

HALACHA, THE ‘JEWISH STATE’ AND THE CANADIAN *AGUNAH*: COMPARATIVE LAW AT THE INTERSECTION OF RELIGIOUS AND SECULAR ORDERS

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Introduction

Let us imagine Sarah, 40, who has been married to Joseph, 45, for over 15 years. They have a 10 year old adoptive child from Israel whom they raised together in Canada. Sarah has graduated from the University of Toronto in Political Science and Women’s Studies and has recently been promoted as a tenured professor at York University. Joseph, on the other hand, has never liked school very much and, after college, became an automobile mechanic. In the last three years, Sarah and Joseph have been separated and have obtained a civil divorce in Montreal.

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However, Joseph refuses to grant Sarah a *get*, the Jewish divorce which can effectively only be granted by the husband.² Joseph is more than happy to retaliate for the humiliation he suffered, having had to sell his house following divorce. He has vowed never to grant Sarah a religious divorce and to leave her as an *agunah*, a chained wife. Last year, Sarah met David, another modern Orthodox man, and they now want to marry and have a child together. However, being an *agunah*, Sarah cannot remarry according to *halacha* (Jewish law) (Cohn 2004: 66) and she cannot have legitimate children in the eyes of her religious community. Any children she may bear with her partner will be considered a *mamzer* (pl. *mamzerim*, bastard children) and will be “effectively excluded from Judaism” (Nichols 2007: 155). The *mamzer* status continues on for generations down the

femmes religieuses au Canada’), at Harvard Law School’s *Global Legal Education Forum* in Cambridge, MA (‘Teaching Across Systems and Borders: Rethinking the Religious/Secular Divide in Legal Thought’), at the University of Toronto Munk School of Global Affairs conference *The Politics of Islam in Western Europe* (‘Navigating the Secular/Religious Divide: Muslim Women Divorcing in Western Europe’), at the Réseau hispano-canadien d’experts en immigration (RHICEIN)’s event *Espagne, Canada, État des savoirs sur le statut des immigrés* in Madrid, Spain (‘Droit constitutionnel canadien et liberté de religion: de la Cour suprême aux acteurs sociaux’), and at the Oñati International Institute for the Sociology of Law workshop *Legal Practice and Accommodation in Multicultural Europe*, convened in Oñati, Spain by Marie-Claire Foblets and Prakash Shah (‘Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada’).

² The authority to divorce is found in the Torah at verse 24:1 in the book of Deuteronomy, which was interpreted as bestowing on the husband the exclusive privilege to enact divorce (Kaplan 2004: 61). My fictitious character Sarah might not be considered an *agunah* according to a strict Jewish legal definition of the term, i.e. as someone who fits the narrow (mostly fault-based) grounds entitling a spouse to have the divorce compelled by the rabbinical courts but does not obtain divorce. For a summary exposition of religious grounds to compel divorce see *infra* part V. For an exposition of this narrow definition of the *agunah* problem, see Broyde (2001: 10). I have included such a contested example of an *agunah* woman on purpose, to plead for a wider definition of the *agunah* as encompassing all forms of divorce refusal. This definition aligns with that of Justice Rosalie Abella, herself a Jewish woman, writing for the Supreme Court of Canada in *Bruker v. Marcovitz*.

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line and *mamzerim* are only permitted to marry each other (Rayner 2001: 43).³ In fact, Sarah is still considered religiously married to Joseph, notwithstanding her civil divorce (Bitton 2009: 117-118; Biale 1984: 102).

Sarah's existence is now split in two. In her 'secular' life, she is financially autonomous, having bought her own apartment and settled her financial disputes with Joseph. According to her tax forms, she is single. However, in the eyes of her synagogue, her Orthodox Jewish neighbours and her religious family, she is still considered married. This schizophrenic state of affairs is an important phenomenon in Israel and in countries of the Diaspora, where many women "fall between the cracks of the civil and religious jurisdictions" (Shachar 2008: 576), with the isolation and economic hardships this situation often entails. In Canada, this issue has reached the Supreme Court in the landmark *Bruker v. Marcovitz* case.

Both Israel and Canada, like other polities, have adopted State mechanisms to sanction *get* refusal and alleviate the "plight of the *agunah*" (Breitowitz 1992, 1993: 277; Hachohen and Greenberg 2004: 14). The Canadian responses, which stem from civil law and reach out into the religious sphere, take the form of judicial enforcement of contractual agreements related to the *get* and of sanctions against refusing husbands engaged in (civil) procedures under the *Divorce Act*. The Israeli legislation, the so-called *Sanctions Law*, provides for sanctions of *get* refusal and grants disciplinary power to (religious) rabbinical courts that adjudicate divorces. In this article, I unpack the functioning of the Israeli and Canadian State law solutions to this social problem by presenting the results of two years of fieldwork and interviews with Jewish women in Canada and Israel. I analyse how both legal systems operate and investigate the underground voices of Jewish women who navigate between the religious and the secular spheres upon divorce. After having exposed my methodological postures and approaches, I present for each country the 'official' legal response and the 'unofficial' socio-legal phenomena, which lie beneath the surface. In the context of Jewish divorce, it seems clear that the Canadian civil state remedies are influenced by a web of alternative community responses and recourses that are available to women and

³ Men, on the other hand, are not subject to these consequences. Indeed, a man's marriage with another woman in the absence of a *get* is halachically valid and that man's children are legitimate. He is not considered to have committed adultery, but merely to have contravened a rabbinical decree prescribing monogamy (Nichols 2007: 155).

that at times render ineffective the civil remedies. For instance, contractual clauses such as the one at issue in *Braker v. Marcovitz* may be inefficient and scarcely used, given that there already exists a customary Jewish marriage contract, the *ketubah* and that the latter is held to be unenforceable by civil courts. Moreover, the *Divorce Act* recourses' efficiency is circumvented if Jewish legal subjects do not see in civil courts a meaningful solution to their problem, but instead go to community members and institutions who can provide them assistance and support. Quite similarly, Israel's *Sanctions Law*, while attractive to some Jewish women of the Diaspora, is also hopelessly ensnared in informal practices of rabbinical court judges, police, and rabbinical advocates. In fact, my interviews and the socio-legal literature reveal that the indeterminacy of (religious) adjudication simultaneously accounts for the shortcomings of the *Sanctions Law* and provides means for Jewish women to strategically manipulate it to their advantage.

This complexification of State law, which I investigate on both the Canadian and Israeli fronts, is meant to build on burgeoning literature on the subject of the interaction between secular state law and 'unofficial' religious norms (Moon 2008a; Grillo et al. 2009; Foblets et al. 2010; Nichols 2011; Maclean and Eekelaar n.d.). In so doing, I want to stress that no policy response can ignore non-State normative commitments and community affiliations, as the latter often explain the shortcomings of State law and might even provide inspiration for alternative strategies for women and legal practitioners in minority communities. I thus seek to further a new pragmatic approach to the practice of law, one that takes into account the relevance of *everyday* normativity and its potential usefulness to alleviate the 'plight of the *agunah*'.

Interviews, Stories and Pluralities: Notes on Field Research

This analysis is based on my field-work in Canada and Israel, during which I interviewed twelve Jewish women who had experienced difficulties in obtaining a *get* from their husbands and had used all kinds of strategies to break away from a marriage that they no longer wished for themselves and their children.

The Canadian fieldwork included visits to synagogues, discussions with practicing and non-practicing Jewish men and women, rabbis and other religious experts, as well as formal interviews conducted in Toronto, Montreal and Ottawa, with six Jewish women. The women were chosen from a variety of denominations and socio-economic backgrounds. They had all been married and were civilly or religiously divorced, or both, and were thus able to provide qualitative accounts of

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the socio-legal interplay between the secular State and religious law.⁴

Through my fieldwork in Israel, I informally questioned activists, rabbinical advocates, lawyers, and academics, and conducted formal interviews with six Jewish women from different towns and cities across Israel. Four women were already divorced and two were struggling to obtain their *get*. Four of these women had the Israeli *Sanctions Law* applied against their husbands because the latter were refusing to grant the *get*. The women had the *Sanctions Law* enforced by a rabbinical court, in a process whereby their husbands were either put in jail, had their driver's licenses taken away, had their passports confiscated and/or were disqualified from certain honours in the synagogue. The interviews were conducted with a Hebrew-English translator. Four interviews were held in Hebrew (with the translator asking the questions under the supervision of a research assistant who understands Hebrew) and two were held in English in one-on-one conversations.

I must insist that this research is not quantitative in nature, but qualitative. Even though I sometimes make quantitative assessments of the participants' circumstances to reflect on other quantitative data, I am acutely aware of the limitations of my methodological approach. This qualitative research cannot cover every Jewish community and the participants are not necessarily representative of all Jewish communities in Canada or Israel. Therefore, this data must be treated with caution, as a method to reflect the subjective and individual experiences of Jewish women who go through divorce. In this endeavour, I use a 'story-telling' (Van Praagh 1999; Campbell 2009) approach to the field to depict the ways in which legal agents navigate the socio-economic endowments that community life produces. If it is indeed difficult to draw policy conclusions from mere stories (Fajet 1994), I have nevertheless tried to combine my intimate portraits with empirical data, case-law analysis and socio-legal literature, to draw some general conclusions from these years of fieldwork. However, I also use the story-telling approach, which has important historical origins in feminist jurisprudence (Bartlett 1990) and critical race theory (Delgado 1993), based on the idea that "law can never rest on a complete picture of reality, but it can acquire a fuller, more accurate vision by accumulating stories that widen the horizon" (Baron 1994: 284). In this sense, qualitative interview analysis brings new, marginalized accounts of the socio-legal processes as they are experienced by Jewish women and thus builds on existing scholarship from its margins.

⁴ For extensive analysis of the findings of this fieldwork, see Fournier (2012).

In addition to providing fragments of untold knowledge about Canadian and Israeli legal systems, my methodology provides me with an opportunity to put to the test a legal pluralist methodology, and to show its relevance to two countries as seemingly diverse as Canada and Israel. Rather than an exhaustive empirical account, my article can thus be viewed as an invitation into uncharted territory. Specifically, my study the *agunah* problem will allow me to illustrate and introduce *critical* legal pluralism (Kleinhans and Macdonald 1997), an approach whose main impetus is, as put by one critical legal pluralist scholar, to unveil “how apparently marginalized actors [...] might at once be both influenced by and pivotal in shaping the normative frameworks by which they live” (Campbell 2008: 123). The Canadian manifestation of this movement has been headed by Roderick A. Macdonald, who has attempted to build on classical legal pluralism’s impetus to look beyond state law (F and K von Benda-Beckmann 2006; Griffiths 1986; Merry 1988). *Critical* legal pluralism understands the law as encompassing “how legal subjects understand themselves and the law” (Kleinhans and Macdonald 1997: 36). For *critical* legal pluralists, “law arises from, belongs to, and responds to everyone” (Macdonald 2002: 8). This outlook led me to analyse Israeli law through the eyes of *agunah* women. Indeed, my encounters underline “the relevance of first-person accounts [...] to developing a fuller sense of the law” (Campbell 2009: 191). With this methodological posture, I aim to go beyond conventional feminist accounts of the *agunah* problem (Stopler 2004; Shalev 1995: 92) towards portraits of women moving through secular and religious divorces as social agents (Korteweg 2008). Specifically this article is inspired by a particular form of *critical* legal pluralism, which “dissociates the law from the State without giving up on its institutional autonomy and differentiation from other normative orders” (Melissaris 2004, 2009: 60). My qualitative fieldwork reintroduces the multiple sites of regulation of Jewish divorce, establishing the *everyday life*⁵ normativity of Canadian and Israeli Jewish communities as a challenging and important focus for contemporary legal practice. By casting the Jewish community institutions and the way Jewish women navigate through them as *spatial* layers of legal pluralism (Manderson 2005) in Jewish communities, I aim to steer the research agenda in a direction that paints a clearer picture of some social processes that affect State law’s effectiveness in alleviating the plight of the *agunah*.

⁵ On the implications of this concept in several strands of legal pluralist scholarship see Sarat and Kearns (1993); Macdonald (2002); Ewick and Silbey (1998); Merry (1986); Sarat (1990).

‘Official’ Stories: the Canadian *Divorce Act*, Contract Law and the ‘Religious Thicket

This section analyses ‘the plight of the *agunah*’ in Canada through the ‘official’ responses introduced by the State with the aim of comparing them with the ‘unofficial’ responses of the legal subjects involved. This section aims to outline the challenges faced by practitioners who try to navigate the plurality of legal orders through these State law mechanisms.

In 1968, the Parliament of Canada exercised its jurisdiction over “marriage and divorce”⁶ to enact the *Divorce Act*, whose current 1985 version lays out the grounds and procedure for divorce in Canada. Canadian ‘official’ family law stands as an egalitarian, staunchly contractual and civil regime. For instance, it trumps all other possibly applicable legal systems in a private international law context (Fournier 2011). However, the State reaches out to intervene into the religious domain, specifically addressing the ‘plight of the *agunah*’ in two distinct instances. The first mechanism, the Supreme Court’s ruling in the case of *Bruker v. Marcovitz*, is judicial in nature, and the second, section 21.1 of the *Divorce Act*, is legislative.

The case of *Bruker v. Marcovitz* sheds light on ‘the plight of the *agunah*’ in particular ways. Mr. Marcovitz had signed a separation agreement, which contained a clause binding him to “appear before the rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious *get*, immediately upon a Decree Nisi of Divorce being granted” (quoted in *Marcovitz*: para. 39). Mr. Marcovitz then refused to fulfil his contractual obligation despite the granting of the civil divorce and left Ms. Bruker as an *agunah*, unable to remarry within her Orthodox community or to have legitimate children for a period of 15 years, after which he finally granted her a *get*. I note in passing that it may well have been too late for Ms. Bruker to have children when she received her *get*, as she was “almost 47” at the time (*Marcovitz*: para. 29). Ms. Bruker went forward with a petition for damages for breach of contractual obligation, damages that were awarded by the trial judge in the amount of \$47,500, at the time equivalent to roughly £21,000 (*S.B.B. v. J.B.M.*). However, the province’s Court of Appeal decided to reverse the award because the agreement entered into by the parties, being “religious in nature,” was considered unenforceable (*Marcovitz c. Bruker*: para. 76). Hilton J.A. wrote for the

⁶ As provided by s. 92(26) the *Constitution Act, 1867*.

unanimous Quebec Court of Appeal that: “if there is any relief available to Ms. Bruker, it is in a religious forum, not a secular one” (*Marcovitz c. Bruker*: para. 90).⁷

Upon appeal to the Supreme Court of Canada, Madame Justice Rosalie Abella, herself a progressive Jewish woman (Abella 2005), writing for the majority, reversed the Court of Appeal’s judgement and imposed damages on the recalcitrant husband for his refusal to give the *get* despite contractual commitment to do so. The decision was harshly criticized, particularly in French speaking Quebec, which is closer to French republicanism than other parts of Canada (Gaudreault-Desbiens 2009: 165), on the basis that it runs against a *laïcité*-inspired vision of civil law as a pure body of legal rules that never must enforce any religiously-coloured commitment (Landheer-Cieslak in Langevin et al. 2008; Astengo 2009: 529; DeCoste 2009; Moore 2009: 239). Ironically, refusing to conceive the “religious aspect of the obligation [...] as a barrier to its civil validity” (*Marcovitz*: para. 51) allowed the court to implement wholly secular remedies (damages) to the *agunah* problem. This judgement usefully flies in the face of the secularist conception of the “religious community as an association that members join and quit at will” (Moon 2008b: 62), a view which does not seem to account for the importance of informal religious norms and decentralized community bonds for religious/minority citizens. As put by an observer, the decision intelligently recognizes the existence of “different normative spheres while attempting to reconcile them in the context of particular cases” (Glenn 2008: 439; see also Kleefeld and Kennedy 2008).

While undoubtedly a celebratory decision for many, its power remains uncertain for several Jewish women in Canada. First, the decision only applies in so far as a separation agreement calling for the granting of the *get* is concluded in the course of a civil divorce (*Marcovitz*: para. 23). It does not apply to the *ketubah*, a form of religious prenuptial agreement which includes various provisions such as the husband’s duty to provide his wife with adequate food, clothing, shelter and regular intercourse and to pay her a financial compensation upon divorce (Epstein 2005: 163). The Supreme Court was not in a position to reverse the current law on the enforceability of *ketubah* contracts, an issue on which it did not purport to

⁷ In an interesting contrast, in France, a country generally considered a secularist hard-liner, the Cour de cassation, the country’s highest court, held that awarding damages for *get* refusal does not contravene the separation of Church and State (Cour de cassation, Chambre civile 2, 15 June 1988).

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decide (*Marcovitz*: para. 46). The Manitoba Court of Appeal's 1974 ruling in the case of *Morris v. Morris*, which held that the *ketubah* is unenforceable by a civil court, is still applicable. Hence, the Jewish women who could otherwise include in their *ketubah* a so-called 'Lieberman clause', whereby the husband recognizes the jurisdiction of the *Beth Din* and submits in advance to any measures taken to sanction *get* refusal (Finkelman 1995: 156), cannot benefit from this legal strategy.⁸ Neither does the current state of the law leave room for a solution based on the idea, adopted by an Illinois court in *In re Marriage of Goldman*, that the generic *ketubah* words on which the argument rested in *Morris* did indeed constitute a contractual obligation to grant the *get*.⁹

The *Morris* Court's decision to declare the Jewish marriage contract unenforceable is based on the idea that Canadian family law is a "civil matter [THAT] cannot be allowed to become uncertain or schismatic by reference to various sects or religions." (*Morris v. Morris*: para. 55) Is religion truly this 'private' matter removed from the power of the State? Conversely, is the State this 'objective' and 'neutral' apparatus? Or should courts and the State be analysed as culturally/ideologically oriented institutions, despite widespread denial of this phenomenon (Caughey 2009: 323; Althusser 1997)? The religious-private/secular-public dichotomy seems built on fragile assumptions, especially in the Jewish context where communities have been installed for centuries in Canada (Tulchinsky 1997; Nigro and Mauro 1999) and 'public' group life bears significant importance. For these communities, a phenomenon of "declining familism" (Hartman and Hartman 2009: 25; Tulchinsky 2008: 490) has partly shifted the prime locus of social regulation from the family, which may have been more important in the immigration context, to important community webs which form a sort of "self-governing quasi-state" (Weinfield 2001: 173) composed of Jewish tribunals, schools, hospitals, old-age centres, sports leagues, cultural centres, newspapers, media, etc. In this context, the unenforceability of the *ketubah* on the grounds adopted in *Morris* seems outdated.

The second limitation of the *Marcovitz* decision is that the Supreme Court was legally unable to extend the civil courts' sanctioning of *get* refusal beyond the post-nuptial contractual realm (Langevin et al. 2008: 684 note 103). Abella J. describes

⁸ The civil enforceability of this type of clause in New York family law has been settled by the New York Court of Appeal in *Avitzur v. Avitzur*.

⁹ It bears notice that a New Jersey court dismissed a similar claim on the basis of freedom of religion (*Aflalo v. Aflalo*).

the French solution of awarding damages for extra-contractual civil liability as follows: “it is impossible in the circumstances of the case at bar to draw any inspiration from the situation in France.” (*Marcovitz*: para. 153) Although “not precluded” (*Marcovitz*: para. 154), this legal response was obviously unnecessary for Ms. Bruker who benefited from a written contract.¹⁰ As for the Israeli solution of allowing “financial compensation” to a wife whose husband refuses to grant her the *get*, the Court affirms that: “the solutions adopted in Israel cannot be imported into Canada without taking account of Canadian legislation and the Canadian context.” (*Marcovitz*: para. 153)¹¹ Thus, in the peculiar situation of *get* refusal, it seems clear that Jewish women in Canada still need to manage for themselves a way to transform their religious commitments into a proper contractual obligation.

Absent a contract, where does the ‘plight of the *agunah*’ tragically go? What recourse may capture her inability to obtain a religious divorce from her husband? Whom can she reach to pressure a husband acting out of pure bad faith? To answer these questions and further understand the complex, shifting boundaries between the religious and secular spheres, I collected micro-level narratives in the forms of six interviews with Jewish women who had experienced difficulties in obtaining the *get* in Canada. While this work can certainly not be considered quantitatively representative, it is interesting to note that only one out of six participants had included in her separation agreement a clause relating to the *get*. Four others had not been able to include such a clause, for various reasons pertaining to their lack of awareness of the law or incomplete legal counselling. The last participant had not included any clause in her separation agreement for her first divorce, and after having learned the lesson the hard way, negotiated such a clause for her second divorce. For 5 out of 6 participants, the ‘official’ state law—the *Marcovitz* decision—is of no application (Linderberg 2010). Only section 21.1 of the *Divorce Act* could in theory be of assistance, the second state solution to which I now turn.

¹⁰ In the case of Stephanie Bruker, resort to Quebec extra-contractual civil liability (tort) law would have even been precluded by art. 1458 of the *Civil Code of Québec*, which forbids the option between contractual and extra-contractual liability in the presence of a contract. However, there would be a strong case for recognizing *get* refusal as a tort, if not on purely pragmatic grounds, as a matter of principle, to cast a stigma on what is often malevolent, oppressive behaviour, as argued by Cobin (1986: 430).

¹¹ Interestingly, there is no mention, neither by the majority nor by the dissent, of the *Sanctions Law*, the Israeli statute which allows religious courts to compel the giving of the *get* and sanction the recalcitrant husbands: see *infra* part V.

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Section 21.1 of the *Divorce Act* was enacted in 1990, after much lobbying from Jewish women's groups. Four years earlier, the Province of Ontario had amended the *Ontario Family Law Act* to allow for sanctions aimed at recalcitrant husbands regarding the settlement of financial matters related to the divorce (Tager 1999: 447; Freeman 1996: 375). This legislative overlap certainly illustrates the pressing nature of the *agunah* problem in Canada. Given the restricted geographical scope of the Ontario statute, I only discuss the federal pan-Canadian *Divorce Act*, which is more widely known. The federal Minister of Justice of the time, Doug Lewis, thus justified the amendments to the *Divorce Act*:

I am concerned about protecting the integrity of the *Divorce Act* and preventing persons from avoiding the application of the principles contained in the act. [...] Without a *get*, a Jewish woman cannot remarry in her own faith. Children of a subsequent civil marriage suffer religious disabilities. [...] The government is moving where it can and where it is brought to the government's attention to eliminate sexism and gender bias in the law. (*House of Commons Debates* 1990: 8375-77)

This section of the *Act* was conceived to put pressure on a spouse withholding a religious divorce; it does not allow courts to actually order the granting of a religious divorce, much less pronounce the religious divorce themselves. In this regard, it is in keeping with the fundamental Talmudic rule according to which the granting of the *get* is a "personal act between husband and wife, with the courts (or indeed, the state, as in Israel today) playing or taking no role insofar as the actual effectuation of the divorce is concerned" (Haut 1983: 20).¹² Under the provision, a spouse (most likely the wife) can file an affidavit with the court about any barriers to religious remarriage present in their case. If the barrier has not been removed after the serving of the affidavit, section 21.1(3) allows the court to dismiss applications under the *Divorce Act* filed by the withholding spouse (most likely the husband) and to "strike out any other pleadings and affidavits filled by that spouse under [the] Act." (s.21.1(3)(c) and (d))¹³ Subsection 21.1(4) allows the

¹² However, in the case of *E.I. c. A.A.* the Quebec Superior court, in a strange judgement, literally ordered the granting of the *get* (see para. 11).

¹³ Subsection 21.1(6) indicates that the provision does not apply to situations where the barrier to religious divorce is in the hands of a religious body or official. I note in passing that this has no bearing on *get* refusal since under Jewish law the husband alone can grant the *get*, and the *Beth Din* in theory can never supersede

recalcitrant husband to circumvent this process if he demonstrates “genuine grounds of a religious or conscientious nature for refusing to remove the barriers [to remarriage]”. This subsection has surely been included as a safeguard against a long-expected constitutional challenge to s 21.1 based on freedom of religion (Van Praagh 1993: 245), one of which had been mounted by Mr. Marcovitz and subsequently abandoned at trial, therefore not making it to the Supreme Court: (*Marcovitz*: para. 34). Notably, the 2002 British ‘*get* bill’,¹⁴ the equivalent of s. 21.1, does not contain such a perplexing exception.

Nevertheless, the adoption of s. 21.1 is an extremely positive development in Canadian law, as it allows for a definition of the *agunah* problem that goes beyond strict religious criteria. Since under pure *Halacha* there is no ‘right’ to divorce, the *agunah* could come to be defined restrictively, encompassing only women who fit within the restrictive (mostly fault-based) grounds for compelling divorce instead of being defined plainly as any woman who is divorced civilly but denied a religious divorce (Broyde 2001: 37). Indeed, the existence of s. 21.1 and the large definition of the *agunah* has thus allowed for an ongoing argument before Quebec courts as to whether “a civil divorce judgment carries with it the implicit obligation to give a *ghet*” (*Abadi v. Emanuel*: para. 7). Moreover, the adoption of s. 21.1 also offers a mechanism of integrative dialogue between the secular and religious, going a long way towards what Ayelet Shachar described as a

joint-governance framework [which] offers us a vision in which the secular law may be invoked to provide remedies for religious women to protect them from their husbands who might otherwise ‘cherry-pick’ their religious and secular obligations” (Shachar 2010: 127).

Here, the ‘official’ state law sees and directly acknowledges how members of minority families navigate among different legal orders to which they are subject. Interestingly, it seems that most of the petitions under s. 21.1 are successful,¹⁵

his will.

¹⁴ The *Divorce (Religious Marriages) Act 2002* (UK), which amends the *Matrimonial Causes Act 1973* (UK) to allow the court to suspend the decree absolute of divorce until each party produces a declaration to the court “that they have taken such steps as are required to dissolve the marriage in accordance with those [religious] usages” (S. 10(2)).

¹⁵ See e.g. *I.L. c. M.A.*; *K.N.H. v. J.S.*; *E.S. c. O.S.*; *D.A. c. J.H.*; *A.D. c. J.P.*;

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which indicates that the Canadian State responds to the complex reality of plural family types in an engaged fashion. Moreover, the ‘freedom of religion’ exception clause of s. 21.1(4) is in practice looked upon with much scepticism by the judiciary. Applications under the exception clause were dismissed in a number of cases, creating a string of interesting precedents (*I.L. c. M.A.*; *K.N.H. v. J.S.*; *E.S. c. O.S.*; *D.A. c. J.H.*).

However, despite section 21.1’s clear call on Jewish women to seize the civil legal tools, the number of cases in which this legal mechanism was invoked is effectively very small. In addition to the four cases previously mentioned, it was sometimes alluded to but not invoked because the parties had negotiated and worked out the matter through other means (*Darel v. Darel*; *Blumes v. Blumes*; *N.K. v. M.K.*; *Nathanson, Schachter and Thompson v. Levitt*). Likewise, in the Quebec Superior Court case of *R.M. v. M.S.S.*, proceedings under s. 21.1 were initiated by the wife but the dispute was ‘resolved’ outside the courtroom (para. 33). Furthermore, although my qualitative fieldwork cannot be considered as necessarily representative, it is again interesting to note that only one of my six interviewees has had recourse to s. 21.1. The other participants were unaware of the existence of the provision, almost twenty years after its enactment. What appears as a powerful legislation drafted to purposely address the ‘plight of the *agunah*’ seems to sometimes remain a dead letter. The next section investigates some possible reasons for this state of affairs and presents some of the alternatives Jewish women are presented with upon divorce.

‘Unofficial’ Stories: The Plight of the Canadian *Agunah* in Underground Community-Life

Given the limits of the two ‘official’ State mechanisms to address ‘the plight of the *agunah*’, I have sought to explore what lies in the shadow of these legal remedies that might explain their seemingly scant use. The Supreme Court of British Columbia case of *Nathanson, Schachter and Thompson v. Levitt* inspired a working hypothesis. In that case, an application under 21.1 and a consequent challenge to the provision’s constitutional validity were abandoned “at the last minute through the intervention of a rabbi.” (para. 32) Whether the intervention in that case occurred through the official channel of the *beth din* or through informal

E.F. v. A.K. In some marginal cases such as *Tanny v. Tanny* the provision was used against a refusing wife.

mediation is unknown. Nevertheless, it shows the influential role of the community on religious minority members¹⁶ and clearly invites legal scholars to further explore the impact of non-state forms of power on the behaviour of religious subjects, which I did by engaging in socio-legal fieldwork in Canada and studying the non-State recourses available to Jewish women.

For the *get* to be religiously valid, a rabbinical court or *beth din* (pl. *batei din*) composed of three Jewish judges (*dayanim*)¹⁷ must oversee the divorce process. However, the *beth din* cannot execute the divorce itself, as the “man’s consent [is] the *sine qua non* of the entire process” (Berger and Lipstadt 1998: 99). Nevertheless, *batei din* have put in place several non-state mechanisms to pressure recalcitrant husbands. For instance, a *beth din* can decree a *cherem*, an order on the community to marginalize the recalcitrant husband (Fishbayn 2008: 83). A wife can also apply for a *siruv* (sometimes spelled *seruv*), a contempt citation ordered against a person who refuses to appear before a *beth din* to which he or she is summoned (Saris 2006: 375; Guthartz 2004: 48; Fried 2004; Wolf 2009: 1191). Several sanctions can be enacted along with this decree to restrict the husband’s position in the synagogue. For instance, the Rabbinical Council of America established a policy to enforce orders of *siruv* in synagogues, against men who are using the *get* as a bargaining tool in their divorce procedures or are refusing to give the *get*. Various forms of excommunication can be applied with the possible consequences that the recalcitrant husband “not be permitted to occupy any elective or appointed position, or position as employee, within the Synagogue” or be downright “excluded from membership in the Synagogue” (Rabbinical Council of America 1993). These sanctions can be very effective given the role of synagogues in maintaining the “religious and cultural cohesion of the community” (Baker 1993: 28). Even though these measures are described as unequally and sometimes reluctantly enforced (Breitowitz 1992: 15; Greenberg-Kobrin 1999: 368), they have the benefit of being efficient in at least *some* religious communities (Wolfe 2006: 441). One of my participants had attempted to yield the power of *siruv* against her husband. She was confident that this

¹⁶ For instance, in Ontario alone, each year about 30 cases of divorce by Jews are overseen in their entirety by the rabbinical *Beth Din*, including issues such as custody and property division (Boyd 2004: 41).

¹⁷ The rabbinate has been closed to women for centuries. However, in recent decades, female rabbis have been admitted in North America, though the importance of this phenomenon varies greatly according to the denomination involved (Joseph 2005: 582).

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mechanism would work, as her husband's family would not be able to bear the brunt of public humiliation in the community:

I have been in contact with many rabbis from the *beth din*, trying to force him to give the *get*. [...] He was called three times to appear before the *beth din* and he did not show up all three times. If he doesn't show up he is put in *siruv*. [...] My ex-husband's family is an established family; they give a lot of money to charity, so they really would not want him to be put in *siruv*, because it would bring public humiliation to the family. (Canadian Participant #10)

This powerful bargaining tool illustrates how community pressure can often be perceived as the most useful option available, more so than 'official' State law. In addition to the formal recourses before the *beth din*, community life presents a plethora of informal alternatives for *agunah* women to explore. This "organizational ecology" (Friedland 2001: 45) endows Jewish women with important resources. For instance, the New York Jewish Press magazine ran a column reporting recalcitrant husbands and *agunah* women, bringing shame on the husbands (Zornberg 1995: 711). Likewise, in January 2011, a New York Orthodox Jewish public figure was publicly shamed by rabbis and campaigners through Jewish media and the internet for his refusal to give the *get* (Oppenheimer 2011). Inherent to many Jewish community dynamics are informal interpersonal bonds, reinforced by "series of interlocking matrices of religious belief and practices" (Unterman 1997: 196), which often work to create informal recourses and opportunities which supersede the civil courts and the 'official' State law.¹⁸ Some of my participants yielded these disciplinary tools through their connections in the Jewish legal and religious *milieus*:

I retained a great attorney. She's become a very, very close personal friend. My attorney is Jewish, not religious, but she's Jewish. The attorney that he retained is also Jewish, and from what I understand, but I am not 100% sure, I think he was told that his attorney would not represent him, unless he promised to give me the *get*. (Canadian Participant #6)

¹⁸ See Van Praagh's account of some Montreal Chasidic (ultra-orthodox) communities' perception of themselves as self-regulating entities (Van Praagh 1996: 214). Also see Richman (2006).

In my community, some [people] mentioned to the friend of my ex, who was a president of a synagogue: “Give her the *get*”.
(Canadian Participant #8)

Other participants used their personal bonds of friendship and family to pressure their recalcitrant husbands, using shame and public reputation as a weapon:

After thinking about how I could convince him [to give the *get*], I came to the conclusion that it would be impossible to persuade him on my own and enlisted the help of those I thought would be most embarrassed by his behaviour. I called an aunt of his with whom he was quite close and has a great deal of respect for. [...] She said she would absolutely speak to him and encourage him to do the right thing. [...] To this day, I don't know for sure what led to his finally agreeing to a *get*, but I think the pressure and embarrassment of my exposing his behaviour in front of others led to success. (Canadian Participant #4)

State law can no longer ignore this emphasis on community affiliations. For many religious women, the civil sphere is not necessarily the first forum that they will explore upon divorce. Moreover, when they do enter that space, it may not always be reflective of their experience. This is no surprise given that secularism, which is oftentimes paradoxically informed by Protestant emphasis on individual (private) belief as the foundation of religion and the latter's seclusion from the civil domain, does not have the same resonance in non-Christian contexts (Stone 2000: 190; Shah 2006). This should not be taken to suggest that the boundaries between Jewish communities and gentile 'secular' society are not blurry and that multiple community belongings are not overlapping (Cooper 1996; Van Praagh 2008). However, solutions rooted in the civil laws of the State, even when they do reach out to the religious sphere as does section 21.1, may take root less easily in non-Christian communities, for whom the 'unofficial' religious community mechanisms are not seen as divorced from their 'public', 'civil' life and may indeed be seen as preferable to the remedies created by the State. Critical attention to this dynamic may be key for the integrative dialogue to begin between the secular and the religious, and for a meaningful access to justice policy to be implemented among minority religious communities.

‘Official’ Stories: Sanctions, Jail and the Israeli Rabbinical Courts

I now turn to the case of Israel, which has strong social and religious relevance to most of the Diaspora communities (Ben-Rafael 2006; Stratton 2004: 143). This importance is illustrated by my Canadian participant who had neither used s. 21.1 nor included a *Marcovitz*-type separation agreement, but mentioned the possible use of Israel’s 1995 so-called *Sanctions Law*, the *Rabbinical Tribunals (Implementation of Divorce Judgments) Law*, a statute allowing for the punishment of recalcitrant husbands. She was disappointed to learn that the *Sanctions Law* only applies to Israeli residents and citizens, which her husband was not.¹⁹ However, this anecdote underline the large-scale trans-jurisdictional intertwinements that globalization has brought to the realm of family law disputes (Fournier 2010: 2-3; Cossman 2006; Blackett 1998). This section explores the Israeli legislation relating to the *get* from a comparative law perspective, in an attempt to inform the analysis of Canadian law and Western legal systems more generally. The complex forces constraining the Israeli legislation directly affect the ways in which Jewish women worldwide may view the issue of the *agunah*. As Dr. Norma Joseph, a prominent Jewish scholar and public figure (Brown 2005), has argued: “Judaism is at stake over this issue” (quoted in Prentice et al. 1996: 450).

Israel’s family law regime, in a large measure dating back to the Ottoman Millet system, confers jurisdiction over divorce and marriage to (religious) rabbinical courts (*The Rabbinical Courts Jurisdictions (Marriage and Divorce) Law*: S. 1; Navot 2007: 21). When the British set out to govern Palestine at the close of the First World War, this system was maintained by article 53 of the Palestine Order-in-Council of 1922 (Shiloh 1970: 481). When the state of Israel was created in 1948, the ‘status quo’ arrangement, Ben Gurion’s compromise with religious parties and authorities, provided that the creation of the state would in no way compromise the “values and way of life of religious Jews”. This arrangement confirmed that “Orthodox courts would have jurisdiction in issues of personal law (particularly matters of marriage and divorce)” (Lerner 2009: 447). Moreover, the divorce procedures, which are the focus of this article, are governed by strictly

¹⁹ Even though this is indeed the state of the law, this participant could have tried to petition an Israeli rabbinical court, as it seems that some of them do ascertain jurisdiction over non-resident Jews, who may even have celebrated their marriage outside of Israel, as evidenced by a warning against this extension of Israeli jurisdiction issued by the US Department of State to American citizens travelling to Israel (US Department of State 2012).

religious law, even though certain ancillary areas of divorce law such as custody and matrimonial property are governed by civil law (Shifman 1990: 538). Up to today, there is no civil marriage to speak of for the majority of Israelis.²⁰ As put by Martin Edelman, even though Israel is not a formally theocratic State, “Judaism functions in the Israeli polity as if it were the official state religion” (Edelman 1994: 3-4).

The problem of the Israeli *agunah* has gotten significant international media coverage. A 1995 source estimated that between 8,000 and 10,000 Israeli women were being denied a *get* (Fisher 1995). By comparison, a study found that 462 Jewish women across Canada and the United States had declared being *agunah*, even though authors of the study indicate that the actual number of *agunahs* in both countries could be from 20 to 50 per cent higher (Jewish Tribune 2011). That being said, the Israeli figures are highly contested. For instance, in 2007 the Rabbinical Courts Administration published statistics which indicate that there is a mere total of 69 *agunah* women in Israel, taking into consideration only the cases registered at the rabbinical and pending for more than two years. There are obviously huge political stakes behind this debate, including the very definition and control over the scale of the *agunah* problem. Going beyond cases where downright refusal drags on for years, it is interesting to note that Israeli men often use the *get* as a bargaining tool to extract concessions in alimony custody of property matters, before granting the *get*. It is estimated that almost 100,000 divorced women have been victims of such ‘*get* extortion’ in Israel (Yefet 2009: 447).

In order to combat the ‘*agunah* problem’, the Knesset enacted the *Sanctions Law*, which allows women to use sanctions against their recalcitrant husband to pressure them into giving the *get*. The rabbinical court can only order the parties to divorce on very specific halachic grounds but may not enact the divorce itself. If there are no grounds for divorce, there is nothing short of an agreement of the spouses that can dissolve the marriage. While the grounds for ordering divorces vary tremendously across jurisdictions and religious authorities, generally, if the wife is subject to physical or verbal abuse by her husband, if the husband is impotent or sterile or if he fails to provide maintenance, an order to grant divorce may be issued (Lieber et al. 2007: 712-713). Although the Israeli rabbinical court judges,

²⁰ A bill was passed in May 2010 to allow civil marriage for partners who are both considered as “lacking a religion”, a group which may not be very important numerically in Israel (Lerner 2011: 213 footnote 12).

like their Canadian *beth din* counterparts, do not often issue orders of *get* compulsion, when they do, the *Sanctions Law* allows them to issue sanctions and to withhold certain benefits from the husband to ensure compliance with the order. The *Sanctions Law*, unlike Canada's s. 21.1, is thus conditioned upon the existence of these grounds for compelling divorce (Einhorn 2000: 152). Nevertheless, the *Sanctions Law* is intended to be binding on religious authorities. The power of the community to use indirect pressure to influence a husband to issue a bill of divorce, which in the past was done through ostracism and excommunication, is now said to be translated into legislation by allowing the courts to withhold certain benefits from the husband. For instance, the law allows for the imposition of restrictions on the right to leave the country, obtain an Israeli passport, maintain a driver's license, work in a profession regulated by law or operate a business requiring a license or legal permit, open or maintain a bank account (Kaplan 2004: 123). Section 3 of the *Law* even allows for imprisonment to ensure compliance with a divorce order. The period of imprisonment that a rabbinical court may impose is limited to five years, a term that may be extended by the court as long as the total term does not exceed ten years (*Sanctions Law*: s. 3(b)). A further section of the *Law* goes as far as to allow the rabbinical court to impose sanctions upon a husband who may already be serving a jail sentence (*Sanctions Law*: s. 2(7)). So we see that the 'official' law ostensibly provides a solution for *agunah* women. Let us now see how this plays out in the realm of 'unofficial' law.

'Unofficial' Stories: Unenforced Laws, Indeterminacy and Informal Strategizing

This section aims to go beyond the official legal discourse to examine how the *Sanctions Law* is applied and how various actors shape it on a day-to-day basis.²¹ Despite the enactment of the *Sanctions Law*, which is a clear indication that the 'plight of the *agunah*' must be addressed, very few sanctions have actually been enacted. Statistics show that between 1995 and 1998, only 163 restraining orders were issued against recalcitrant husbands, of which 76 came from the same rabbinical court in a single district (Halperin-Kaddari 2004: 239). The *Sanctions*

²¹ This article does not study the all-important phenomenon of the growth of parallel non-state Haredim courts in Israel. It focuses on the State rabbinical courts, which most observant sectors of Israeli society still abide by and support (Hofri-Winogradow 2010-2011: 65).

Law was used only 73 times in 2008; only 20 arrest warrants were issued, and private investigators were hired by the courts only 36 times to locate men who had disappeared in Israel or abroad to avoid giving their wives a *get* (Administration of the Rabbinical Courts 2008). In 2009, only six of the verdicts imposing sanctions included arrests warrants (Ettinger 2010). These numbers are quite low for a nation of more than 7 million people. The *Sanctions Law* was thus often unenforced. Through my fieldwork, I sought to analyse the variables that affect and complicate the *Sanctions Law*'s disciplinary power. For my participants, the ineffectiveness of the sanctions stemmed from judicial actors and the police in charge of executing the ordinances rendered under the *Sanctions Law*:

The rabbinical court put out a warrant to arrest him and the police didn't do anything with it. For more than a year the police did nothing, they didn't arrest him and then the rabbinical court decided to close the case. (Israeli Participant #3)

The police went and looked for him, but he wasn't there. I told them to look at his sister's house, I told them to look at his brother's house, everywhere they went to look, he wasn't there. He ended up showing up anyways. What did I learn from that? I can't count on the police that they're going to find him. Court order, shmourt order! [...] I can sit at home and hold this nice piece of paper and have it framed on the wall, and he's going to still do whatever he wants. (Israeli Participant #6)

Almost all of my participants shared this criticism of police and judicial actors. Furthermore, the ineffectiveness of the sanctions was also said to stem from the rabbis themselves. In fact, the participants indicated that hearings at the rabbinical courts were delayed because the rabbis were reticent and unsympathetic to the women's plight:

I don't think that the rabbis do their job the way they should. We go into a hearing and we're invited for 10:30, and we go in at like 12:30 and at one o'clock, when they have to go home, they put on their coat and their hat and they say "Ok, we've heard enough and we'll send you a decision in the mail." [...] The rabbis wait a long time until they actually go ahead and give you an arrest warrant. (Israeli Participant #5)

We started all of [the sanctions] but [the rabbis] actually didn't

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want to do [the sanctions]. You see I learned the rabbinical court's ways [...] They start something but they don't follow it all the way through to the end. It's like they feel... it's not comfortable for them to hurt people. [...] It was a waste of time!
(Israeli Participant #4)

Many scholars have noted, echoing the testimonies of my participants, that the rabbinical courts are reluctant to issue orders compelling the granting of the *get* out of fear that applying sanctions upon the recalcitrant husband will render the eventual giving of the *get* invalid due to force or undue pressure (Blecher-Prigat and Shmueli 2009: 283; Einhorn 2000: 151; Shifman 1999: 245). Indeed, a *get* that is given forcibly, or because a man *felt* pressured to do so, is halachically invalid (a “*get* meuseh”) (Yefet 2009: 446; Bitton, 2009: 117-118; Kaplan 2004: 61). This may explain why in 2006, for instance, only 41 compulsion decrees were issued in Israel (Ratzlav-Katz 2007). Furthermore, as revealed in the statistics quoted above, “[e]ven when men are commanded to divorce, the court seldom applies the coercive measures that it was legislatively authorized to use in 1995” (Yefet 2009: 448). Robyn Shames²² also explained to me that rabbis sometimes encourage women to settle by saying “pay him what he wants, you see what type of person he is, just pay him what he wants”. She also described the conception of rabbis she encountered: for them, women will only hurt themselves by refusing the conditions men put forth in order to grant them a *get*, sometimes becoming ‘get refusers’ in the eyes of the court.

A rabbi's ideological and personal inclinations may thus influence the adjudicative process. Accordingly, the religious composition of Israeli courts was always the object of much academic interest. Scholars have described the “monopoly” (Raday 1996: 214) orthodox groups enjoy over family law in Israel. Orthodox rabbis are considered to form the majority of rabbinical court judges in the country (Woods 2008: xvi; Halperin-Kaddari 2000-2001: 348). The most orthodox rabbis are often said to be overly sympathetic to the husband (Halperin-Kaddari 2004: 233; Clinton 2000: 306) and to be very reticent to order the granting of the *get*, except in extreme cases “like those involving a violent, ill or sterile husband” (Ettinger 2010). Thus, the ‘official’ law here again needs to account for decentralized normative belongings and religious ideology that affect and circumvent the ‘official’ law.

²² Director, International Coalition for Agunah Rights (online: <http://www.icar.org.il/en>), sent by email on March 8, 2011.

However, the ‘unofficial’ does not only hamper the *Sanctions Law*. It can also allow *some* legal subjects to find their way around the insufficiencies of ‘official’ law. Participants mentioned that in addition to being often unenforced, the *Sanctions Law* is indeterminate in its application, in the sense of being permeable to ideological manipulation. Some participants have indicated that the rulings issued by the rabbinical courts depend on the backgrounds, personalities and religious ideologies of the judges and are inconsistent:

[The rabbis] only care about what the man wants not what the woman wants. They treated me like I wasn’t even there. Then I said: “I came to ask to be free, not for money or anything, just to be free...” [...] When the rabbis saw that I have a rabbinical advocate and that I am determined, that I want [a divorce] and that I am doing everything to get it, then they were easier. (Israeli Participant #2)

Once in a while we will get a rabbinical court that has guts, that will put the pressure on the guy. But it is unpredictable, there’s nothing uniform in the decision-making. It’s all based on whim and which three judges are sitting and half the time there aren’t even three judges there so they can’t make a decision. They show up late for work, they leave early from work... There is nothing uniform about the rabbinical courts, one rabbi is rigid, one is not rigid. (Social Worker, *Mavoi Satum*²³)

Lawyers and rabbinical advocates, as a result of the indeterminacy of religious adjudication, will strategize to bring their clients in front of judges who they deem more lenient. Participants had often wanted a particular rabbi to adjudicate their divorce petition because of these perceived ideological, religious or personal inclinations:

I knew that I needed to be in [rabbi] Rav Feldman’s²⁴ group, the panel with the three of them. [...] Now in the *beit hadin hagadol* (high rabbinical court), there was only one *dayan*, one of those

²³ Organization which supports *agunah* women (online: <http://www.mavoisatum.org>).

²⁴ All personal names have been changed to protect the anonymity of the individuals concerned.

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rabbis who would understand. [...] So we knew that we needed to get to Rav Shmuel Feldman. (Israeli Participant #6)

Accordingly, notwithstanding widespread complaints that rabbis are overly sympathetic to men, some participants were able to play out their image against that of their husband's to successfully influence the rabbis. According to Halperin-Kaddari, the religious courts, when rendering decisions, will put more emphasis on 'moral' and religious questions than do the Israeli civil courts. Their application of the law and appreciation of the facts may be tainted by their religious perspective (Halperin-Kaddari 2004: 250). For instance, Ariel Rosen-Zvi indicates that the rabbinical court will likely favour the 'more religious' parent for custody purposes (Rosen-Zvi 1989: 352). As some of my participants demonstrated, exploiting the perception that the rabbis had of their personal ethics could constitute a fertile strategic avenue for many religious women:

Watching him in action yelling at the judges, [...] that was what convinced them that I needed a *get*. [...] I'm this together lady, and when they saw him ranting and raving they didn't like him. [...] So then, at one point, towards the end, we finally got a *chiyuv* [order that the *get* be given]. (Israeli Participant #6)

Three rabbis were sitting at the *beit din*, and I said "When you go to sleep think that I am your daughter. Would you relate to your daughter like you are acting to me?" I don't know if it did anything to them but the next time, they changed, they decided they had to give me a *get*. They treated me like a human. (Israeli Participant #2)

In addition to this ideological breach in some rabbi's misogynistic attitudes, the community-based nature of the rabbinical courts allowed some women to personally put pressure on the rabbis, using personal connections and networks:

We needed to go to the high rabbinical court. And only there was I saved, because we had there rabbi Lazare who worked with my boss, and he came to a lot of the hearings. I called him many times and asked him to help. (Israeli Participant #1)

Thus, we see that while the *Sanctions Law* cannot be considered a success in terms of women empowerment, some women do exploit informal avenues in the shadow of the law. 'Unofficial' Israeli law not only helps explain why the *Sanctions Law*

fails, it also gives us examples of how the limitations of the law can be overcome by women who take on the rabbis, using a variety of techniques and tricks which I have only begun to discover in my fieldwork. If the stories of my participants cannot be considered as numerically representative of all women in Israel, they echo the findings of many socio-legal studies and thus complement the latter with a qualitative account. My study aligns with that of Sezgin, who brilliantly demonstrates (2010a) that there are many other “coping strategies” being used by Israeli women and men like marrying abroad, common law partnerships or claiming damages for *get* refusal (Eglash 2011), which are redrawing the boundaries of the (religious) legal system from within. Perhaps these coping strategies can serve as inspiration to women around the world struggling to obtain a *get*. Revealing as I have done the indeterminacy of the *Sanctions Law* and its permeability to ideological manipulation²⁵ can thus be a political gesture in itself and hopefully contribute to alleviating the plight of the *agunah* in unexpected ways.

Conclusion

In this article, I have developed an approach that navigates and analyses the intersection between the religious and the secular and its impacts on Jewish women divorcing in Canada and Israel. Drawing from my fieldwork and the literature, I have emphasized the necessity to explore the sites of regulation that lie beyond the locus of the State but nevertheless highly influence the shape and the impacts of the law. For instance, Canadian public policy values contract law as a solution to the *agunah* problem, but is limited if women do not use this form of legal regulation. Moreover, remedies enshrined in the Canadian civil *Divorce Act* can only assist those women who have penetrated the civil sphere upon divorce and have been correctly informed of the existence of section 21.1. Whereas the Canadian approach to the *agunah* problem brings positive results when used by Jewish women, the Israeli response seems attractive on its face but is rarely applied in the manner in which it was intended (albeit with notable exceptions where women were able to play out the indeterminacy of religious law to their advantage). In fact, the law enforcement mechanisms will be given all sorts of fair and unfair directions depending on the rabbi appointment process and the parties’

²⁵ This is not to suggest, of course, that secular law is determinate and free of ideological influences. For the application of the indeterminacy thesis in Western secular systems, see Kennedy (1997) and Tushnet (1996).

strategies.

The lessons Canada and Israel have to learn from each other are wholly methodological. Both cases underline that one cannot only understand law through the ontological tools of “legal evangelicalism”, which “breeds a reliance on the rituals, catechism and creed of official institutions that focus on the word (especially on the definitive pronouncements of the *curia* that sits at the top of an institutional hierarchy)” (Macdonald 2011: 306). As *critical* legal pluralism teaches us, legal subjects shape and produce law as much as Parliament does, through their constructive creativity and normative interpersonal interactions. In the Canadian context, this has entailed going beyond the civil law recourse to wander into the private sphere of community affiliations to understand why state law sometimes fails, and why community interactions can sometimes be more efficient than state law. Recent research done in the plight of the *agunah* in the United Kingdom has also taken the promising approach of investigating the reasons of the insufficiencies of State responses to the *agunah* problem (Jackson et al. 2009: 10-11) and the reactions of non-State actors to these policies (Douglas et al. 2011: 48). In the Israeli context, the *critical* legal pluralist outlook has led me to assess the role of religious ideology and informal bonds of religious community to explain at once why the *Sanctions Law* fails for so many women yet is used by *some* women to successfully put an end to their plight. While at first the socio-legal landscapes of both polities seemed to be polar opposites, we have seen that many conclusions from both studies can be connected. In both polities, we have seen that legal agents navigate through “different legal spaces superimposed, interpenetrated, and mixed in [their] mind as much as in [their] actions” (Santos 1987: 297-298). Moreover, my fieldwork in both countries illustrates how legal pluralist inquiry can at once be attentive to State law and be committed to non-State normativities. In this regard, my invocation of *critical* legal pluralism may be unorthodox, informed as it is by a vision of the State as an important source of bargaining endowments, which intersect with non-state power relations (Fournier 2012). My findings illustrate how legal subjects’ socio-economic bargaining may straddle the fence between State and non-State law, two phenomena which have been pitted against one another by some strands of legal pluralism, but which “dynamically interact with one another” (Sezgin 2004: 102-103) and are in fact mutually constitutive (Corrin 2009). I have begun to chronicle these interactions through the eyes of *agunah* women that confront State and non-State recourses and intertwine them as they bargain with religious law.

These findings could be shown to have significant repercussions on our conception of access to justice. As put by Canadian Participant #4, who had not been able to

get adequate counselling on religious divorce matters:

One of the questions when you're first going through a consult should be, you know, "Are there any religious issues?" And that did not come up. [...] I really do think that, you know, family law attorneys should be aware that sometimes there are really strange religious issues that come up in divorce, and it should be addressed.

Understanding the unofficial norms that shape the 'law in action' can thus be seen as a fundamental professional duty, analogous to those encountered in multicultural contexts (Bryant 2001; Jacobs 1997; Hartley and Petrucci 2004). This is also key to ensuring professional services that incorporate basic commitments to equality and access to justice (Way 2002: 214). As put by Roderick A. Macdonald, meaningful "empirical research [on access to justice] must target the everyday law of social interaction where inaccessible justice is first perceived" (Macdonald 2010: 517). This does not imply that lawyers should assume any systematic hierarchy between a legal subject's normative commitments, which are unevenly distributed and perpetually re-designed (Macdonald 2011: 325). Rather, legal practitioners must adapt their consultations on a case-by-case basis by finding the appropriate way to combine State and non-State law to further the interests of Jewish women. Any access to justice policy must acknowledge and embrace the messiness of the "multiple networks, constant transitions and mixing of legal spaces" (Van Praagh 1996: 214) that are characteristic of legal systems as seemingly different as Canada and Israel. In these two polities, the relationship between the civil state and religious law is one of "tension and opposition" (Leckey 2006: 18), leading to many unexpected outcomes as this tension is played out by judges, rabbis, wives and husbands. Jukier and Van Praagh emphasize that:

Deference to religion by the state, and a corresponding refusal to interfere, may seem to be one option; authority over religion by the state, with an accompanying eagerness to fix the perceived failures of traditional faiths, may seem to be another. A careful reading of *Bruker* should suggest that neither is feasible or desirable, and that a sometimes seemingly chaotic coexistence of normative commitments, of religion 'at' law, is closer to reality (Jukier and Van Praagh 2008: 338).

Moreover, the twelve Jewish women I interviewed have shown that the interaction and intertwining of State and non-State regulation orders, when it is duly

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acknowledged by legal practitioners, has “generated interesting and creative solutions to problems of marriage and divorce in a number of communities” (Estin 2009: 471), as evidenced by the recourse to members of the religious community by some of my participants to pressure their husbands. As Sezgin notes, these internal pluralist solutions may be more productive than “top-down secular solutions” (Sezgin 2010b: 30). Thus, engaging in inter-normative empirical work that chronicles those solutions may be the way to better understand the ‘plight of the *agunah*’. As a result of this work, could Israeli *agunah* women, following my Canadian participant who strategized across borders in considering the Israeli legislation, be inspired by Western Jewish women’s navigation of Jewish community institutions? Moreover, could Canadian *beth dins* develop their own *Sanctions Law*, taking cues from what Israeli rabbinical courts and Canadian civil courts have been trying to achieve? The ‘plight of the *agunah*’, which travels from the (Canadian) civil State to the (Israeli) religious State to the (Canadian) private religious sphere of the *beth din*, can perhaps only be addressed by borrowing solutions across countries, communities, normative orders and boundaries.

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