

Draft – Do not quote – Footnotes to come

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**Civil and religious laws (which have their own rules) concerning divorce:  
the condition of women and their empowerment**

Historically, marriage has always been at the center of a tension between religious and secular systems, which relationships tend towards influence and cooperation rather than exclusion and separation. Religious law has given an input to the process of emphasizing the freedom of self-determination of individuals in marriage matters and promoted a woman's recognition of an equal position.

Marriage crisis has been addressed in different ways by religious systems; they offered the exit freedom from marriage in different ways and in a different measure. Divorce is anyway an exception to marriage stability, even in historical periods when this freedom was not recognized in secular systems or it was in a very restricted way.

Several western secular systems have adopted an institutional idea of marriage since the second half of the twentieth century, where individual freedom is protected only if it agrees with a more important state interest. For this reason public agencies were entrusted to authorize (or not authorize) both the constitution and dissolution of marriage and to rule its life.

More recently civil marriage has developed towards a secularized and private trend and it has departed from the Christian-religious model; in this way a full freedom to access to marriage is connected to a wider freedom to withdraw from an unsatisfying marriage for many reasons. Marriage is losing its role as a factor of social cohesion, as a place where to "learn citizenship", as a "seminarium rei publicae"; the greater weakness of marriage makes a person more vulnerable and excluded from the social context which he participates in.

Nowadays western systems have also to address the opposite needs of both receiving a plurality of new religious cultural peculiarities and receiving the limits of the reception of different identities with their own systems of values. A critical point is marriage freedom, specifically divorce freedom and the costs of the exercise of this freedom for a woman. Some religious models seem to refuse that "modern" paradigm which implies that gender does not imply different roles; these models promote systems founded on an "asymmetric polarity". In these systems marriage is important not only for the individual but also for the community; it gives a benefit not only to individual but also to the wellness of the group. A woman is burdened with the social expectation of the perpetuation of the specific identity of a group. For this reason she is subject to more rules and forms of control, she has a status of inequality and dependence within her own community, her marriage is not stable (polygamy, separation, divorce) when she is not able to perform the function which she aims towards.

Both in Israel and in Islamic countries a woman's condition, her role and her expectations are at the crossroads between tradition and modernity, universality and specificities. These systems are open, even in different measures, to the impact of globalization, to the affirmation of human rights at an international level and to the elimination of every form of discrimination, but a woman's position cannot yet be considered equal. Even though in various branches of law secularization is in process, because of western influence, in the marriage field the liberty to free oneself from the rules of religious belonging are not recognized. This happens within the ambit of the specific dynamics of the relationship between State, groups and individuals, where typical community identities prevail over individual ones, and the State is not able to offer a secular alternative. A patriarchal and male-centred model of the family continues to predominate, so such a model tends to perpetuate the

distinction of gender roles between public and private spheres. The presence of elements of gender disparity is nevertheless not wholly due to the complex relationship of integration between secular and religious law but also to historical, political and social factors that tend to direct social praxis creating pockets of resistance. The distinction between the cultural and religious element is not easy.

In a multicultural perspective the comparison and the clash between a plurality of norms develops in the framework of the basic values of religious freedom, pluralism, democracy, equality, equal dignity of every individual, not regarding sex, race, language, culture and religion. In a western perspective these fundamental values are rooted not only in state juridical systems but also in the framework of European Union and International principles, specifically in human rights, which protection cannot be limited by forms of (even cultural and religious) relativization.

These problems arise both in a model of weak multiculturalism, which enforces, for some effects, foreign decisions (not always judicial in a western perspective) in the light of a public order increasingly modified to accommodate new needs, and also when the principle of the unity of jurisdiction is uncertain, and forms of private (also religious) jurisdiction (either *de facto* or *de iure*) and contractualization of the effects of marriage, including the conditions of its dissolution or its not-dissolution (covenant marriage) are admitted.

The recognition of exit freedom from marriage is connected to the different perspective of marriage, only as a contract or recognizing a sacramental dimension. The idea of marriage as a public or private institution has an impact on the recognition of more or less autonomy to partners and on the role of the judicial-religious authority. The rules concerning the “exit freedom” are a useful parameter to evaluate the model of (“strong” or “weak”) marriage adopted in a juridical system; it also permits to consider the costs for a faithful-citizen which are connected with the choice to access to marriage in coherence with his own religious law.

In Jewish law, a view of marriage as a contract prevails; there is a wide freedom to dissolve marriage; at the same time religious authorities have limited powers to solve difficult situations (e.g. when the husband refuses to give the *get* to his wife) and to settle disputes. In Canon law, where the marriage is seen also as a sacrament, the religious system offers a model of marriage whose basic characteristics and purposes are not modifiable by the two partners. The power to dissolve marriage comes from the authority, even though with necessary participation of the parties. The prevailing role of the religious authority is coherent with its power to declare a marriage invalid, not only for the benefit of the parties involved but also in the superior interest of ascertaining the truth.

Islamic law, as adopted in modern arabic countries, recognizes divorce both in a private form (by the decision of one or both parties) and in a public form (by judicial decision). Modern legislations tend to accommodate divorce in forms which require participation or at least supervision of a religious-judicial authorities.

Religious systems have different levels of recognition of equality between partners regarding divorce. Some gender differences need a contextualization in the light of (social, historical, juridical and religious) principles, values and disvalues which characterize marriage in the ambit of specific religious laws. All of them, even though reaching different levels of evolution, tend to move from an male-centred idea of marriage towards a perspective which increasingly emphasizes female dignity and her equal role.

The unilateral exit freedom from marriage is more largely recognized when religious law adopts a contractual/privatistic approach; otherwise dissolution is permitted only when it is coherent with a superior interest of the religious system (*favor fidei*) and has its basis in the divine project of salvation.

In Jewish law, divorce, even permitted, is seen in a negative perspective, as a stable bond is considered a positive value. Jewish marriage adopted different models, as it was influenced by

different religious systems. These models alternate the recognition of an unilateral (mainly male) exit freedom from marriage (perceived as a sort of “free association”) and an exit freedom strongly restricted either by the necessity of the consent of both spouses or by the need of other requirements, so marriage develops in a “corporative direction”. In some of these models there is a disparity between the spouses’ positions: one appears involved in an associative bond, the commitment of the other has the character of the charter of a corporation.

A rebellious woman is that one who vindicates her exit freedom from marriage, because of repulsion for her husband. The exercise of this freedom met different levels of recognition, depending on the marriage model adopted privileges individual freedom of spouses on an equal level or favours male position or marriage unity. In all models there is a common trend to impose correctives to the disparity in the spouses positions, a) extending a woman’s exit freedom, making it equal to men’s, also admitting the possibility of unilateral divorce for women; b) restricting men’s freedom (divorce by mutual consent) c) imposing dissolution religiously “in law” of a failed de facto marriage, this happens by granting and accepting the ghet.

Monogamy has never been a strongly typical aspect of Jewish marriage; different expressions of sexuality have been traditionally accepted (poligamous marriage, extra-marital relationships). The monogamous, strong corporative, more difficult to dissolve, model of marriage has prevailed in aschenazi tradition; it answers the need of an efficient and functional model.

The divorce paper (ghet) is always required. A man grants the ghet and a woman accepts it in the presence of two witnesses and they both acquire a free status again.. This procedure underlines, if only from a formal point of view, male dominance in the conceptual understanding of marriage dissolution in Jewish law. The aim of this procedure is to protect the certainty of a marriage status, exercising a form of control on women.

In the biblical perspective divorce was the same of repudiation, it was out of normative control and an arbitrary act of a man, as a “*déclaration de désamour*”; a man could also demand a reconciliation and take a woman again, if she did not marry in the meanwhile.

In the Torà, an unilateral male right was stated, without a woman’s consent, and with a restricted duty to pay a dowry; a woman could ask divorce only if a grave fault of man was present. Male dominance results in permitting poligamy.

In the talmudic period a process of equalization develops; a woman’s right to divorce was admitted, in a series of circumstances caused by her husband, even though she maintains totally or partially her right to dowry; a man’s right to divorce was restricted by an appropriate use of the ketubà clauses.

In the rabbinic period, even though men’s unilateral right was maintained, his patrimonial duties are increased in the occurrence of divorce without a woman’s fault. The definition of patrimonial duties is compulsory to have access to marriage.

In gheonim perspective marriage is closer to a free association; dissolution can happen by each spouse’s will or mutual consent. A woman can obtain divorce if she has abandoned her family for a certain period, without losing her dowry.

Religious authorities have the power to decide compulsory divorce and annulment (retroactive divorce) of marriage for purification aims; the ghet is not required in the second case. When marriage contract clauses have not been observed, annulment can be decided. Marriage model is “weak” (partnership); maintenance of marriage depends on a continuous consent, freely revocable by each spouse.

This model gives more power to rabbinical authorities, it was subsequently abandoned and replaced by a plurality of options which emphasize the autonomy of the parties rather than the intervention of religious authorities. Sometimes the unilateral freedom to divorce is emphasized, and spouses are equalized in this direction, sometimes a contractualistic approach founded on mutual consent is affirmed, sometimes female position in marriage contract is strengthened, or finally failure of marriage is used to declare a divorce.

The predominant model, adopted in Europe, Israel and the Usa, after a decree of Rabbi Gershom, denies both spouses the possibility to free themselves unilaterally from the marriage bond: divorce can only be obtained by the mutual consent of both parties, with the exception of the instance of gross fault. In the case of a marriage prohibited by religious law each spouse can obtain divorce, even though there is no consent of the other spouse and the latter was not conscious of the prohibition.

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

Some scholars think that Rabbi Gershom’s decrees just formalized well established social praxis; anyway, various factors favoured the establishment of a strong form of marriage: externally, the influence of the European Christian tradition, which affirmed a marriage model founded on consent and a strict condemnation of polygamy; internally, the aschenazi aspiration to maintain the palestinian monogamous model and finally the wish to grant increasing stability to marriage and certainty to a woman about the enjoyment of her marriage status in the context of central Europe. An institutional idea of marriage develops, where family is a micro-cosmos which protects all the social structure and guarantees its perpetuation. The interest in unity of family prevails, even though it is not coherent with individual needs of its members; marriage and divorce become, in a certain way, “public” institutions by community approval and rabbinical supervision. This interest is placed in a higher position than the traditional procreative function, typical of Jewish marriage.

The Catholic Church has traditionally promoted the affirmation of an equal dignity for a woman: the strict restriction of (mainly male) exit freedom from marriage (*bonum sacramenti*) the Augustinian prohibition of the discrimination of women because of their reproductive inability (which legitimated repudiation), the affirmation of an autonomous freedom to have access to marriage founded only on free consent of spouses, without any family, social and economic conditioning), the refusal of polygamy (*bonum fidei*), are the warning sign of a process of female emancipation, which developed in the second part of the twentieth century, and which the Church anticipated.

In Canon Law, indissolubility implies an everlasting bond and the prohibition of dissolution of a valid marriage contract through the private will of the spouses or the public power of the Church for any reason.

Consent cannot be revoked and spouses cannot ask for dissolution. Because of the consent spouses acquire a permanent status; on the contrary in secular systems the spouse can dispose the effects of marriage, as divorce has been introduced. In secular systems consent is continuously subject to verification, it has to be confirmed day by day, as it is connected with the maintenance of common material and spiritual life of spouses. Repudiation is prohibited.

Anyway in Canon law there are some exceptional possibilities of dissolution: dispensation for non consummation and dissolution for a faith privilege. All canonical marriages are intrinsically not dissoluble, but some of them are not absolutely extrinsically indissoluble.

Marriage *ratum et consummatum* (can. 1141) is absolutely extrinsically not dissoluble; dissolution is possible if one of these conditions is absent.

In the first case catholic doctrine makes the example of the union of the soul with God; for the second one the mystic union of Christ with his Church. The first one can be dissolved by a contrary disposition; the second is not casual and cannot be dissolved. Marriage *ratum et non consummatum* can be dissolved by the Pontifex. Dissolution can be asked by both spouses or by one of them, but not unbeknown to the other. Marriage, if not consummated, has not completely

realized its purposes. This type of dissolution requires the presence of a fair reason. The spouses have not a specific right to dissolution, the decision is a pontifical concession and is in the ambit of his power of discretion

Other hypotheses concern those ones where the *favor fidei* permits an exception to the rule of the indissolubility of marriage. The increasing presence of a plurality of religions in civil society makes these cases more frequent. Canon law answers not only to the need of the faithful that the final failure of his marriage is stated, but also to the public superior interest of the Church to protect the *salus animarum*. For this reason *favor fidei* has to be favoured on *favor matrimonii*, even though there is a doubt about the presence of some legal requirements (can. 1150). This interest involves the possibility that a new marriage can give some spiritual benefit.

Marriages between non-baptized people can be dissolved by pauline privilege, when one spouse is converted to the Christian faith and receives baptism and the other one, interrogated by the local Ordinary on his intentions (whether he wishes to receive baptism or at least to cohabit) doesn't answer or he departs or answers negatively, unless the baptized party gave the other a just cause for departure. In these events, the converted party can contract a new marriage; the previous marriage is considered as dissolved *ipso iure* without a formal ecclesiastical decision. The intervention of ecclesiastical authority is required for the validity of the new marriage: the interpellation of the local ordinary is required, unless a dispensation occurred.

The 1983 Code rules other two specific hypotheses of dissolution for pauline privilege of a marriage contracted by non-baptized. The first rules the case when a spouse receives baptism and he is not able to restore cohabitation because of objective external events (captivity or persecution); in these cases he can contract a new marriage, even though the other party has received baptism in the meantime (can. 1149) The second hypothesis concerns the marriage of a polygamous spouse converted; after receiving baptism, he can keep one of his wives dismissing the others, if it is difficult for him to remain with the first (can. 1148).

A further hypothesis of dissolution in favour of faith is permitted by petrine privilege; this case has been reformed by 2001 Normae.

In this case dissolution is conceded by pontifical dispensation. A marriage between a non-baptized and a baptized person in a faith different from the catholic one can be dissolved, when one of the spouses converts to Catholicism, the impossibility to restore common life between spouses is ascertained and there is a just cause (e.g. the wish to enter a second marriage with a baptized person.) Another condition is that the spouse who asks for dissolution is not partially or totally responsible of family disintegration.

Nowadays, the equalization between men and women, in secular law in all the aspects of marriage relationship and the legitimation of the exercise of an increasingly larger possibility of dissolution of marriage causes a clash between secular and canon law, which rules only limited hypotheses in which not solvable crisis of marriage is taken in consideration. There is a divergence between the ways to address marriage crisis, which give life to alternative possibilities in the ambit of a pluralistic society. The traditional canonical model is subject from the external and also from the internal a continuous process of remission in discussion, which risks weakening it.

Some scholars put in discussion the possibility to use the expression "divorce" when dissolution happens through procedures which do not involve actively and completely both parties but on the contrary privileges the spiritual wellness of the faithful party, some others recognize an "existential" consummation, which involves not only the carnal union but also the progressive realization of a complete and mature communion of life between the spouses; other scholars wonder if canonical marriage is the only marriage form in conformity with divine project, or if it's only the canonization of a specific culture; if we can consider a not strictly fixed project or even a plurality of divine projects.

Finally, other scholars enlarge the perspective examined, and underline indirect instruments to reach an aim (freedom from a failed marriage) which canonical system does not permit to be reached directly.

The Islamic tradition considers dissolution of marriage “the thing mostly disapproved by Allah, between those permitted”.

Islamic law, as it is acknowledged in modern Arabic countries, permits dissolution of marriage both in a private form (based on will of either one or both parties) and in a public form (as an effect of a judicial decision). Repudiation was originally conceived as a private act of a man aimed at freeing himself unilaterally from marriage. Man can otherwise authorize his wife or another person to put it in act. Even though repudiation is considered as a blameworthy act, in some case it can result as “recommendable”, “licit” or even “compulsory”. He can give this authorization in marriage contract or in a following act; a woman’s consent is required in order to include this clause; otherwise the contract will be valid, but the clause will be void.

Repudiation must take place in fact for a completely free act of will and not subject to coercion.

Man has to have total mental competence; repudiation asks for his free will and he shouldn’t be coerced. He is able to change his mind twice: first and second repudiations are revocable, as they happen during the legal retirement of a woman (*iddat*) but the third repudiation causes the definitive dissolution of the marriage and the man will not be able to marry the same woman again. Revocation of repudiation can be explicit or implicit, when a man resumes ordinary life; it is a further right of a man, in the ambit of his power of discretion; neither another payment of *mahr* nor a woman’s consent are required. Repudiation has to be pronounced in specific periods, in order to be consistent with *sunna*, otherwise it will result in “prohibition”. Triple repudiation is negatively evaluated (the pronouncement of three repudiations at the same time). Religious law recommends the presence of two witnesses. In modern Arabic Countries this institution has been subject to a process of reduction as an act of private autonomy and attempts are being made to include it either in a judicial procedure or in a specific form, in order to guarantee that a woman is at least informed of the dissolution of her marriage. In some countries repudiation is drafted by a notary and notified to the woman; in other countries a judicial decision or authorization is required. Courts must first attempt to reconcile the spouses and they can order a payment to be made by the husband, in order to guarantee maintenance to both wife and children.

Other forms of unilateral dissolution of marriage are the vow of abstention from marriage relationships pronounced by a man (*īlā’*) and offensive oath (*zihār*). In the first case there is a waiting period of four months, some Islamic schools affirm that then repudiation becomes irrevocable, following other schools an unilateral act (repudiation, judicial petition) is required. With the second a woman is likened to a prohibited one. After some time the husband has to opt between reconciliation with his wife (through expiation) and repudiation. Expiation is recommended to favour resumption of life in common and to avoid women’s poverty. In both hypotheses modern Arab State legislation gives the possibility for a woman to become an active party; when her husband does not make a choice she can ask the juridical authority to fix a time limit; after its expiration divorce will be declared, in order to avoid to women an uneasy situation of uncertainty about her marriage status.

Mutual cursing oath is a form of dissolution of marriage that involves participation of both spouses. This hypothesis offered also a man a means to disclaim paternity of a child. In this case a man charges his wife with adultery, but he avoids the corporal sanction that he could receive if his charge is without any evidence. The woman avoids penalty connected with adultery, as she refuses the charge under oath. Marriage is dissolved by this double oath and that woman is prohibited to man forever.

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

woman loses all the rights she acquired with marriage contract (dower and maintenance). In Some States *hul'* laws verify that *hul'* is required because of woman's free choice, without any form of pressure or coercion, in order to give a better protection to a woman's position; she has to be assisted by her guardian, if she is underage, in order to protect her economic interests. Maintenance during her legal retirement cannot be renounced. In some States this procedure cannot be self-managed by the two parties; mutual consent has to be authorized by judicial authority and the presence of two witnesses is required. The compensation can be decided by the judicial authority if the parties do not define it; its amount cannot exceed the mahr.

A dispute can be deferred to two arbitrators when the the parties disagree on economic aspects.

Finally there is the possibility of judicial dissolution, on request of each party; in some States nowadays divorce always requires a judicial decision and also some forms of private and unilateral divorce will be enforced by a judicial registration. Judicial divorce has not a homogeneous character, as the Islamic schools have different opinions about the role of judicial authority, the possibility for a woman to require divorce, the causes of it (because of grounds that either make continuation of conjugal life excessively hard or hinder conjugal relationship otherwise, as mental insanity, physical defects, ill-treatments or conflicts between spouses). Some legislations guarantee a woman the possibility to require divorce even when contract conditions have not be respected. Some factors which in other religious systems are considered from the point of view of the validity of marriage in Islamic law only make possible divorce, so the same nature of this act seems fluid.

Contractual vision of marriage, which is typical of Islamic law, seems to justify a woman asking termination of marriage because of her husband's economic shortage. This shortage is expressed in lacking either payment of dower or maintenance. Nowadays the ratio of these provisions seems aimed to a better protection of the "weak party". Courts will try to reconcile parties or to defer the claim to arbitrators as well in these hypotheses. In addition a woman can ask termination of marriage because of absence or imprisonment of her husband; these situations are recognized as causing an effective damage to women, which risk being subject to illicit conduct by third parties. Islamic law differs from Jewish law, which is not able to give a solution to the problem of a woman de facto separated from her husband, even though for reasons that are not dependent on his will.

In religious systems, forms of dissolution of marriage, even though one or both spouses are not consenting because of the necessity of maintenance of religious homogeneity are justified. On the contrary in secular systems the different or the change of religion has not any influence on divorce, unless it causes an unbearable prosecution of common life.

In Canon law dissolution can happen by privilege of faith, if there is a just cause.

In Jewish law, a man's apostasy permits a woman to require the *ghet*. If a man refuses and rabbinic authority does not succeed in imposing its authority, she can petition a secular court, which can use coercion to obtain the release (Rabbi Caro); following other opinions, coercitive instruments can be used only when a man's behaviour can persuade a woman to disrespect the obligations deriving from her religion.

In Islamic law, if a muslim man abandons his religion, marriage is considered automatically dissolved, without necessity either of repudiation or judicial divorce; this fact intervenes only if parties do not comply to the obligation to divorce. A woman who becomes an atheist, abandons either Christian or Jewish faith, will be divorced *ipso iure*. The apostatized woman loses every right on her mahr; the apostatized man will pay a half of the contracted dower. If a woman converts to Islam, and her husband refuses to do the same, marriage will be dissolved.

Canon law recognizes the possibility of dissolution of a *ratum et non consummatum* marriage, even though a just cause is required, the other systems give an indirect importance to non-consummation; sometimes this factor can influence (also economic) conditions of dissolution of marriage.

One aspect of gender disparity, in Jewish law, concerns the hypothesis when one of the spouses does not give consent to divorce; dissolution requires the husband's release of a *ghet* and a woman's acceptance. Religious authority is not able to have a substitutive role; a man can be coerced only in limited cases.

This is a religious obligation which requires a strict observance. However, religious law recognises man the possibility of a one-sided divorce, through a complex procedure (procedure of one hundred rabbis), when a woman does not cooperate or she is insane.

On the contrary when a woman does not obtain a *ghet* she acquires the status of *agunah*, even though she is either separated or in fact abandoned by her husband. She has a right to be divorced, in order to to celebrate a new religiously valid marriage and grant legitimacy to children born from the new marriage, but for various reasons she cannot reacquire free status.

For Jewish law, in secular juridical systems an inconsistency is formed between the right to dissolution of marriage in secular law and the connected reacquiring of free status and the not correspondence of the same status in religious law.

This problem does not deny only the possibility to refuse the release of a *get*. In the past a woman could be chained to a only formally existent marriage because the husband could not give the *ghet* (in the case of mental insanity) or he had disappeared, and it was not certain if he was still alive, or converted to another faith and could contract a new marriage, without dissolving the previous one, as it was considered invalid. Another case is *levirate*, when the husband's brother apostatized or disappeared or emigrated in another continent. This plurality of situations prevented a uniform solution from being reached.. Rabbinical concern for the hard female position was proved by the alleviation of probative burden for women, as a witness (even apostatized or not-Jewish) was considered enough to prove the death of her husband. The declaration of a woman is enough too, if spouses notoriously lived together in harmony.

Nowadays the most common situation is a man's refusal to release a *ghet*, in order to negotiate post-marriage solidarity regime or the right to visit children in a stronger position. Uncertainty of female position is worsened in secular states, where rabbinical authorities do not have any power enforced by the State to coerce a spouse to release the *ghet*. In secular States there is a clash between the right to dissolution of marriage in secular law and the connected renewed free status, and the non conformity of the same status in religious law. In some States (France, USA) there is a strong pressure to assimilate the causes of dissolution in religious law with those ones provided in secular law; this would imply renouncing the claims of autonomy of religious law concerning personal status.

Religious systems do not adopt a uniform solution concerning the regime of economic protection in the event of dissolution. The qualification of marriage only as a contract or also as a sacrament influences their more or less pronounced trend to rule a pretty secular matter. Nevertheless a gradual recognition of equal female dignity in marital relationships seems to be emerging. Institutions that originally caused a de-subjectification of women in a marriage contract now ensure the commitment to obligations of post-marriage solidarity in favour of the weaker party in the relationship. These institutions address the choice of one of the spouses over the exercise (or non-exercise) of exit freedom in marriage, they also carry out an indirect function of stabilizing marriage, in contrast with the arbitrary exercise of power to divorce by a unilateral act (e.g. Islamic repudiation).

Regarding canon law, it tends to affirm its competence on the spiritual part of marriage, the one concerning its nature of institution of divine law and its sacramental dimension; for other aspects a cooperation with civil law is searched; this cooperative wish is testified by the norm about warning parties to observe obligations deriving from civil law, by the ecclesiastical judge declaring void a marriage (can. 1689, C.i.c.). Other norms express the Church's concern towards the observance of obligations of post-marriage solidarity ruled by civil law in case of divorce: the prohibition to be a witness in a marriage of a person which does not comply with natural obligations towards the spouse and the children of a previous declared invalid or dissolved marriage (can. 1071, C.i.c.).

Canon law states that during separation the obligation to maintain and educate children remains (can. 1054, C.i.c.); the converted polygamist, who chooses to keep one of his wives, has to provide for the needs of the other no longer cohabiting wives; the *Normae* ruling *petrine privilege* provides the burden, for ecclesiastical authority, to interrogate the party who petitions dissolution about civil and moral obligations towards his first spouse and their children.

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

The access of women to the job market has changed their traditional role of total dedication to the marital home, husband and children, and the paternalistic approach to family law. It has also introduced new needs for balancing rights and duties, even post-marital ones.

Provisions concerning conjugal and post-conjugal economic regime between spouses (absence of an equal distribution of assets between spouses in the case of *démariage* in Jewish law; strict separation of each spouse’s wealth in Islamic law may prove to be unsuited to the changed social context, but may reveal the poor care of the weaker party in the marriage, specifically in the broken phase of the relationship. In this case both spouses appear to experiment a wish of both affective and economic “disinvestment”: each of them tries to re-appropriate what he either brought about or acquired during marriage.

In Jewish law in the past the marriage contract stated the sum the husband had to pay to his wife in the event of termination of marriage or death, and the restoration of what she brought; nowadays it is like that in Israel.

*Ketubà* made the dissolution of marriage easier for men, giving women an economic compensation, if there was not a woman’s fault; women lost every right in the last case, as a punishment. She lost every right on *ketubà* when she petitioned divorce, when there was a fear that she vindicated exit freedom to receive an economic profit from marriage. Anyway, in the talmudic period a man who could not comply with economic obligations coming from *ketubà* could not free himself unilaterally from marriage.

*Ketubà* also is a factor of marital cohesion and of promotion of reconciliation between spouses, a sane instrument of prevention (and repression) of behaviours not coherent with maintenance of common life. Reduction of *ketubà* sanctioned inappropriate female conduct; its increase pressed men to comply with their duties.

As we know, Rabbi Gershom’s decrees made the position of spouses more equal, as consent became necessary for dissolution of marriage and woman was given the possibility to refuse divorce.

In Islamic law a dower (*mahr*) has to be given by the man to the woman in the event of marriage. This payment gives a man the possibility to free himself unilaterally from marriage (through repudiation); when divorce is caused by his wife he can obtain return of *mahr*. The dower is also an instrument of persuasion useful for a woman to obtain “repudiation by consent” offering the partial or total return of the *mahr*.

*Mahr* has been considered either as an effect of marriage (Hanafi school) or as a constitutive element of marriage contract (Maliki school); originally, in the pre-Islamic Arabia was considered a “bride price” (when a man seduced an illibated woman he had to marry her and pay the dower); now it is a form of economic aid for woman in the event of divorce or death of her husband. For these reasons the custom has developed to pay a totally or partially deferred *mahr*, when marriage is dissolved. A deferred *mahr* has a deterrent effect on men’s right of repudiation (as happens in Jewish law with *ketubà*), but it also limits female possibility to require the *hul‘*, which implies the return of the dower.

A woman has a right also to maintenance and accommodation during her legal retirement; her position is more protected as repudiation is not final. In the event of repudiation, Islamic law recognized the “moral damages”, providing a “consolation gift”, to compensate her pain due to

abandonment. This form of compensation was “recommended”, but was compulsory in the event of a not consumed marriage. State legislators extended this institution to unjustified and illegal divorce, confirming its compensative nature. Sometimes it is provided whatever be the cause of divorce, and is a form of post-marriage help. Nowadays the consolation gift is not only an instrument of economic protection of women, but also of condemnation of negative male behaviours.

In secular state systems, the juridical instruments proper of religious law are not enforceable, so they have little impact on individual behaviour. In States that adopt a paradigm of religious specificity and grant religious groups the possibility to self-rule, the cost to pay is the putting to risk of more vulnerable individuals (or groups); juridical systems which impose normative uniformity, even though they formally grant equality of treatment, risk in equal measure to discriminate the values of minorities which are not able to integrate in the dominant culture.

There is a clash between secular and religious laws, concerning the meaning public or private of religious rules, so “the attempt to subject them to forms of public secular control means to desacralize them”.

In Jewish law the need to find a convergence between civil and religious law concerns the research of juridical instruments which permit a woman’s release from the hard condition of *agunà*.

In Israel rabbinical courts have jurisdictional (sometimes coercitive) powers and can enforce their decisions, adopting economic sanctions and sometimes imprisonment. In secular systems rabbinical jurisdiction is merely voluntary: the parties can freely decide to submit to it and to comply to its decisions, sometimes religious communities have an attitude of mistrust towards the *bet din*, also because of the absence of a juridical hierarchical system, and because of the fear that local rabbinical authorities do not respect the authentic meaning of religious law and they are lacking effective authority.

*Bet din* is bound to religious law; his decisions sometimes can be not coherent with the parties’ wishes and he can limit aspirations to divorce, as Jewish law not always imposes the release of a ghet or sanctions for not releasing. For these reasons sometimes a party is recalcitrant to submit to religious judicial authority. The islamic judicial authorities encounter the same difficulties where *šarī‘a* is not enforced by judicial state authorities and imans are not appointed or recognized by the State.

In a secular system, the possibility to dissolve an unsatisfactory marriage using the instruments offered by a religiously neutral law, exercising an exit freedom from religious law, implies a weakening of religious expectations, especially of a woman (the release of a ghet for a Jewish woman, the payment of a mahr for an islamic woman, when she petitions divorce for reasons which are not permitted to her by religious law); these expectations cannot be protected totally or partially by state judicial authority in a substitute way.

Almost all Western systems have admitted the possibility to dissolve marriage; both marriage and divorce are subject to the same process of “de-instituzionalization”. Some forms of religious divorce (private divorce or unilateral divorce) can be classified in the ambit of civil divorce with great difficulty; however, laws and jurisprudence take into consideration the transformation from divorce associated to sanction and responsibility to models of dissolution founded on mutual consent, on recognition of irreparable split of common life, on objective separation for a certain period of time, and the admission of forms of substantial unilateral divorce (nofault divorce). of time. The role of judicial authority is reduced to a guarantee of legitimacy and equity of the procedure. Divorce requires easier and simpler procedures, in some juridical systems they do not always have judiciary but only administrative character.

Autonomy of parties and negotiation of divorce, even of its economic effects, are emphasized and they favour the development of a plurality of forms of exercise of exit freedom from divorce.

A “neutralization” and uniformation of post-marriage regimes tends to develop, and they are not connected to the reasons and forms of divorce; in the past these differences limited the exit freedom. Scholars think that secular systems do not tend to realize “the transition from de-instituzionalization to de-juridicization of divorce”: intervention of a third (judicial or administrative) authority remains the factor which characterizes all the forms of divorce; a public authority continues to be (more or less) required, and it indicates the difference between a more or less veiled “institutional” and more or less marked “existential” perspective. The latter emphasizes a social dimension of marriage and divorce.

In secular systems there is a need to find and to update juridical mechanisms which protect both access and exit freedom. The latter encounters more difficulties to be realized, States maintain their monopoly regarding dissolution of marriage. However, a more open approach is present in laws that rule de facto unions, where consent is revocable unilaterally and ad nutum.

Secular States, even though they recognize the possibility to celebrate marriages in religious forms, state their exclusive jurisdiction regarding dissolution of marriage. Exit freedom, legally exercised in a secular system, is framed in the ambit of state-imposed principles; religious forms of dissolution of marriage have no effect.

Some States’ systems (like Italy) which in the past recognized a specific regime only to a Confession have nowadays eliminated canonical dispensation from the number of decisions which can be enforced in State system; there is a “negation of protection” of exit freedom from marriage in a religious form and taking the distances from other traditionally concordat juridical systems (Spain, Portugal), which continue to recognize forms of canonical divorce.

On the other side religious marriage is not dissolved by civil divorce. Clash between secular and religious systems is due to the non-negotiability of the values proper of each one: canon law considers marriage as indissoluble, as secular systems recognize parties more autonomy regarding the effects of marriage; Jewish and Islamic Law admit divorce but consider it an act of private, often unilateral, autonomy (the last one in a less marked way) rather than to a decision of a third authority, which grants equal participation of both spouses; Islamic law admits forms of revocable dissolution-repudiation not comparable to the reconciliation of spouses as ruled in secular systems.

For these reasons a clash between personal civil and religious status in the experience of a faithful-citizen can occur, underlining a disagreement between state and religious norms.

Both an “universalistic” and a “relativistic” approach reveal their limits: the first implies a process of homogeneization of civil society into the values of the majority, demanding a restriction of different values and identities into the categories provided by civil law, and disfavoring an accommodation of the needs of specific groups. The second sometimes implies, as a reaction, an acceptance of a specific and incomplete interpretation of religious law, which does not take into consideration the plurality of schools and opinions within it.

In the European ambit both States which follow an “assimilation” approach (like France) and States which for a long time have adopted a self-affirmation of “ethno-cultural differentialism” (like Germany) tried to find an accommodation to the needs of Islamic communities, through the instruments of international private law and bilateral agreements. There is an increasing awareness that today cultural homogeneity granted in the ambit of the normative area has been replaced to a multicultural society, where particularity and universality have both an effect on the definition of a national identity.

Islamic repudiation and Jewish ghet pronounced in a country of the European Union will not be directly and automatically enforced, even if pronounced in front of consular authority of a State which rules these forms of dissolution. However, the idea of public order seems weakened regarding recognition of foreign decisions: forms of “consensual repudiation”, pronounced by the husband on request of his wife or with her acceptance (parified to consensual divorce), divorces where is a woman is given a fair economic compensation are enforced, even though they are not judiciary acts.

However, in that case the weaker party is prejudiced as the woman has to renounce to mahr to obtain divorce. The States impose different conditions in order that the repudiation is considered to be pronounced abroad: some stricter jurisdictions require that all the phases of the procedure take place abroad, other jurisdictions are more flexible. When spouses are subject to different jurisdictions the problem rises of which law prevails. There is a common trend to consider the principles of equality of spouses and the right of defence of women as non-renounceable; every clash with them implies a insuperable contrast with public order. The event that Islamic repudiation is increasingly subject to forms of judiciary and public control has to be taken in consideration, as it favours an easier enforcement in western systems.

Some juridical systems don't give any juridical importance or effect to religious divorce; others in a mistaken spirit of strengthening religious laws, swing between not always justifiable limitations of state jurisdiction in favour of religious law, and the recognition of a state power to enforce religious obligations. The risk of a violation both of individual freedom of conscience and religion and of religious autonomy appear. Alternative models of resolution of disputes, in a non-judicial forum, forming: a) a sort of "collaborative law" (arbitral commissions in the USA, sharia courts in the English system); b) civil enforcement of agreements where parties committed themselves (in marriage contracts or in separation agreements) to religious obligations; c) the possibility to negotiate pre-marriage agreements (USA) to define those effects of marriage which the State leaves to the autonomy of the parties; are developing. In some States, laws that impose removal of burdens which limit the possibility to enter a new marriage, or impose an economic pressure to the spouse who is recalcitrant to release a divorce, have been enforced (Canada, New York laws)

An intermediate solution between intervention and abstention positions is that one which imposes compensation of civil law damages coming from non-performance of religious acts, when there is an intention to harm the weaker party in marriage, as this should be an abuse of right (France, Holland).

The various solutions swing between the need to satisfy social demands of protection of religious needs and the state duty to abstain from unlawful interference in religious matters, which also cause a secularized interpretation of religious laws.

The balance between protection of religious choices and the respect of the principle of neutrality implies the research of a difficult equilibrium between: a) a partial de-structuration of secular marriage model, delegating to civil society, in its (also religious) components, the duty to give, in a reasonable measure, the rules of alternative models of common life (and the connected post-marriage regime) and b) the definition of the correct measure of state intervention in order to protect non-negotiable values in a secular, pluralistic and democratic system.

The comparison, and sometimes the clash, between a plurality of (religious and secular norms) norms has to develop in the framework of fundamental values of religious freedom, pluralism, democracy, equality, equal dignity of every individual, independently from specific gender, race, language, culture, religion belonging.

The clash between civil and religious law, and the search for forms of accommodation of religious interests is understandable in a contractualistic perspective, typical of separatistic systems, which protect only "negative" religious freedom.

In these contexts spouses can make use only of a civil marriage model, and they have to use the instruments offered by civil law to guarantee themselves a conformity between their personal civil and religious status.

The recognition in some systems, which adopt bilateral agreements, of marriage models alternative to the secular one, should imply a deeper coherence: a citizen-faithful can choose a religiously-typicized marriage project, without renouncing to obtain from the State the civil effects of a religious act, and he can opt not to use the secular model offered by the State to all citizens without distinction; at the same time the possibility of recognition of civil effects to acts of religious divorce from a religious marriage (but with civil effects) should be guaranteed.

The openness towards a system where a plurality of normative (also religious and cultural) experiences are welcomed implies thinking about the faint border-line between the recognition, in the constitutional framework, of reasonable peculiarities and exceptions to civil law provided for all citizens, and the (even indirect) introduction of a system of different personal status, sometimes connected to a non-equal budget of rights and duties founded on specific identity.

Economic protection of the weaker spouse has to be given peculiar attention: (direct or indirect) recognition of forms of religious divorce accommodates religious needs, but it cannot become an instrument to free oneself from economic effects of the state post-marriage regime of solidarity; the same or equivalent cost has to burden all the (civil and religious) forms of divorce. In this direction, there is a doctrinal and jurisprudential effort aimed to promote an evolution of State laws on marriage towards a parity of advantages and disadvantages consistent with the options of religious or secular marriage. A democratic realization of a loyal competition between civil and religious marriage should be enforced in this way.