*), which, according to Jewish law, is invalid. Therefore the Beth Din would not cooperate.²⁴

The judgment of the Supreme Court has been followed in several decisions by district courts and one court of appeal.²⁵ In these cases the courts referred to a letter by 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 also, according to Jewish law, be coerced to cooperate. 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 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 May 28, 1986 by the District Court of Middelburg.²⁶ 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, which restricted her in her options in life, might lead to the conclusion that the (former) husband had acted unlawfully. The court continued by stating that it was not competent to judge this issue, apparently considering this to be within the competence of the religious courts. That was not the end of the matter, however, because the court held that the refusal by the (former) husband to cooperate in a procedure before a rabbinical court was unlawful, having regard to the weighty interest of the wife. Her request to order her (former) husband to cooperate in the religious divorce proceedings was granted.²⁷ The court made, in other words, a subtle distinction between the provision of the *get* as such and participation in the procedure which could possibly result in the provision of a *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 recognizing the wife's plight.

4. The English legal system

4.1. In general

The English legal system is not characterized by a formal separation of Church and State. England has an Established Church, the Anglican Church, the Supreme Governor of which is the Sovereign. It is not unique in this respect in Europe (cf. Denmark, Greece, Finland). Certain ecclesiastical measures adopted by the Synod of the Church of England have the force of law within the English legal system.

At the same time the United Kingdom recognizes the religious freedom of adherents of other religions and non-religious citizens as well. Non-Anglican religious institutions can operate freely in society according to their own regulations. Also in the United Kingdom religious courts may function within the religious community concerned. So for many years there have been

23 See C. van der Plas, *De taak van de rechter en het IPR*, 2005, p. 161.

24 Wolf, *supra* note 9, pp. 178-183.

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

26 There is no formal rule of binding precedent in Dutch law. A decision by the Supreme Court is merely persuasive.

27 Rechtbank (District Court) Middelburg 28 May 1986, 1986 *Nederlands Internationaal Privaatrecht (NIPR)*, no. 413.

rabbinical courts for the Jewish community.²⁸ A recent development is the introduction of Islamic Sharia courts.²⁹

The United Kingdom is party to the main human rights conventions. Since the entry into force of the Human Rights Act (HRA) 1998 the freedom of religion as formulated in Article 9 ECHR is part and parcel of the national legal order. The HRA includes, next to that, a specific provision (s. 13.1) that only underlines the importance of this right: ‘If a court’s determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of this right.’ That seems to imply that respect for the autonomy of religious organizations should be a serious concern for the courts.

4.2. The law of marriage and divorce

The traditional definition of marriage in English law can be found in Lord Penzance’s judgment in *Hyde v. Hyde* (1866), who held that a marriage ‘as understood in Christendom (...) may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.’ Already this definition indicates that English law is not strictly secular in all respects.

English law recognises both religious and non-religious marriages. Religious marriages can, according to the Marriage Act 1949, be subdivided into three categories. First, marriages solemnized according to the rites of the Church of England, by a clergyman in a public ceremony, according to specific rules. Secondly, so-called non-Church of England marriages, solemnized in other places of worship which have been registered under the Places of Worship Registration Act (1855). A minister of the denomination or religion concerned may officiate in the ceremony. Furthermore, the declarations prescribed by the Marriage Act 1949 should be made, and the conclusion of the marriage has to be registered. This second option is available, not only for other Christian denominations alongside the Anglican Church, but also for adherents of other faiths. The third category comprises both Quaker and Jewish marriages; the latter defined in s. 26 of the Marriage Act 1949 as follows: ‘a marriage between two persons professing the Jewish religion according to the usages of the Jews’. These can be solemnized in a synagogue, but also at home or in a hotel, provided these places are approved by the local authorities. Also in these cases the prescribed declarations have to be made, while the conclusion of the marriage has to be registered.

Non-religious marriages also referred to as civil marriages are solemnized in a public ceremony at a Register Office.

While marriages may be solemnized according to religious rites (and complying with some legal requirements) divorce is now exclusively a matter for the civil courts. This was not always the case. Up to 1858 divorce was only possible by Act of Parliament. The Jewish inhabitants of the British Isles could apply their own rules, including divorce by means of the *get*. In 1866 the Registrar-General decided not to recognize a Jewish divorce, however.³⁰ The ground for divorce in English law is the irretrievable breakdown of the marriage, which may only be assumed in the following cases: adultery, unreasonable behaviour, desertion for at least two years, separation for two years, while parties consent to the divorce or a separation of at least five years in other cases.

28 The oldest one, the London Beth Din, the Court of the Chief Rabbi, was established in the early 18th century. See The Centre for Social Cohesion, *The Beth Din: Jewish Law in the UK*, 2009, p. 1.

29 See, for example, S. Ali, ‘Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus’, in M. Loenen & J. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, 2007, pp. 57-79, at pp. 73-76. The author uses the term ‘Sharia Councils’.

30 Freeman, *supra* note 10, p. 368.

4.3. The English approach to the *get* problem

Before the amendment of the Matrimonial Causes Act 1973 by the Divorce (Religious Marriages) Act 2002 the problem was addressed in the case law in various ways. Courts tried to find ways and means to persuade the refusing spouse to 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 concerning her maintenance demands, the Court of Appeal increased the sum payable as a strong incentive for the former husband to grant a *get*.³¹ 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.³² A third approach was followed in a decision of a 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*.³³ Freeman assumes that nowadays this will be seen in terms of Jewish law as unjustified coercion that results in the *get* being invalid.³⁴ As we will see there are also other opinions on this issue. The somewhat confusing picture displayed by the case law has now been replaced by the legislation that addresses at least some of the problems of the *get* refusal. Parliament has, on the initiative of a Private Member, adapted the procedural provisions of the Matrimonial Causes Act 1973. The Divorce (Religious Marriages) Act 2002 amends the 1973 Act to the extent that the grant of the final decision on the divorce (*decree absolute*) can be made dependent on cooperation in the procedure that leads to a divorce under religious law. 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.’

In this Act secular law and religious law are in a sense linked together. The Act received support from representatives of the various branches of the Jewish community, among them the Chief Rabbi, Dr Jonathan Sacks, and the presidents of the most important religious courts.³⁵ Notwithstanding this fact, it was regretted by some in Parliament that the state had to interfere by means of legislation where the religious community itself saw no ways or means of addressing the problem. Having regard to the support by the religious authorities mentioned, it can be assumed that this Act 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.³⁶ For many husbands this will be an incentive to cooperate in the divorce proceedings. Of course, this will not solve all the problems of the *agunah*, for example when the husband does not care about the

31 Court of Appeal, *Brett v. Brett* [1969] 1 All ER 1007.

32 *Beales v. Beales* [1972] 2 All ER 667.

33 Judge Viljoen of the Watford County Court, *O v. O* (Jurisdiction: Jewish Divorce) [2000] 2 FLR 147, referred to by Freeman, *supra* note 10, p. 373.

34 Freeman, *supra* note 10, p. 373.

35 See Divorce (Religious Marriages) Bill. House of Lords debates, 10 May 2002, <<http://www.theyworkforyou.com/lords/?id=2002-05-10a.1401.3>>, p. 3.

36 Wolf, *supra* note 9, pp. 180-181.

divorce at all.³⁷ Another point is that the Act implies that a relevant religious authority confirms the compliance with the religious usages concerned.³⁸ That may be a Beth Din 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 realized that only a *get* granted under the auspices of an Orthodox Beth Din is recognized universally.³⁹ Finally, the court *may* suspend the *decree absolute* if a *get* is refused, but it is not obliged to do so. It has discretionary powers.

To conclude we can say that the English approach has the advantage of bringing at least some clarity thanks to the intervention of the legislature. It provides us with an interesting intertwinement of secular and religious law. In many cases it may provide relief for chained women. As indicated it does not solve all problems of all parties in the field of a *get* refusal.

5. The Israeli legal system

5.1. In general

Israel is, according to its Declaration of Independence of May 14th, 1948 and to Basic Law: Human Dignity and Liberty of March 17th, 1992, both a Jewish and a democratic state. Israel is a parliamentary democracy, which adheres to the rule of law and the protection of human rights. Its judiciary is independent and tends to display a critical attitude vis-à-vis other branches of government. It has ratified the major human rights conventions.

Israel has no state religion properly speaking. The Jewish character of the state is however clear if we consider the official day of rest – the *Shabbat* and the festivals and days of remembrance which are observed on a national level. Its legal system demonstrates influences from several legal traditions, reflecting its complex history. It includes elements of the civil law tradition, but even more of the common law tradition. Next to that, religious law plays a special role.⁴⁰ For the greater part Israeli law has a secular character. Israel is not a theocracy in the Biblical sense. It recognizes religious freedom and the equal protection of religions and their adherents by the state. However, as far as the law in general is concerned there is a vague reference to Jewish law as an aid to interpretation in the Foundations of Law statute, adopted in 1980, which provides: ‘Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in *the light of the principles of freedom, justice, equity and peace of Israel’s heritage*’ (emphasis added).

In addition, several aspects of family law are governed by religious law, while religious courts have jurisdiction in these matters. In these fields Israel recognizes legal pluralism, not unlike the situation under the Ottoman Empire and during the Mandate period before 1948 (the *Millet* system). 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 recognizes fourteen religious communities: Jewish, Muslim, Druze and Christian (various denominations such as Eastern Orthodox, Armenian Apostolic, Roman Catholic etc.).⁴¹ Members of these religious courts are appointed by the

37 M. Freeman, *The Law on Get and why it Disappoints*, The Agunot Campaign, <http://www.agunot-campaign.org.uk/civil_law.htm>.

38 This follows from Rule 3 of The Family Proceedings (Amendment) Rules 2003. See on this S. Faith & D. Levine, ‘Religious Divorce’, 2003 *Family Law Journal*, May, pp. 11-14 at pp. 13-14.

39 D. Levine & S. Faith, ‘Divorce, religion and the law’, 2002-2003 *Family Law Journal*, December/January, pp. 18-20.

40 See, for example, D. Sinclair, ‘Jewish Law in the State of Israel’, in N. Hecht et al., *An Introduction to the History and Sources of Jewish Law*, 1966, pp. 397-419.

41 Y. Sezgin, *A New Theory of Legal Pluralism: The Case of Israeli Religious Courts*, Association for Israel Studies, 19th Annual Meeting, April 27-29 2003, San Diego, CA.

President of Israel. There are variations between the different religious communities as to the jurisdiction of these courts. For example, Muslim courts have broad exclusive jurisdiction in the field of family law, while the Jewish rabbinical courts only have exclusive jurisdiction in matters of marriage and divorce. As to other aspects of the law of personal status and family law the jurisdiction of religious courts and state courts are 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 the religious courts. To make the situation even more complex, it has 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.

5.2. 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 which is applicable. That means that marriage and divorce among Jews are governed by Jewish law, while Islamic law is applicable to Muslims and the law of the various Christian denominations to their adherents. Having regard to the fact that the great majority of the citizens of Israel are Jewish,⁴² this approach strengthens the Jewish character of the State of Israel. This can be explained from the history of the State of Israel, more specifically the balancing between the religious and secular forces which, within the framework of the Zionist project, shaped the modern State of Israel.⁴³ So far, the Israeli Parliament, the Knesset, has rejected the introduction of civil marriage and divorce. Recently a proposal to introduce a civil marriage was placed before the Knesset.⁴⁴ It remains to be seen whether this will ever become Israeli law. The law as it stands wants to preserve the Jewish character of the state, even though the majority of the members of the legislature are from secular parties and only a minority of the population are religious in an orthodox sense.

Israelis without a religious affiliation (or a religious affiliation not recognized for the purposes of family law) have to conclude their marriage elsewhere (e.g. in Cyprus). Such a marriage is recognized under Israeli law.

The law concerning the Jewish marriage is determined by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953. It determines 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 summarized above. It is useful to underline, in addition, that in the Israeli legal practice there is an officiating rabbi present at the solemnizing of a marriage. He is responsible for the registration of the marriage.⁴⁵

42 In 2008 the composition of the population was as follows: 76% Jewish, 16% (Sunni) Muslim, 2.5% Christian, 1.5% Druze and 4% not classified (source: Centre for Information and Documentation on Israel (CIDI), The Hague).

43 See M. Edelman, *Courts, Politics, and Culture in Israel*, 1994, p. 50.

44 See on this E. Sztokman, ‘The Civil Marriage Bill in Israel: A small step for...womankind??’, October 14, 2009, <<http://blog.elanasztokman.com/2009/10/14/the-civil-marriage-bill-in-israel-a-small-step-for-womankind>>.

45 A. Rosen-Zvi, ‘Family and Inheritance Law’, in A. Shapira & K.C. DeWitt-Arar (eds.), *Introduction to the Law of Israel*, 1995, pp. 75-109, at p. 88.

It is ensured that only orthodox rabbis will conduct marriages.⁴⁶ A marriage solemnized by a non-orthodox rabbi is not recognized.

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:

‘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, alongside Article 23, to ‘any other provision’, is interpreted by Cohn to extend also to Article 18 (freedom of religion) and Article 26 (prohibition of discrimination).⁴⁷

When ratifying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Israel made several reservations. The first 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 concerned the prohibition of the discrimination of 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.’

5.3. 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. It should however be prevented that the *get* is provided under pressure thereby precluding the free will of the husband. In order to see how the courts in Israel have coped with the problem of the *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 that 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 do so the husband may continue this refusal to provide a *get* or, in the case of a non-cooperative wife, she may persist in her refusal to accept one. It is nevertheless important to specify the several

⁴⁶ Edelman, *supra* note 43, p. 61.

⁴⁷ M. Cohn, ‘Women, Religious law and Religious Courts in Israël – The Jewish case’, 2004 *Retfaerd* (*Scandinavian Journal of Social Sciences*) 107, pp. 57-76, at p. 67.

instruments at the disposal of the rabbinical courts to apply degrees of pressure and coercion in the case of a *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, under Jewish law, there are reasons for a divorce. The second possibility is that the court issues a decree stating that there is an *obligation* (for the man) to give or (the woman) to accept the *get*. Non-compliance 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 by 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 like fines or imprisonment, without consequences for the validity of the *get*. These orders are even rarer than the previous category.⁴⁸

Although divorce as such is exclusively within the jurisdiction of the religious courts, also secular courts in Israel have dealt with issues related to divorce. Since 2004 they have introduced a device to enforce rulings of rabbinical courts on a *get* refusal by accepting tortious liability for refusing a *get*.

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

‘[a] 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 *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.’⁴⁹

The Family Court in Kfar Sava did the same in 2006. It also concerned an obligation decree. The judge stated in an *obiter dictum* that he would also have awarded damages in harsh cases that had only 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 negligent in this case as from one year after the woman started her divorce action.⁵⁰

The question is whether the secular courts have not overplayed their hand by using secular law provisions to induce parties to carry out 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 a *get* refusal. On March 11, 2008, the Supreme Rabbinic 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

48 A. Blecher-Prigat & B. Shmueli, ‘The Interplay between Tort Law and Religious Family Law: the Israeli Case’, 2009 *Arizona Journal of International & Comparative law* 26, no.2, pp. 280-301, at p. 282-283.

49 Quoted by Spalter, *supra* note 21, pp. 41-42.

50 Blecher-Prigat & Shmueli, *supra* note 48, pp. 286-287.

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)⁵¹

Apparently, it is in the view of the Supreme Rabbinical Court within the exclusive powers of the religious courts to cope with the problem of a *get* refusal. The intervention of the secular courts in the realm of religious courts has led to a stalemate.

This 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 which the *get* refusal creates for the parties concerned.

6. Comparisons

6.1. General

The three legal systems discussed share, with almost all other legal systems around the world, the institution of marriage, as well as the possibility to divorce under certain conditions. It is also a matter of fact that the institution of marriage in whatever form is an important tenet of religions, at least of the three monotheistic religions of Judaism, Christianity and Islam. Opinions as to the possibility to dissolve a marriage differ, but are recognized within these religions as well. As a consequence these religions, in some form or another, provide for rules, we could say law, especially in the field of marriage and divorce.

That has been the case for centuries. We can even say that the fact that marriage became a matter of public concern in Western countries is a direct consequence of the long predominance of Christianity in the West. Until the French Revolution marriage and divorce remained strongly determined by religious law. This was either enforced by the State, by the Church or, in the case of Jews living in several countries, to a certain extent by their own authorities. The Enlightenment, however, did not fail to exert its influence on the law. It 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 the secularization 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 its original religious roots. It also has to be underlined in this connection that cohabitation outside marriage has become a common feature of modern societies, also in the countries studied.

6.2. An explanation for the different approaches

The three states discussed display various degrees of secularisation of the legal system. To begin with: the Netherlands. In terms of formal law the Dutch legal system is the most secular of the three discussed in this contribution. The separation of State and Church is not explicitly expressed in the Constitution, although it is assumed that the principle can be derived from provisions of religious freedom. There is, however, a tradition of recognising sphere sovereignty that allows for freedom of religious communities to organize their internal relationships according to their own religious tenets. Family law is secular. Marriages have to be solemnized at the Municipal Hall. Parties are free to have their religious celebration afterwards. It depends on the religion concerned whether or not this will include a solemnization of a religious marriage.

51 File 7042-21-1. See S. Weiss, *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>.

Religious marriages do not have consequences in civil law. It will therefore be no surprise that legislation does not provide for a remedy in relation to religious impediments to a divorce in terms of religious law. There are only a few court decisions that address the *get* problem. The landmark judgment by the Supreme Court was criticised because it seems to overlook the effects of the religious law concerned. The consequences of the *get* refusal for the wife were approached exclusively in terms of tort law. A later decision by a lower court followed a more cautious approach. All in all, it is difficult to draw conclusions. The *get* problem does not seem to be looked upon as a serious problem for the legal order. That is perhaps the consequence of the strictly secular approach of family law in the Netherlands.

That may become even clearer if we compare the Dutch law to English law. The UK is not a purely secular country. The separation of State and Church is not a constitutional principle, although religious freedom is a cornerstone of the legal order. England has an Established Church. It has to be noted, on the other hand, that the law, apart from the regulations concerning the functioning of the church, is not religious. That means that its sources have no specific religious nature, and the same is true for the courts that enforce the law. The English system allows for religious institutions and their members to be governed by their own religious principles. Within the legal order there is still a rather positive attitude towards the role of religious communities in society, not only towards the Established Church. So marriages solemnized within religious communities, including those within the various Jewish communities according to their rituals, are recognized as marriages by the state. In that sense religious marriages have consequences in civil law. The applicable family law has however a secular character and the dissolution of marriage by divorce is regulated by secular law. If parties also want to be divorced according to religious law, they are free to do so. However, if they do not, that may have consequences for the civil divorce. That was initially made clear in the case law and since recently the legislation provides for instruments to cope with the problem of a *get* refusal, albeit that the approach of the *get* refusal is not considered satisfactory in all respects. The legislation concerned is nevertheless an interesting example of the intertwinement of secular and religious law, fitting a legal order which so far acknowledges a public role for religion.

Finally, Israel. This state has a complex legal system, which corresponds to its history. Having regard to its system as a whole, it cannot be said to be a theocracy. It cannot even be said that there is an official state religion. The greater part of its law is secular; that is true both for its contents and its enforcement institutions. On the other hand, however, Israel is officially a Jewish as well as a democratic state. The term Jewish does not exclusively refer to a religious identity, but that identity is the central part of a wider context with historical and cultural elements. That is not without consequences for the law. Jewish law is applied in various fields, while the law of marriage and divorce, properly speaking, is exclusively of a religious nature in the sense that the religion of the parties, if recognized by the state, determines the law to be applied in these fields. That means for the Jewish inhabitants of Israel, as we have seen by far the majority, Jewish law. Its application therefore contributes to the identity of the nation. The family is by excellence the institution for the transfer of this identity through the generations. Furthermore, the family plays an important role in the Jewish religion. When the State of Israel was created in 1948 the preservation of that identity had the highest priority. It is therefore not surprising that as the outcome of the negotiations between the secular and religious wings of Zionism a part of family law was to be religious in nature. That does not exclude that it has been, and still is, a subject of continual debate. As we have already said, recently a proposal has been presented to the Knesset to introduce a civil marriage in cases where both partners have no (recognized) religion. The approach to the *get* problem illustrates the complexities of the system.

Marriage and divorce are *per se* governed by religious law. Related aspects are, however, not exclusively within that realm. We have seen that the way in which the rabbinical courts have addressed the refusal of a *get* was not considered to be satisfactory by the parties. Secular Israeli courts have since 2004 felt free to intervene by imposing (punitive) damages in cases of an unjustified *get* refusal. Rabbinical courts do not accept this intervention, however. That is not surprising having regard to the objection against the forced *get* and the view that the rabbinical courts should have exclusive jurisdiction in these matters. We are faced with a stalemate, the social effects of which in the Israeli society are in quantitative terms more important than the frictions that were signalled in connection with Dutch and English law. The predominant role of religious law is not to the satisfaction of all members of society.

7. Evaluative remarks

7.1. General: a theatre of colliding values

All the three approaches to the *get* problem discussed exemplify the clash between religious and secular law. The three systems differ mainly as to the jurisdictional context where the collision occurs. Such a clash is as such not surprising. To a certain extent, I think that it is even inevitable.⁵² Is there not in principle a fundamental incompatibility between the 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 recognizing the equal worth of human beings, tends to stress different roles for men and women within 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. There are often 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. This already illustrates that the collision can easily be translated into human rights terms. The question of how to balance colliding human rights is not a neutral, technical one. ‘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 to human rights as such may also lead to different views as to the degree of acceptability of religious law, as will be illustrated in the following sections.

⁵² See Cohn, *supra* note 47, p. 68. She uses similar terms.

7.2. Human rights arguments in favour of religious law

a. The religious inspiration of human rights

Traditionally, human rights had strong religious connotations. Sometimes human rights are even seen as originating from religious sources. For example, Asher Maoz derives basic principles of human rights from the sources of Judaism. 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 man in our image after our likeness” (...) So God created man in His own image, in the image of God created He him, male and female created He them.’⁵³ Already the biblical context makes clear that this approach to human dignity points in the direction of equal dignity for men and women, in terms of respect for them as human beings, but this does not exclude the different roles of the spouses in family law, as follows from the basic text on divorce in Deuteronomy discussed above. Human dignity refers, in other words, to all members of the human species, but this does not automatically imply that all distinctions between human beings, including those based on gender, have to be wiped out.

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 the Torah and Talmud has been developed over the centuries and its precise contents has 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.⁵⁴ Respect for religious law requires that these issues should in principle be solved within the community itself, by the authorities concerned. Secular authorities which want to intervene will inevitably have to make a choice between diverging religious views. Should that not be generally outside the realm of the secular state? In addition, it should be noted that membership of religious communities is not compulsory. It always remains possible to leave the religious community concerned.

And, finally, is not the application of religious law within a religious community protected by the freedom of religion?

b. The freedom of religion, rights of minorities and self-determination.

Respect for religious law can be argued from the 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 that stress the unity of life, in the sense that acts of worship *per se* and obedience to religious rules are both an indispensable part 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 provisions.’⁵⁵ It is important to realize this when

53 Maoz, *supra* note 2, pp. 691-692.

54 See, *inter alia*, S. Magid, ‘Is egalitarianism heresy? Rethinking gender on the margins of Judaism’, 2004 *NASHIM: A Journal of Jewish Women’s Studies and Gender Issues*, pp. 189-229 and C. Longman, ‘Waar een rabbijnse wil is, is er een halachische weg?’, 2004 *RoSa. Uitgelezen* 10, no. 4, pp. 1-9.

55 Quoted by Maoz, *supra* note 2, p. 678 (emphasis in the original).

interpreting the relevant human rights provisions, such as Article 9 of the European Convention on Human Rights (ECHR), which encompasses the protection of the manifestation of one's religion or belief in worship, teaching, practice and observance.⁵⁶ The precise scope of the freedom of religion as to activities motivated by one's religion or belief is under debate.⁵⁷ That is also true for the more specific question whether the application of religious law is protected by the freedom of religion. There is a rather old decision by the (then existing) European Commission of Human Rights (December 6, 1983) in which it held that the refusal of a Jewish husband to hand over the *get* was not to be recognized as a manifestation of him observing his religion. Therefore the Commission did not have to answer the question whether the decision of the French court in question ordering the refusing husband to pay damages was justified by the second paragraph of Article 9.⁵⁸ The question may be asked whether this isolated admissibility decision still has to be regarded as an 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 observing a religion, in terms of Article 9, namely in the case of *Cha'are Shalom ve Tsedek*, which concerned ritual slaughter according to Jewish law.⁵⁹ In addition it can be mentioned that in a recent decision by the Supreme Court of Canada, in the case of *Bruker v. Marcovitz*, it was at least not categorically ruled out that the *get* refusal might be inspired by a sincerely held belief, although in that case there were strong doubts as to whether that was at issue. And it was immediately added that the exercise of the freedom of religion could be restricted in favour of other rights and interests. The same case illustrates the complexities of the problem discussed here. Also the interest of the spouse in receiving a *get* was considered to be relevant in terms of individual religious freedom, namely the possibility to obtain a religiously valid divorce, which enabled her to remarry under Jewish law.⁶⁰

Next to the individual aspect, the 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'.⁶¹ In this connection also Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) is relevant. It includes within religious liberty the freedom to establish and maintain charitable or humanitarian institutions, 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 respect for religious rules within the community concerned. This may also be applied to the recognition of religious law applied within a specific religious group.

Religions, especially the three monotheistic religions referred to in this contribution, have strong opinions and practices concerning human relations, sexuality, family life, marriage and divorce. These issues play an important role in the authoritative sources of their doctrines and ethical standards, such as the Bible, the Talmud, the Koran and the Sunna. As we have seen,

56 Art. 18 ICCPR uses similar terms.

57 See M. de Blois, 'Two Cities in Conflict', in M. Loenen & J. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, 2007, pp. 167-183, at pp. 172-174.

58 Application 10180/82, *D. v. France*, *Decisions and Reports* 35, February 1984, p. 199.

59 ECtHR 27 June 2000, *Jewish Liturgical Association Cha'are Shalom ve Tsedek v. France*, ECHR 2000-VII, Paras. 73 and 74.

60 Supreme Court of Canada, 14 December 2007, *Bruker v. Marcovitz* <<http://scc.lexum.unmontreal.ca/en/2007/2007scc54/2007scc54.html>>. See M. de Blois, 'Respect of neutraliteit? Over de omgang met religieus recht in een seculiere staat', in N. Doornbos et al. (eds.), *Rechtspraak van buiten*, 2010, pp. 237-242.

61 Para. 72.

sometimes more specific rules and procedures have been developed, based on the primary religious sources.

In addition to the freedom of religion also the rights of minorities should be mentioned, in connection with states where religious minorities exist.⁶² These rights entail the right of members of these minorities to profess and practise their religion with other members of their group. In this framework also the application of religious law is relevant, even if there are tensions between group rights and individual rights if not all members of the religious minority group agree on the principles and rules on the practice of their religion.

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.⁶³ 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.

7.3. Human rights arguments against religious law

a. Human rights as the ideal of secularism

It should, on the other hand, not be overlooked, however, that from a human rights perspective the application of religious law may also be very problematic. Is the whole idea of religious law not 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 both in the 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.’⁶⁴ It is even submitted that ‘the fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine’.⁶⁵ 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 to Articles 7 and 16 of the Women’s Convention referred to above. 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).⁶⁶

62 Art. 27 ICCPR.

63 Art. 1 of both the ICCPR and the ICESCR.

64 Quotation from B. Wilson, ‘Secularisation: Religion in the Modern World’, in S. Sutherland & P. Clarke (eds.), *The World’s Religions, the Study of Religion, Traditional and New Religion*, 1991, at p. 196, in K. Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’, 2004 *Essex Human Rights Review* 1, no. 1, pp. 1-16, at p. 14.

65 F. Raday, ‘Culture, Religion and Gender’, 2003 *I.CON* 1, no. 4, pp. 663-715, at p. 668.

66 Report of the Committee on the Elimination of Discrimination against Women 16-17 Sessions, 1997, at p. 91. See also R. Halperin-Kaddari, ‘Women, Religion and Multiculturalism in Israel’, in A. Laquer Estein, *The Multicultural Family*, 2008, pp. 267-294, at p. 274.

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

Also the case law of the European Court of Human Rights (ECtHR) displays a positive approach to secularism. In its *Refah Partisi* judgment⁶⁷ it showed its sympathy with the principle of secularism which is prevalent in Turkey in unequivocal terms:

‘that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.’⁶⁸

In the same judgment we find a very critical approach to religious law in the framework of a plurality of legal systems:

‘that a plurality of legal systems, as proposed by *Refah*, cannot be considered to be compatible with the Convention system. (...) it would do away with the State’s role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State (...) but static rules of law imposed by the religion concerned (...). Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals (...)’.⁶⁹

The Court then concentrated on the most important religious law in question and concluded:

‘(...) that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention (...)’.⁷⁰

The Court stated that

‘freedom of religion, including the freedom to manifest one’s religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole. (...)’.⁷¹

The quotations make clear that the Court favours a secular approach that limits the scope of the freedom of religion to the private sphere. As a consequence there seems to be little room for religious law, if any. At least religious law that does not recognize equality between men and women is not acceptable.

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:

67 ECtHR 13 February 2003, *Refah Partisi (Welfare party) and others v. Turkey* (GC), ECHR 2003-II.

68 Para. 93.

69 Para. 119.

70 Para. 123.

71 Para. 128.

‘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.’⁷²

From this it can be concluded that in the opinion of the Committee the prohibition on the discrimination of women prevails over the 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, ECtHR and HRCttee all tend to lean towards the conclusion that international human rights law is opposed to religious law, especially when its requirements may interfere with the equal rights of women. As we have seen, that was one of the criticisms of the Jewish divorce law. Only where this inequality is in a sense ‘repaired’ may a national legal system escape the condemnation of an international human rights forum.

b. Freedom of religion and rights to equal treatment

It is held in more specific terms that the Jewish law on the *get* refusal is contrary to several individual rights. We might think of individual rights such as the freedom of religion and conscience. That is, at first sight, indeed the case, where the refusal of a *get* is a blockade to the spouse remarrying 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 friction between the 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.

Next 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.⁷³ 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 in the preceding section. 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 on 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.

7.4. A solution?

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, which is illustrated by the problem of the *get* refusal in the three legal systems discussed. In my view there is no such solution at hand, bearing in mind the sometimes strongly diverging views on the meaning of human rights. What has been said, however, may contribute to a critical reconsideration of the easiness of the common human rights approach to the problems of the 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 is by no means the only perspective possible. Maybe that will inspire national

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

73 See *inter alia* E. Tager, ‘The Chained Wife’, 1999 *Netherlands Quarterly of Human Rights* 17, no. 4, pp. 425-457.

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courts and international supervisory bodies with some modesty when it comes to the judgment of cases where religious law and secular law collide.