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# Juridical Bonds of Marriage for Jewish and Islamic Women

ADELAIDE MADERA

Researcher in Canon Law, University of Messina, Italy

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*This paper examines the condition of women in both Israel and Islamic countries, specifically their freedom to leave a marriage, and compares respective models. First, the study analyses the peculiar relationship between secular and religious law in Israel and Islamic countries. Second, it studies the nature of marriage as a contract in these legal systems, comparing a totally private approach and a mixed, public–private approach. Third, it analyses the possibilities of dissolution of marriage in such legal systems, indentifying some aspects of gender disparity. Finally it discusses some juridical tools offered in these legal contexts, which are intended to rebalance the exercise of a woman's freedom to leave a marital relationship and its conditions.*

## INTRODUCTION

Both in Israel and in Islamic countries, a woman's condition, her role and her expectations are at a crossroads between tradition and modernity. In the field of marriage, a woman's individual liberty to free herself from her own religious rules is not recognised, despite the secularisation process in various branches of law. A patriarchal and male-centred model of the family continues to predominate; such a model tends to perpetuate the distinction of gender roles between public and private spheres. This happens within the ambit of the specific dynamics of the relationship between the state, groups and individuals, where typical community identities prevail over individual ones, and the state is not able to offer an effective secular alternative. The presence of elements of gender disparity is nevertheless not wholly due to the complex relationship of integration between secular and religious law but also to historical, political and social factors that tend to direct social praxis, creating pockets of resistance. In fact, the secular–religious relationship has sometimes directed the process of legal evolution towards a wider recognition of women's equal dignity.

One critical stumbling block is freedom in marriage and, specifically, freedom to 'exit' a marriage and the cost of the exercise of this freedom for a woman. In this regard, the need for a new interpretation of the institution of marriage emerges: an interpretation that is consistent with the current social dynamics that affect modern marital relationships, while still respecting

religious law. First of all, the recognition of the exit freedom is connected with a view of marriage as a contract, lacking a sacramental dimension; in this case, a greater freedom to withdraw from an unsatisfactory marriage relationship is authorised. The comparison between the Jewish and Islamic models reveals both the limits of a totally private approach and the impact of accepting (or not accepting) a public dimension of marriage. These factors have a specific influence on the role of the religious judicial authorities.

### EMANCIPATION OF WOMEN IN ISRAEL: MYTHS AND MISCONCEPTIONS

Since 1950 in Israel, within the framework of the welfare state, the idea of equality has become a legal statement of the principles of equal dignity and social rights of women, protection against forms of violence and abuse, and participation in public life and military service. However, it has been observed that the building process of Israeli political identity has been realised at the expense of the protection of a woman's specific needs. These were reduced in a generic trend towards the integration of women in the pursuit of national ideals; only more recently has there been a transition from the formal statement of equality to the realisation of a more substantial equality.<sup>1</sup>

The process of legal modification has left the role of religious law unchanged in the ambit of marriage and family law.<sup>2</sup> The presence of distinct religious juridical microsystems within the framework of the secular juridical macrosystem has compromised the realisation of an equal freedom of the sexes, and it has confirmed the conviction that 'women in Israel have a state of their own'.<sup>3</sup> The state of Israel, even though considered as both a bastion of democracy and a promoter of liberal political ideals, presents points of convergence with nearby Islamic countries, the latter considered by colonial rhetoric as an incarnation of the traditional oppression of women.<sup>4</sup>

The institutions of marriage and divorce remain subject to religiously characterised regulation, which varies according to personal and religious status, following the rule of the Ottoman regime, later maintained by the British Empire. A particular legislative pluralism has been achieved, where civil and religious law are present and sometimes intertwine; as a result, many elements of

1 See R Halperin-Kaddari, *Women in Israel: a state of their own* (Philadelphia, PA, 2004), pp 9–23.

2 See M Edelman, *Courts, Politics and Culture in Israel* (Charlottesville, VA, 1994).

3 See Halperin-Kaddari, *Women in Israel*, pp 3–23.

4 See R Salih, 'Femminismo e islamismo: pratiche politiche e processi di identificazione in epoca post-coloniale', (2007) 3 *Jura Gentium*, <<http://www.juragentium.unifi.it/it/surveys/islam/mw/salih.htm>>, accessed 19 December 2007.

conflict are caused by the specific relationship between the state and orthodox Jews.<sup>5</sup> The submission to marriage law on the basis of religious or personal status strongly influences marriage freedom both in the access stage – because the exercise of religious freedom regarding marriage in a secular form is limited, and religious homogamy is compulsory – and in the relationship stage – because the law legitimises inequalities and discriminations between spouses, particularly with regard to the ability to free themselves from the marriage bond.

This rule seems to make up an essential element of modern Israeli (and specifically Jewish) identity, in order to cement social peace; in addition, it has become part of a political, social and juridical context where the centrality of the family is emphasised and strong social pressure is imposed on women. In fact, women are still prized for their procreative ability, which is controlled by men, and they are penalised when they choose either not to enter into, or to free themselves from, the state of marriage.<sup>6</sup>

#### ISLAMIC LAW: BETWEEN TRADITION AND MODERNITY

The process of modernising Islamic law began during the Ottoman Empire, which introduced substantial modifications to the original religious law. Various states later realised different levels of secularisation of their juridical systems: some of them abandoned Islamic law in order to conform to Western models (for example, Turkey); others maintained religious law as a rule in a large range of human relationships (for example, Saudi Arabia). A middle course was the maintenance of religious law only in a number of legal sectors (family law, inheritance, forms of religious funding) where the monopoly of religious authorities and their judicial power were more deeply established. In these fields, the abandonment of sharia would have caused conflict between secular and religious authorities. The secularisation in other branches of law therefore reinforced the role of sharia in the areas that remained subject to it.<sup>7</sup> However, religious law is not a monolithic block but a macro-identity that expresses itself in different interpretations of various Islamic schools. Some states have now enforced laws on personal status, creating a hybrid system between Islamic and Western models. These states' policies towards the

5 See SI Strong, 'Law and religion in Israel and Iran: how the integration of secular and spiritual laws affect human rights and the potential for violence', (1997) 19 *Michigan Journal of International Law* 109–218.

6 In Israel, a woman as an individual is not the natural beneficiary of the social security system when she is outside the family context: see Halperin-Kaddari, *Women in Israel*, pp 98–111.

7 See Z Mir-Hosseini, *Marriage on Trial: a study of Islamic family law* (third edition, London, 2000), pp 10–19.

role of women range from an extreme observance of traditions to more liberal political attitudes.<sup>8</sup>

Strong reactionary movements, which qualify themselves as Islamic, have recently developed. They infiltrate more easily into juridical systems lacking a democratic structure, where deep differences between social classes tend to be rooted. Although secularisation seemed to be the dominant trend before 1970, since 1990 there has been a volte face and movements aimed at the ‘purification’ and ‘islamisation’ of the law have developed.

Family law focuses on tensions between modernists and fundamentalists. The debate between modernists and traditionalists is not only concerned with the problem of abandoning the religious model in order to face up to the need for equality and those arising from women’s emancipation, but also develops within an Islamic framework. New interpretative solutions, more consistent with the principles of non-discrimination and women’s equal dignity, are currently sought, through the elaboration of specific (even if conflicting) models of female emancipation, characterised by ‘alternative modernities’.<sup>9</sup>

## MARRIAGE AS A CONTRACT IN JEWISH LAW

In Jewish law, a view of marriage as a contract prevails in both the celebration and the termination of marriage, even though the presence of some religious aspects cannot be denied. In this contractual framework, neither a licence nor permission is required in order to form or dissolve a marriage and the role of the state or religious authority is merely declaratory. Marriage is considered as a contract founded on the free agreement of spouses, even though consent is expressed during a formal public ceremony, with some ritual/religious aspects. However, some limits to marriage are given by religious law. Marriage is invalid when the consent is founded on deception or threats, or is in any other way imperfect.

Even though marriage is based on the free consent of both spouses,<sup>10</sup> the patriarchal view of family and its consequent favouring of the male appears:

- i. In religious–legislative promotion of marriage between underage people;

8 See M ElSafty, ‘Gender inequalities in the Arab world: religion, law or culture’, (2005) 1 *Jura Gentium*, <<http://www.juragentium.unifi.it/en/surveys/islam/mw/elsafty.htm>>, accessed 19 December 2007.

9 See Salih, ‘Femminismo e islamismo’.

10 See AM Rabello, ‘Il matrimonio nel diritto ebraico’ in S Ferrari (ed), *Diritto ebraico, canonico, islamico: un commento alle fonti* (Torino, 2006), p 10.

- ii. In some aspects of a woman's subjection regarding her property (a woman's wealth is subject to male management, while her maintenance right is in relation to her earnings);
- iii. In some duties coming from the marriage bond (differences of effects as the result of unfaithfulness) and from different importance given to the consent of spouses for marriage termination.

## ISLAMIC MARRIAGE: BETWEEN PUBLIC AND PRIVATE

In Islamic law, marriage is a contract made by consent of the parties; it is not strictly necessary that those parties coincide with the spouses. Rights and duties coming from marriage are ruled by religious law and spouses cannot deviate from them by means of a private agreement. Only some rights and duties are mutual; others pertain to the specific gender role. The requirement for the same religious affiliation is applied more strictly to a woman.<sup>11</sup> A marriage contract is subject to Islamic jurisdiction and this gives a character of holy inviolability to the effects of marriage.<sup>12</sup> Marriage is also considered a religious bond and it contains many ethical aspects, even though its juridical structure is that of a contract of exchange.

Originally, the only formal requirement for the celebration of marriage was the presence of two witnesses, in order to make it public. Nowadays, the legislation of various states is oriented to promoting both the presence of a qualified expert, who sometimes exercises the functions of a registrar, and the observance of administrative procedures (registration of marriage and transmission to the registrar). The act of marriage is not therefore limited to a wholly private sphere. However, the non-observance of administrative procedures does not result in the non-recognition of marriage and of some of its effects.<sup>13</sup>

Various elements prove either a limitation or an influence on the exercise of freedom to have access to marriage, and on the choice of partner by the family group:

- i. The influence of the guardian (*wali*) on the choice of a spouse, taking into account that guardians had coercive powers in the past;
- ii. The possibility of premature marriages, even though modern Arabic states require a minimum age for marriage in their laws;
- iii. Women's frequent use of proxy to a guardian in order to arrange a marriage.

<sup>11</sup> See S Ferrari, 'Pluralità di sistemi matrimoniali e prospettive di comparazione', (2002) 2 *Daimon* 43.

<sup>12</sup> See JJ Nasir, *The Islamic Law of Personal Status* (third edition, The Hague, 2002), p 45.

<sup>13</sup> See R Aluffi Beck Peccoz, 'Islam e società in Egitto: il matrimonio 'urfi'', (2002) 2 *Daimon* 179–191.

## DISSOLUTION OF MARRIAGE IN JEWISH LAW

In Jewish law, divorce, even though permitted, is considered negatively in contrast to the positive value of the permanency of the marriage bond.<sup>14</sup> Divorce has followed different models, often favouring the male partner.<sup>15</sup> In the following models, variously practised, the same trend is explicit, aiming to impose correctives to the disparity in the spouses' positions:

- i. To extend the exit freedom of women, making it equal to men's, also admitting the possibility of unilateral divorce for women;
- ii. To restrict men's freedom (divorce by mutual consent);
- iii. To impose dissolution religiously 'in law' of a failed *de facto* marriage; this happens by granting and accepting the *get* (divorce paper).<sup>16</sup>

Within the ambit of a contractual/private conception, judicial authorities have only declarative powers and not constitutive ones; the dissolution of marriage requires the participation of both spouses in the procedure of (male) granting and (female) acceptance of the *get*.<sup>17</sup> This procedure underlines, if only from a formal point of view, male dominance in the conceptual understanding of marriage dissolution in Jewish law.<sup>18</sup> Rabbinical authorities are not permitted to ratify a divorce if the consent of both spouses is lacking.

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. The agreement between parties concerns not only the exercise of the freedom to leave a marriage but also the specific conditions.<sup>19</sup> In this 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. If this prohibition were absent, the stronger party in the relationship (the husband) could abandon his first wife and celebrate a new marriage without the agreement of his partner.

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

14 See Rabello, 'Il matrimonio nel diritto ebraico', p 60, for an examination of the cases when divorce is religiously prohibited.

15 See MJ Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law: a conceptual understanding of the agunah problems in America* (Hoboken, NJ, 2001), p 16; I Breitowitz, *Between Civil and Religious Law: the plight of the agunah in American society* (Westport, CT, 1993), pp 9–40.

16 See Broyde, *Marriage, divorce, and the abandoned wife in Jewish law*, pp 23–27.

17 See Rabello, 'Il matrimonio nel diritto ebraico', pp 91–92.

18 See B Greenberg, 'Marriage in the Jewish tradition' in K Scott and M Warren (eds), *Perspectives on Marriage* (New York and Oxford, 1993), p 392.

19 See Rabello, 'Il matrimonio nel diritto ebraico', pp 62–75.

the other, be forced to dissolve their marriage, by a procedure directed by rabbinical authorities. Marriage has, therefore, apparently evolved from being viewed as a partnership (where each one can freely 'dissociate himself or herself') to a state of domestic corporation (where exit freedom is strongly limited by conditions defined in the incorporation act).<sup>20</sup>

## DISPARITY BETWEEN SPOUSES IN JEWISH LAW

However, Jewish religious law recognises the possibility of a unilateral divorce to men through a complex procedure (the 'procedure of one hundred rabbis'). When a woman does not obtain a *get*, she acquires the status of *agunah*, even though she is either separated from or abandoned by her husband.<sup>21</sup> This implies the impossibility of celebrating a new religiously valid marriage and the illegitimacy of children born of a new marriage.

In Israel, on the basis of national legislation (following the Ottoman system, later maintained by British mandate), rabbinical courts continue to have jurisdiction over Jewish marriages and divorces.<sup>22</sup> This happens within the framework of a system that assumes that a jurisdictional dualism only applies to some effects of marriage dissolution. Israeli religious authorities are specifically sensitive to the requirement that a *get* is granted by free choice and they are reluctant either to authorise a unilateral dissolution of marriage or to order either the granting of a *get* or fines in order to press for such a concession, with the exception of cases of gross fault or irrecoverable failure of marriage.<sup>23</sup> Male violence towards women is sometimes considered as a cause, not for ordering, but only for suggesting divorce.

Rabbinical courts tend to favour mediation, counselling and other means aimed at reconciling spouses, in order to protect children's interests, when present. When reconciliation is not possible, they direct spouses to negotiate conditions for the dissolution of the marriage: as standard procedure, extrajudicial agreements are negotiated by spouses and afterwards ratified by religious

20 See Broyde, *Marriage, divorce, and the abandoned wife in Jewish law*, pp 17–28.

21 This problem does not only arise when the husband refuses the *get* for various more-or-less juridically founded reasons. In the past, a woman was formally 'chained' to a marriage bond in several situations. See E. Westreich, 'Levirate marriage in the state of Israel: ethnic encounter and the challenge of a Jewish state', (2003–2004) 37 *Israel Law Review* 426.

22 See AM Rabello, 'Il Rabbinato Centrale di Erez Israel', (2003) 3 *Daimon* 115. Some problems connected to divorce (custody of children and post-marriage division of assets) are under civil jurisdiction, but can be dealt with by rabbinical courts when they are attached to a request for a religious divorce. The judge who was in charge of the start of the legal proceeding is deemed to be competent. See M Galanter and J Krishnan, 'Personal law and human rights in India and Israel', (2000) 34 *Israel Law Review* 125.

23 Rabbinical courts can order imprisonment only when it is prescribed by Talmudic law; otherwise there is the risk that a *get* is invalid. See A Maoz, 'Matrimonio e divorzio nel diritto israeliano', (2002) 2 *Daimon* 223–233.

courts, in which the woman ‘pays’ in order to free herself from marriage, renouncing her legitimate post-marriage expectations, both personal and financial (custody of children and distribution of assets). Neither secular nor religious law can adequately make up for the imbalance of the contractual power of the parties.

Such a religiously characterised system is counterbalanced by alternative juridical instruments, which allow those who do not wish to make use of a religiously based marriage model to enjoy the same treatment in an indirect way. The possibility of celebrating a civil marriage abroad or a proxy marriage,<sup>24</sup> or to obtain the protection granted to de facto (also gay and lesbian) partnerships, are the only secular alternatives and are the key to the (political) survival of a marriage model founded on personal status laws in the ‘modern’ state of Israel.<sup>25</sup> Tolerance of some forms of ‘civil objection’ to religious marriage indirectly offers a civil accommodation of the needs of religious freedom in a negative form.

#### DISSOLUTION OF MARRIAGE IN ISLAMIC LAW

Islamic law, as is acknowledged in modern Arabic countries, permits dissolution of marriage both in a private form (based on the will of either one or both parties) and in a public form (as an effect of a judicial decision).<sup>26</sup> Repudiation was originally conceived as a private act of a man aimed at freeing himself unilaterally from marriage. Even though repudiation is considered as a blameworthy act, in some cases it can be considered as ‘recommendable’, ‘licit’ or even ‘compulsory’. A man has to have total mental capacity. He is allowed to change his mind twice: first and second repudiations are revocable, but the third repudiation causes the definitive dissolution of the marriage, and the man will not be able to marry the same woman again. 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.<sup>27</sup> 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 at including it either

24 These forms of marriage are juridically invalid on the basis of international private law. However, when two Israeli citizens celebrate such a marriage, it can be registered administratively, in order to guarantee that these partnerships receive the same social benefits granted to legitimate marriages. See Halperin-Kaddari, *Women in Israel*, pp 227–262.

25 Ibid.

26 See Nasir, *The Islamic Law of Personal Status*, p 134; S Oktai Özdemir, ‘Dal matrimonio religioso al matrimonio statale in Turchia’, (2002) 2 *Daimon* 163.

27 See R Aluffi Beck Peccoz, ‘Il matrimonio nel diritto islamico’ in Ferrari, *Diritto ebraico, canonico, islamico*, p 220.



in a judicial procedure or in a specific form, in order to guarantee that a woman is at least informed about the dissolution of her marriage. In some countries, repudiation is drafted by a notary and notified to the woman (Egypt); in other countries, a judicial decision or authorisation is required. Courts must first attempt to reconcile the spouses (Libya, Algeria, Morocco) and they can order a payment to be made by the husband, in order to guarantee maintenance to both wife and children (Morocco).<sup>28</sup>

Other forms of unilateral dissolution of marriage are either a vow of abstinence from marital relations pronounced by a man (*ilā*) or an offensive oath (*zihār*), by which a woman is likened to a forbidden one. After some time, the husband has to choose between reconciliation with his wife (through expiation) and repudiation. A mutual cursing oath is a form of dissolution of marriage that involves the participation of both spouses. In the past, this option also offered men a means to disclaim paternity of a child.<sup>29</sup> In this case, a man charges his wife with adultery but he avoids the corporal punishment that he could receive if his accusation is unfounded. A woman avoids the penalty connected with adultery because she refuses the charge under oath. The marriage is dissolved by this double oath and the woman is forbidden to that man forever. Dissolution can also happen by mutual consent through a sort of consensual repudiation (*hul'*). In this case, the woman presses her husband for the dissolution of the marriage, offering him either a payment of compensation or the return of her dower (*mahr*); she loses all the rights that she acquired with the marriage contract (dower and maintenance). In some states, the laws verify that *hul'* is required because of a woman's free choice, without any form of pressure or coercion, in order to give better protection to women.<sup>30</sup> A dispute can be deferred to two arbitrators when the parties disagree on financial aspects.<sup>31</sup>

Finally, there is the possibility of judicial dissolution,<sup>32</sup> at the request of each party (Syria, Morocco, Iraq, Jordan, Algeria, Kuwait, Sudan and Oman), on grounds that either make continuation of conjugal life excessively hard (mental insanity, physical defects) or hinder conjugal relationships; otherwise, when ill-treatment or conflicts between spouses make continuation of conjugal life intolerable.<sup>33</sup> In addition, a woman can ask for the termination of marriage because of the absence or imprisonment of her husband. A contractual view of marriage, typical of Islamic law, seems to justify a woman asking for termination of marriage because of her husband's financial difficulties. Nowadays, the

28 Ibid, pp 224–226.

29 Ibid, p 234.

30 See Nasir, *The Islamic Law of Personal Status*, p 116.

31 See Aluffi Beck Peccoz, 'Il matrimonio nel diritto islamico', pp 237–238.

32 See Nasir, *The Islamic Law of Personal Status*, p 107.

33 Ibid, pp 120–133.

balance of these provisions seems aimed at better protection of the weaker party.<sup>34</sup> In these instances also, courts will try to reconcile parties or to defer the claim to arbitrators (Iran).

## THE 'COSTS' OF SEPARATION

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. It has also introduced new needs for balancing rights and duties, even post-marital ones. Provisions concerning the conjugal and post-conjugal financial regime between spouses (absence of an equal distribution of assets between spouses in the case of *démariage* in Jewish law; strict separation of each spouse's wealth in Islamic law) may prove to be unsuited to the changed social context, but may reveal the poor care of the weaker party in the marriage, specifically in the broken phase of the relationship.

In Jewish law, a woman's wealth is subject to her husband's control, as either property or management. In the event of the termination of marriage, she has a right to what she brought to the *coniugio* (in addition to *ketubà* (the marriage contract)) but she is not entitled to financial increases realised during the marriage. During marriage, a woman is traditionally obliged to give her husband her earnings. For this reason, in a dispute (for example, separation that is not followed by the granting of a *get*), her earnings are deducted from her maintenance, taking into consideration her financial condition before separation from her husband.<sup>35</sup> On the basis of the Women Equal Rights Law 1951, Israeli Supreme Court cases have tried to lead disputes concerning post-marriage distribution of property into the ambit of secular law. In the absence of a specific law, the Court has sometimes introduced the presumption of a community property rule. Later, the Spouses Property Relations Law 1973 stated that conjugal property has to be fairly distributed in the event of either divorce or death of each spouse, if a different agreement between parties has not been ratified by a notary, a rabbinical court or a family court. This law determines the distribution of property after divorce has taken place. In this way, the original spirit of the law is distorted: in fact, the granting of *get* becomes a tool to control the criteria of post-marriage

<sup>34</sup> Ibid, pp 128–133.

<sup>35</sup> See I Breitowitz, 'The plight of the *agunah*: a study in *halacha*, contract and the First Amendment', (1992) 51 *Maryland Law Review* 312–421.

distribution of property. This distribution of property becomes the effect of a private negotiation (to the detriment of a woman) rather than judicial determination.<sup>36</sup> The rabbinical courts, when petitioned, are required to apply secular law: this increases conflicts between secular and religious law.

In Islamic countries, the absence of regulation concerning joint ownership of property is a common cause of dispute between spouses. Nowadays, there is a discrepancy between the legal model and social reality. According to the former, a man is expected to be the 'sole provider' for his family and a woman maintains control of her own wealth and earnings. For this reason, the man often experiences feelings of inadequacy and frustration when he is not able to fulfil his role, and sometimes he reacts with violence, a wish for physical dominance or abandonment. On the other hand, a woman's expectations are disappointed, and she shows her frustration by making financial requests. In addition, this disparity of gender roles usually makes a woman reluctant to 'invest' financially in a marriage that is perceived as precarious.<sup>37</sup>

#### OBLIGATIONS OF POST-MARRIAGE SOLIDARITY

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 in both Jewish and Islamic law, 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 stabilising marriage, in contrast with the arbitrary exercise of power to divorce by unilateral act (for example, Islamic repudiation).

In Jewish law, in the past, the marriage contract (*ketubà*) also defined the sum that was due to a woman in the event either of the dissolution of the marriage or of her husband's death; it further established the return of any wealth that a woman brought to the marriage. This is the present-day practice in Israel. *Ketubà* made termination of marriage indirectly easier for a man, even though a judicially declared fault of the woman was present, offering her a sort of financial compensation. However, this right could be denied to her, for 'punitive' reasons. Later, Rabbi Gershom's decrees led to greater parity in the position of spouses, making the consent of both of them necessary for the termination of marriage, with the exception of fault cases; these also gave the woman the possibility to prevent termination, by refusing to accept the *get*.

36 See Halperin-Kaddari, *Women in Israel*, pp 236–240.

37 See Mir-Hosseini, *Marriage on Trial*, pp 115–130.

The influence of an individualistic concept of marriage, typical of Jewish law, is noteworthy. In consensual religious divorce, conditions, even financial ones, are negotiated by the two parties: this is the most common model. Agreements of maintenance can be fixed, when one of the spouses undertakes to support the other, even in the event of separation. These agreements do not really reflect a recognition in religious law of the need for financial support of the weaker party; instead, they have the indirect aim of pressing for the granting of *get*.

In Islamic law, a woman has the right to receive dower (*mahr*) from her spouse in the event of marriage. Giving the dower allows a man to free himself unilaterally from marriage by repudiation; where the reason for a divorce is ascribable to the wife, the husband can claim the return of *mahr*. A woman can use the dower as a tool of persuasion to obtain termination of the marriage, pressing for a consensual repudiation and offering the return of an inferior, equal or superior sum to the one that she received.

Dower has been qualified either as an effect of marriage (Hanafi school) or as a constitutive element of the marriage contract (Maliki school). In any case, it has evolved from the 'price of the bride' to a form of financial support for the woman in the event of divorce or the death of her husband: this understanding is confirmed by the increasingly widespread custom of postponing, either totally or partially, the payment of dower at the moment of divorce.<sup>38</sup> If *mahr* has to be paid in a deferred way, it is a deterrent from the exercise of the male right to repudiation, but it also limits a woman's option to petition for *hul'*, which implies the return of the dower received.

A woman enjoys maintenance and accommodation rights during the waiting period following the dissolution of her marriage. The female position is more firmly guaranteed when repudiation is not definitive.<sup>39</sup> When repudiation occurred in the past, Islamic law used to recognise 'moral damages' to women, providing a 'gift of consolation' in order to repay a woman for the pain that she suffered from abandonment: this compensation was only 'recommended', but it was compulsory in the case of a non-consummated marriage. Modern laws have extended this repayment to cases of both illegal and unjustified divorce, confirming its compensatory aim.<sup>40</sup>

## JUDICIAL AND EXTRA-JUDICIAL NEGOTIATION

The exercise of both 'entry' and 'exit' marriage freedom is characterised by its typical contractual approach in Israel and Islamic countries. Both judicial and

38 See Y Meron, 'Il "prezzo" della sposa: aspetti patrimoniali del matrimonio ebraico ed islamico', (2002) 2 *Daimon* 61–70; Nasir, *The Islamic Law of Personal Status*, pp 61–69.

39 See Aluffi Beck Peccoz, 'Il matrimonio nel diritto islamico', pp 244–245.

40 *Ibid*, pp 230–232.

extra-judicial solutions to the problem of the inequality of spouses are sought in a difficult process of accommodating traditional models to the needs of modernity, within the ambit of religious 'lawfulness'. Compulsory subjection to laws governing personal status remains a strong factor of community identity. The introduction of a free-will element, founded on the recognition of individual choice of self-identification in a specific religion is denied in these systems.<sup>41</sup>

The Jewish model seems to favour an approach founded on private law, where the solution to disputes between spouses is left in the hands of the parties. In Israel, both a state approach directed towards a model of formal equality and the specific connection between secular and religious law in this field are ineffective to address individual needs within the system. The standard agreement does not allow an equal exercise of 'exit' freedom; on the contrary it opens up a process of negotiation, where the husband continues to retain the 'key' to a woman's release. Mechanisms aimed at 'encouraging' a reluctant spouse to fulfil his religious duty to grant the *get* have developed, in order to avoid the strict limits that religious or judicial authority may encounter. These agreements allow spouses to participate in a system aimed at governing both the marriage and the conditions of its termination.

According to Jewish law, financial agreements can be drawn up. A husband can commit himself to pay a considerably larger maintenance than is usual to his wife. Maintenance will be due, even during separation, until the moment of termination of the marriage. In Jewish law, a divorce that is granted under either compulsion or threat of penalties, beyond those cases religiously provided, is potentially invalid. An agreement about maintenance is considered consistent with *halachà* (religious law), as it does not establish penalties but only a right to financial support until termination of marriage, even though it is indirectly aimed at pressing a man to grant the *get* more quickly. In Israel, termination of marriage requires the mutual consent of the spouses, including provision for maintenance.

According to sharia law, an Islamic marriage contract can include clauses aimed at re-balancing the positions of the spouses within the confines of a conjugal relationship, even ones concerning financial aspects: the delegation to the wife of the right to petition for divorce, in the event that the husband infringes any conditions of the marriage contract, by celebrating a second marriage or through maltreatment; an obligation to agree on the family address; the right to a complete education. In Islamic countries, there is a trend towards permitting judicial intervention in the breakdown of marriage, and the courtroom is increasingly becoming 'a negotiation area' for conjugal conflicts.<sup>42</sup> A dichotomy between the juridical identity of marriage and its social reality is emerging, and

41 See Galanter and Krishnan, 'Personal law and human rights in India and Israel', p 131.

42 See Mir-Hosseini, *Marriage on Trial*, pp 49–53.

the difficult task of filling the gap between law and social praxis is entrusted to the judges.

A woman often succeeds in renegotiating the terms of the marriage contract, in order to strengthen her (otherwise unequal) position within the marital relationship (for example, she can prevent her husband solemnising a second marriage).<sup>43</sup> However, a woman's efforts are more often directed towards better financial provision on divorce or persuading a reluctant spouse to consent to divorce. Legal protection for women seems substantially aimed either at accommodating the negative consequences of divorce (mainly financial) or at freeing the woman from an unsatisfactory marriage bond, rather than giving a woman equality within the conjugal relationship. Family harmony still seems to be founded on female 'obedience'.

In both models examined, aspects of asymmetry are still present, specifically regarding the exercise of 'exit' freedom from a marital relationship. Such freedom seems directly proportional to a woman's ability to afford the financial consequences of her release. However, some aspects of inequality have been reduced.

A totally personal approach permits the use of mechanisms founded on self-determination and intended to correct the injustices caused by a religious model in a religiously non-neutral legal context (Israel). A mixed approach, public and private, is increasingly trying to include a contractual/religious model in the framework of the state legal system. Such a system will reduce the male-centred aspects of the conjugal relationship, even those present in its breakdown, and promote growing gender equality (Islamic countries). However, cultural tradition and social praxis stand in the way of overcoming these matters. Marriage is still not considered as an agreement of mutual solidarity, where both partners have an equal duty of cooperation and an equal power of decision in the most important choices.

The need for greater female awareness of the juridical tools that are available is evident. Such tools are aimed at re-balancing the exercise of exit freedom from the conjugal relationship. Women have to recognise the relevance of such tools, not only in the pursuit of financial claims but also to personalise the rules of marriage. This personalisation allows not only an alternative allocation of rights and duties but also a more authentic definition and understanding of the intrinsic essence of a couple's life.<sup>44</sup>

<sup>43</sup> Ibid, pp 115–130.

<sup>44</sup> See A Quraishi and N Syeed-Miller, 'No altars: a survey of Islamic family law in the United States', <[www.law.emory.edu/ifl/cases/USA.htm](http://www.law.emory.edu/ifl/cases/USA.htm)>, accessed 10 April 2008.