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Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion

Richard Moon[*]

I. INTRODUCTION

At the time of their civil divorce, Mr. Marcovitz and Ms Bruker entered into an agreement concerning custody, access, division of property and support. Their agreement also included an undertaking by each to appear before the *Beth Din* (rabbinical court) for the purpose of obtaining a *get*, or divorce, under Jewish law.[1] For their marriage to be dissolved under Jewish law, it was necessary for Mr. Marcovitz to provide, and Ms Bruker to accept, a "bill of divorce", or *get*. Without a *get* neither party could remarry in the faith, and any subsequent intimate relationship entered into by either of them would be considered adulterous and any children born of that relationship would be viewed as illegitimate.

Mr. Marcovitz did not appear before the *Beth Din* immediately following the civil divorce, as he had promised. Indeed, his consent to a religious divorce came 15 years later and then only after Ms Bruker had commenced an action for breach of contract.[2] Once Mr. Marcovitz's consent was given, and the couple were divorced under Jewish law, Ms Bruker amended her action to seek compensation for the loss she suffered as a consequence of his failure to give his consent at the time of the civil divorce.

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[1] Clause 12 of their agreement provided as follows: "The parties [agree 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."

Strictly speaking the *get* is not the divorce itself but the "bill of divorce" the husband presents to his wife in the presence of a rabbi and witnesses and that, when accepted by her, terminates their marriage. Because there is no additional requirement, involving the consent of a religious authority, the term *get* is often used to refer to the divorce itself.

[2] Mr. Marcovitz may also have been "encouraged" to give a *get* by an application made by Ms Bruker under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). See note 28 below.

The Quebec Superior Court found that Mr. Marcovitz's undertaking was enforceable, despite its religious character.[3] The judge held that the civil contract was justiciable and within the jurisdiction of the civil court, even though its object involved a religious matter. In his view: "The pith and essence of what is being asked for in this case is not religious" and that even though the case involved "Jewish parties and Jewish institutions", the "principles of Jewish law do not have to be examined in depth".[4] Mr. Marcovitz had "a clear and unequivocal civil law obligation to appear 'immediately' before the Rabbinical authorities" which he breached.[5] The judge awarded Ms Bruker $2,500 for each of the 15 years during which she was unable to remarry, according to her faith.[6] He also awarded her $10,000, on the ground that any children born to her during this period would have been illegitimate under Jewish law.[7]

The Quebec Court of Appeal, however, reversed the decision of the trial judge and held "that the substance of the former husband's obligation is religious in nature, irrespective of the form in which the obligation is stated, and accordingly, that an alleged breach of the obligation is not enforceable by the secular courts …".[8] In reaching this conclusion the Court said that its role was not "to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one …".[9]

A majority of the Supreme Court of Canada, in a judgment written by Abella J.,[10] reversed the decision of the Quebec Court of Appeal and held that Mr. Marcovitz's promise was legally enforceable:

> The fact that [the promise] had religious elements does not thereby immunize it from judicial scrutiny. We are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious

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3 *B. (S.B.) v. M. (J.B.)*, [2003] Q.J. No. 2896, [2003] R.J.Q. 1189 (Que. C.S.).

4 *Id*., at para. 30. The agreement, said the judge, created "a valid civil obligation with religious undertones". *Id*., at para. 20.

5 *Id*., at para. 19.

6 *Id*., at para. 49.

7 *Id*., at para. 52.

8 *Marcovitz v. Bruker*, [2005] Q.J. No. 13563, 259 D.L.R. (4th) 55, at para. 76 (Que. C.A.).

9 *Id*.

10 *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, 2007 SCC 54 (S.C.C.) [hereinafter "*Bruker*"]. Chief Justice McLachlin, Bastarache, Binnie, LeBel, Fish and Rothstein JJ. concurring.

> barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.[11]

According to Abella J., a contract dealing with a religious matter is enforceable, provided its object is not prohibited by law or contrary to public order.[12] Justice Abella was prepared to enforce Mr. Marcovitz's undertaking because it was voluntarily made and because its interpretation did not require the court to consider contested religious doctrine. While conscious of the inaccessibility of religious reasons or doctrines to secular institutions, she accepted that religious agreements (or agreements dealing with religious matters) could not lie entirely outside law's purview. A dissenting judgment written by Deschamps J.[13] held that Mr. Marcovitz's promise was not legally binding because it lacked a justiciable "object", one of the essential elements of an enforceable agreement at civil law.[14] According to Deschamps J., a contract with an exclusively religious object (or an object that could only be understood in religious terms) was not legally enforceable under the Quebec *Civil Code*.

Justice Abella's judgment, however, involved more (and perhaps less) than a determination that religious contracts are legally enforceable. She held that Mr. Marcovitz's promise to consent was enforceable not simply (and perhaps not significantly) because it was a voluntary obligation but because public policy supported the removal of barriers to religious divorce and remarriage. The enforcement of Mr. Marcovitz's promise, she said, was supported by a public policy favouring the removal of such barriers, and, more generally, by a public commitment to gender equality and freedom of choice in marriage. While Abella J. was prepared to enforce a husband's promise to consent, there is more than a suggestion in her judgment that a return promise by his wife, and in particular a promise related to custody, support or the division of property, might not be enforced — and that a husband may not use his consent power as a bargaining lever to obtain or "extort" concessions

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11 *Id*., at para. 47.

12 *Id*., at paras. 48-64.

13 Justice Charron joined in the dissent.

14 *Bruker*, *supra*, note 10, at para. 174.

from his spouse. Underlying her judgment is a desire to mitigate the harshness of the divorce rules of the Jewish community and a belief that religious community members may sometimes require legal protection from the rules and practices of their community.

II. The Legal Enforcement of Religious Contracts

The majority judgment of Abella J. addressed two questions: first, whether Mr. Marcovitz's promise to consent to a religious divorce was a binding contractual obligation under Quebec law; and second, if the promise was legally binding, "whether the husband can rely on freedom of religion [under the Quebec *Charter of human rights and freedoms*] to avoid the legal consequences of failing to comply with a lawful agreement".[15]

In response to the first question, of whether the contract was enforceable under the *Civil Code*, Abella J. found that Mr. Marcovitz's promise to consent to a religious divorce was legally enforceable and that Ms Bruker was entitled to damages for the loss she suffered as a consequence of her husband's failure to do as he had promised. A contract could have a religious object, provided that object was not "prohibited by law" or "contrary to public order".[16] According to Abella J. "an agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions, constitutes a valid and binding contractual obligation under Quebec law".[17]

Justice Deschamps, in her dissenting judgment, agreed that a legally binding contract may be motivated by religious interests or may deal with religious concerns, if "it meets all the requirements for a civil contract under provincial legislation".[18] She noted that under the Quebec

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[15] *Id*., at para. 14.

[16] *Id*., at para. 59.

[17] *Id*., at para. 16. Justice Abella added:

> It will obviously depend in each case on the nature of the undertaking and, in particular, on the extent to which the promise is consistent with our laws, policies, and democratic values. An agreement to resolve a custody dispute in a way that offends a child's best interests, or an agreement that violates our employment laws, for example, will likely be found to be contrary to public order.

Id., at para. 62.

[18] *Id*., at para. 123. Justice Deschamps stated that a court is

> not barred from considering a question of a religious nature, provided that the claim is based on the violation of a rule recognized in positive law… . The requirement that there

Civil Code an obligation will be enforceable provided the parties are legally capable of contracting, their consent is legally given, the contract has an object and there is lawful cause or consideration. Justice Deschamps found that Mr. Marcovitz's promise to consent to a religious divorce satisfied all but one of these requirements. In her view, the undertaking lacked a justiciable object — an object that was "capable of legal characterization".[19] Because a religious divorce has no civil consequences, it is not "an operation recognized in civil law" and the promise to consent to such a divorce is not legally enforceable.[20] While an enforceable agreement may be motivated by religious concerns or values, its object must involve actions or consequences that can be understood in legal or secular terms — it must have civil significance or secular meaning.

There are several reasons why the courts may hesitate or refuse to enforce agreements that are based on religious norms or deal with religious matters. First, the interpretation of such an agreement may draw the courts into disputes about the proper understanding of religious doctrine or practice. Second, legal enforcement may be inappropriate given the subject matter of the agreement (matters of faith or deep commitment) and the relationship between the parties (members of a community bound by a shared commitment to a set of values/practices or to a way of life). Third, agreements between religious community members may be tainted by undue influence or unfair pressure.

When enforcing a contract that is based on a religious norm, the court may be drawn into disputes about the proper meaning of the norm and have no secular or "objective" standard upon which to base its

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> be a rule of positive law before an action will lie is a neutral basis for distinguishing cases in which intervention is appropriate from cases in which it is not.

Id., at para. 122.

[19] *Id*., at para. 174. Justice Deschamps observed that under the *Civil Code*: "the object of a contract is the *juridical operation* envisaged by the parties at the time of its formation" (emphasis added). *Id*., at para. 170.

> The fact that the cause of a contract is connected with a religion does not affect the validity of the contract. For example, a person may have various reasons for undertaking to pay his or her religious community a specific sum of money, the most basic being a desire to contribute to an institution's financial health. In this sense, it is correct to say that a contract with a religious cause may be valid. There is nothing unlawful about having a religious reason for entering into a contract. However, the cause of the contract must not be confused with its object …

Id., at para. 169.

[20] *Id*., at para. 174.

interpretation. The court may be forced into the role of "arbiter of religious doctrine".[21] Justice Deschamps thought that the public commitment to multiculturalism, freedom of conscience and religion, and the right to equality, required that the courts "remain neutral where religious precepts are concerned" and avoid any entanglement with religion.[22] This neutrality is necessary if the courts are "to play their role as arbiters in relation to the cohabitation of different religions" and "to decide how to reconcile conflicting rights".[23]

Yet when interpreting commercial and other contractual arrangements, the courts are often required to consider the customs and norms of different sub-groups within the larger community. The contracting parties may have relied on such norms or customs even though they may have (slightly) different views about their meaning and implications. Why then is it unacceptable for the courts to enforce a contract when the norms underlying it (and subject to contest) are religious? The problem, I think, is that religious norms, particularly when they are in dispute, cannot be viewed as simply social conventions — to be determined by an examination of group practice. They are, for the adherent, part of a higher law, and must be respected because they are true or because they are God-given. Any dispute between the contracting parties about the proper understanding of these norms is a dispute about spiritual truth. The resolution of such a dispute involves a judgment not about the best interpretation of a social practice but about the proper reading of divine law — about what God has truly commanded. The democratic/secular state, though, is expected to remove itself from such issues — and avoid making determinations about spiritual truth.

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[21] In deciding that Mr. Marcovitz's undertaking was not legally enforceable, the Quebec Court of Appeal relied in part on the judgment of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter "*Amselem*"] which held that the state should not be "the arbiter of religious dogma". As Iacobucci J. put it: "In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of a religious requirement … . " *Id.*, at para. 50.

The issue has been significant in the U.S., where it has been held that the "establishment clause" of the First Amendment prohibits government actors from becoming "entangled" with religion. The court must interpret a religious contract according to "neutral" or secular principles. A contractual dispute should not be considered by the courts if it cannot be resolved exclusively on the basis of such principles. See, for example, *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

[22] *Bruker*, *supra*, note 10, at para. 102.

[23] *Id*.

Justice Deschamps' requirement that a legally enforceable contract have an object that is "capable of legal characterization" may ensure that the courts have a non-religious standard upon which to draw when interpreting an agreement.[24] Yet, even if its object can be framed in secular terms, a contract dealing with a religious matter (such as an agreement to pay *mahr* or to hold property collectively as a member of a Hutterite community) cannot be interpreted without reference to the norms or practices of the religious community, which may be subject to contest. Any attempt by the courts to avoid religious doctrine and rely on "neutral" principles, when interpreting such an agreement, will either ignore or distort the parties' actual intention — their contractual purpose.

The distinction drawn by Deschamps J., between a contract with a religious object that cannot be characterized in legal terms and is not enforceable, and a contract that despite its religious motivation can be understood in legal or secular terms, and is enforceable, resembles the distinction that is sometimes made, in debates about religious values in public decision-making, between, on the one hand, purely religious reasons and, on the other, (religious) reasons or concerns that can be framed in secular terms. The familiar argument is that because religious values or beliefs are inaccessible to non-believers, they lie outside the scope of reasonable public debate and cannot provide a publicly acceptable basis for law-making. Public action then must be based on non-religious values and concerns, or, at least, it must be possible for a public decision-maker to defend his/her decisions or actions on non-religious grounds, even if her/his motives are religiously based. Public decision-making about the rules of collective life is separated from personal commitment to spiritual truth by the requirement that the former be framed in non-religious terms. But the distinction may be more apparent than real. While a religious adherent may be able to describe her/his values/interests to others in non-religious terms, her/his understanding of, and commitment to, these values/interests rest on their

[24] It is possible, though, that Deschamps J.'s purpose was more limited. While she accepted that it may be necessary for the courts to interpret/enforce some religious contracts, she may have thought that the courts should decline to enforce those contracts that lack any (other) civil significance. The issue of whether a particular piece of property does or does not belong to a particular individual or entity is not just something that secular actors can comprehend, it is something that, in the civil sphere, requires an answer — even if the answer the courts give is to defer to the decision of a religious authority. But civil institutions need have no interest in the status of a particular individual within his/her religious community — as divorced or married, for example.

religious foundation. For the religious adherent, this foundation is part of the justification or basis for the public action or, in this context, the contract. More importantly, the religious foundation of the public action (or the private contract) which gives it meaning and force for the adherent, also shapes its content.

Justice Abella adopted a more pragmatic approach to the issue. In her view, the religious character of Mr. Marcovitz's undertaking did not "immunize it from judicial scrutiny".[25] The court may take jurisdiction so long as the dispute concerns the legal rights of the parties.[26] In this case, said Abella J., "[w]e are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do."[27] The difficulty though is that the resolution of the legal (contractual) issue may depend on religious doctrine — on the proper understanding of a religious principle or practice. In *Lakeside Colony of Hutterian Brethren v. Hofer*[28] (a case cited by Abella J.), Gonthier J. for the majority, was aware of the entanglement issue but did not seem troubled by it. He noted that "while the courts may not intervene in strictly doctrinal or spiritual matters, they will when civil or property rights are engaged".[29] "Once the court takes jurisdiction over a dispute with religious components", said Gonthier J., "it must try 'to come to the best understanding possible of the applicable tradition and custom'."[30] The court, in that case and in this, does not attempt the impossible task of isolating religious concerns and interests from secular law.

Justice Abella seemed to assume that in this case the contract could be enforced without the court having to delve into religious doctrine. She thought that Mr. Marcovitz's promise was clear and unambiguous. She noted that he offered no religious reasons for his failure to perform his undertaking and that, in any event, Judaism recognized no reasons to

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25 *Id*., at para. 47.

26 As Abella J. put it: "I do not see the religious aspect of the obligation in Paragraph 12 of the Consent as a barrier to its civil validity. It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones." *Id*., at para. 51.

27 *Id*., at para. 47. Furthermore, wrote Abella J., "[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable." *Id*., at para. 41.

28 [1992] S.C.J. No. 87, [1992] 3 S.C.R. 165 (S.C.C.) [hereinafter "*Lakeside Colony*"].

29 *Bruker*, *supra*, note 10, at para. 45.

30 *Id*. See also *Lakeside Colony*, *supra*, note 28, at 191.

refuse consent.[31] Yet Abella J. could make this determination only after considering the rules and practices of the religious community. The obvious question is whether she approached this task as a secular public actor seeking to identify the social practices of a religious community or as a member of that community and a participant in the debates about the proper understanding of its rules. It seems likely that her knowledge of Jewish law and practice gave her some comfort in deciding that the religious law was clear on this issue. We are left to wonder, however, what she might have done had there been some dispute (or had she recognized there was some dispute) within the Jewish community about whether a husband was ever justified in withholding his consent.[32]

Another reason for judicial reluctance to enforce religious contracts is that both the subject matter of the contract and the relationship between the contracting parties may make legal enforcement inappropriate. A religious contract is based on norms that are often faith-based and deeply held and that bind the members of the religious community. When entering an agreement or "contract" the parties may not understand themselves as creating legal obligations. They may consider themselves bound not by secular law but by the spiritual norms of their community — by higher law — and by their commitment to each other as members of a spiritual community.[33] And to this we might

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[31] As Abella J. put it in *Bruker*, *supra*, note 10, at paras. 68-69:

> … It is not clear to me what aspect of his religious beliefs prevented him from providing a *get*. He never, in fact, offered a religious reason for refusing to provide a *get*. Rather, he said that his refusal was based on the fact that, in his words:
>
> > Mrs. Bruker harassed me, she alienated my kids from me, she stole some money from me, she stole some silverware from my mother, she prevented my proper visitation with the kids. Those are the reasons …
>
> This concession confirms, in my view, that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker. His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits.

[32] Justice Abella's appeal to Jewish practice to dismiss Mr. Marcovitz's assertion that he had religious reasons for his refusal to give his wife a *get* seemed to ignore the Court's determination in *Amselem* (*supra*, note 21) that an individual's sincerely held spiritual beliefs are protected whether or not they are part of an established belief system.

[33] The courts may decline to enforce such an agreement for the same reasons they have sometimes declined to enforce a "family bargain" — because the agreement is embedded in larger relationships and is inseparable from deeper obligations. The reluctance to enforce family bargains,

add, that the legal enforcement of such an agreement or undertaking (or the threat of legal enforcement) may undermine the deeper spiritual connections between community members.[34] Even when religious parties explicitly engage private law forms — and may reasonably be understood as creating legal rights and obligations — they may believe that it would be wrong, a breach of their faith and their commitment to their community, to resort to the courts when disputes arise about the meaning or implementation of the agreement.[35]

Finally, the courts may be reluctant to enforce a religious contract because they are concerned that one (or both) of the parties has not made a free and independent decision to enter into the agreement. The parties to a religious contract may be connected by a common history and a shared commitment to a set of faith-based norms and practices. They may be materially and psychologically tied to their spiritual community. In this context, pressure to agree may be applied by family and friends.[36] This pressure may be explicit and involve demands and threats, or it may be more subtle. Even in the absence of external pressure, the individual may feel pushed to meet the expectations of family and community. The individual may be expected, as a matter of loyalty to his/her religious community, to agree, and adhere, to norms that are part of the higher law that binds the members of the community, or are part of what constitutes the community's identity.[37] She/he may feel "compelled" to agree to

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and religious bargains, may also rest on a recognition that legal intervention will damage the deeper relationship between family members or religious adherents.

[34] Moreover, the particular norm or practice that is the subject of the contract may be embedded within (and understandable in relation to) a larger system of religious norms and practices. For example, the promise to pay deferred *mahr* in a Muslim marriage contract is tied to the husband's power to divorce his wife unilaterally. For a discussion of this see Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment" in R. Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

[35] For a discussion of the Hutterite prohibition on resort to secular courts, see Alvin Esau, *The Courts and the Colonies*: *The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004). Another example may be the ill-fated proposal to establish Sharia arbitration tribunals in Ontario under the provincial arbitration legislation. The proponents thought it symbolically important for the tribunal's decisions to have legal force. Yet it appears they did not think that disputes between the parties concerning implementation of the arbitration decision should be taken to the secular courts.

[36] Lindsey E. Blenkhorn, "Islamic Marriage Contracts and American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women" (2002-2003) 76 S. Cal. L. Rev. 189 notes that in the case of an agreement to pay Mahr "the bride herself has little or no involvement in the negotiation …".

[37] Some proponents of Sharia arbitration in the recent debate in Ontario declared that one is not a good Muslim if one does not agree to submit one's dispute to arbitration based on Sharia law.

contractual terms that are presented as morally binding, or as elements of community membership.[38] Because individuals are deeply tied to their religious communities, they may feel significant pressure to submit to the rules or expectations of their community. The members of some insular communities may have difficulty even imagining other rules or practices.

However, we should not confuse the inner pressure an individual may feel to live up to certain values or obligations with the various forms of external pressure or restriction that may lead her/him to adopt particular practices or norms (or even with the limited scope of choice that may occur when she/he is not exposed to other ways of thinking). Each of us is affected by an array of deeply held values, commitments and associations. We should not be too quick to regard those who hold views with which we disagree or who live in more insular communities as lacking agency. A general decision by the courts not to enforce religious contracts, might unfairly deny religious individuals the power to make binding legal arrangements based on their values, practices and interests. More practically, a general exclusion would require the courts to distinguish religious from non-religious agreements. Given the subtle and significant ways in which religious belief shapes individual action, the line between these might be very difficult to draw.

Justice Abella thought that instead of refusing to enforce all religious contracts, the courts should address concerns about undue influence or contractual intention on a case-by-case basis. The courts should decline to enforce a particular contract when there is genuine dispute about the relevant religious values or practices, or when there is real concern that the consent of the parties was not given voluntarily. This approach seems both reasonable and necessary. The problem, though, is that every time a religious contract is contested the courts will be drawn to some extent into the interpretation of religious practice or doctrine. Similarly, every religious contract is made between parties who share a commitment to a set of deep values and traditions. The courts may be more inclined to decide that a contract cannot be interpreted in a neutral

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For a discussion of this see Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter" in R. Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

[38] Ironically, in this case, we might wonder whether Mr. Marcovitz's promise was "voluntary" since men who refuse their consent are often subjected to significant criticism within the religious community.

way (or in a way that does not draw the court into the interpretation of religious norms) or was entered without proper consent by one or both of the parties, when it is based on religious values or practices that differ significantly from those of the mainstream community.

III. The State's Role in Remedying Religion

The majority judgment of Justice Abella formally held that a contract dealing with a religious matter is legally enforceable. Her judgment, however, said both more and less than this.

Justice Abella declared that the enforcement of Mr. Marcovitz's promise "harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally …".[39] She saw Mr. Marcovitz's refusal to consent as a particular instance of a much larger problem in the Jewish community: the problem of "recalcitrant" husbands who refuse to provide a *get*, thus precluding their wives from remarrying within the religious community and leaving them in a position of poverty and dependence.[40] Canadians, said Abella J., should have the right "to decide for themselves whether their marriage has irretrievably broken down".[41] In Canada civil marriage and divorce are available "equally to men and women"; but a *get*, observed Abella J. "can only be given under Jewish law by a husband": "It is true", she acknowledged, that *a get* also requires the consent of the wife, but … the

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[39] *Bruker*, *supra*, note 10, at para. 63. According to Abella J., the enforcement of such a promise was "consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination". *Id*., at para. 16.

[40] The dissent did not connect this case to any larger issue of gender inequality or religious oppression. Indeed, Deschamps J. frequently observed that a religious divorce requires mutual consent, and that the wife no less than the husband has the power to prevent a divorce. She also repeated the Quebec Superior Court's less sympathetic description of Ms Bruker's situation. Ms Bruker was said to lead a "life marked by unconventional behaviour" (*id*., at para. 108) involving "many deviations from the doctrines and precepts of the Orthodox Jewish Community — her abortion, extra-marital affairs, use of contraceptives, etc. …" (*id*., at para. 113, quoting the trial judge). Justice Deschamps also referred to Ms Bruker's difficult personality, noting that "[h]er relationship with her daughters was as difficult as her relationship with the respondent." *Id*., at para. 109.

[41] *Id*., at para. 82. Justice Abella referred to "[t]he public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry … ". *Id*., at para. 92. Justice Abella observed that "[f]or those Jewish women whose religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry." *Id*., at para. 82.

law has a disparate impact on women …".[42] In her view, "[t]he refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs".[43]

Mr. Marcovitz was obligated to give his consent to a religious divorce, not just because he had promised to, but because public policy supported the removal of barriers to religious remarriage. Justice Abella thought that the courts should "attempt to facilitate, rather than impede, [Canadians'] ability to continue their lives, including with new families".[44] She stated that "[f]or many years, civil courts have attempted to remedy, or compensate for, the husband's recalcitrance in refusing to provide a get to his wife".[45] According to Abella J. this policy lay behind the 1990 amendment to the *Divorce Act* which empowers a judge in a civil divorce case to exert pressure on a spouse, who refuses to give his/her consent to a religious divorce, by "dismissing any application by that spouse" and "strik[ing] out any other pleadings and affidavits filed by the spouse".[46] As described by Abella J.: "Section 21.1 of the *Divorce Act* … gives a court discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage …"[47]. It is she said "a clear indication that it is public policy in this country that such barriers are to be discouraged".[48]

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[42] For this point she cites Ayelet Schachar, *Multicultural Jurisdictions*: *Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), at 62: "The family law realm … vividly illustrates the troubling paradox of multicultural vulnerability, by demonstrating how well-meaning attempts to respect differences often translate into a license for subordination of a particular category of group members — in this instance, primarily women." As noted by Kent Greenawalt, "Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance" (1998) 71 S. Cal. L. Rev. 781, at 811 the negative consequences of entering a new relationship without a religious divorce are far more significant for a woman than for a man.

[43] *Bruker*, [2007] S.C.J. No. 54, 2007 SCC 54, at para. 82 (S.C.C.).

[44] *Id*.

[45] *Id*., at para. 9.

[46] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 21.1(3). In Abella J.'s view, by passing the 1990 amendments, "Parliament manifested a clear intention to encourage the removal of religious barriers to remarriage." *Bruker*, *supra*, note 43, at para. 63. See also the *Ontario Family Law Act*, R.S.O. 1990, c. F.3, s. 2(5). For a discussion of these provisions see John T. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992) [hereinafter "Syrtash"] and the review of Syrtash's book by Shauna Van Praagh in (1993) 38 McGill 233 [hereinafter "Van Praagh"].

[47] *Bruker*, *supra*, note 43, at para. 81.

[48] *Id*.

While Abella J. was eager to enforce a promise to give a *get*, it is not clear that she would have been willing to enforce a return promise dealing with support or custody. In her judgment Abella J. quoted Kim Campbell, Justice Minister at the time of the *Divorce Act* amendment, who used the term "blackmail" to describe a husband's use of the consent power as a bargaining lever.[49] Yet if a religious matter may be the subject of a legally enforceable contract, why is it "extortion" or "blackmail" for a husband to use his power of consent — his religious prerogative — to "extract" concessions from his wife? The term blackmail or extortion is applicable only if, from a public perspective, it is wrong for a husband to withhold his consent or to threaten to do so for personal gain.[50] The refusal to enforce a return promise would appear to rest on a judgment that the divorce rules/practices of Judaism are unjust or oppressive and that the law should seek to mitigate their impact.[51]

The promise to consent then was enforced by the Court not simply because Mr. Marcovitz gave an undertaking but also, and perhaps significantly, because public policy supports the removal of religious barriers to remarriage — including the barrier of a husband's consent prerogative. The husband's voluntary undertaking provides an opening or opportunity for the court to advance this public policy (to protect the interests of the wife) without having to intervene more directly into the affairs of the religious community.[52]

Justice Abella argued that Mr. Marcovitz's religious freedom was not breached by the Court's enforcement of his promise because his religion "does not require him to refuse to give Ms Bruker a *get*": "There is no doubt that at Jewish law he *could* refuse to give one, but that is

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[49] *Id*., at para. 8. See also the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, s. 56(5): "The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement."

[50] Or stated in another way — it is wrong only if the wife is put in an unfair choice situation — and this will be the case only if the husband has no right to withhold his consent.

[51] Syrtash, *supra*, note 46, at 126 states that if a court were to set aside an undertaking (under s. 56(5) of the Ontario *Family Law Act*) on the grounds that it was given in return for a promise to give a *get*, the *get* might not be considered valid by rabbinical authorities. This suggests, among other things, that within Jewish law the promise to give a *get* may be used as a bargaining lever — and the threat to withhold a *get* is not improper.

[52] I note that Abella J. cited without reservation legislative measures in other jurisdictions that directly intervene to compel a husband to appear before the Rabbinical Court to give his consent. Specifically, she refers to cases in New York and Israel in which the state compelled a husband to consent to a religious divorce even when there was no promise made by him. *Bruker*, *supra*, note 43, at paras. 88-89.

very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits."[53] Because the divorce agreement is not a religious act, enforcement of his promise (and perhaps also a direct legal order) to consent does not breach his freedom of religion — it does not compel or pressure him to act in a way that is inconsistent with his religious beliefs.[54]

Not far in the background of Abella J.'s judgment is the issue of the constitutionality of section 21.1 of the *Divorce Act*, an issue that was specifically not pursued in the courts by Mr. Marcovitz. Nevertheless, Abella J. drew from this legislative provision a public policy supporting the removal of barriers to remarriage.[55] While she insisted that nothing in her reasons "purports in any way to decide the constitutionality of s. 21.1",[56] her finding that Mr. Marcovitz's freedom of religion was not breached by the enforcement of his promise, would seem to apply equally to this provision of the *Divorce Act*.

Yet even if the court does not require the husband to take action that is inconsistent with his religious beliefs and practices, the public policy on which the court relies (and the selective enforcement of religious undertakings — including the one-sided enforcement of agreements to give a *get*) "supports" the exercise of his "discretion" to give a *get.* The *Divorce Act* goes further and interferes with the exercise of the husband's prerogative under Jewish law. It removes or constrains a right that religious law grants to him. Moreover, the harm to which the court

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[53] *Id*., at para. 69. Justice Abella insisted that "[t]his is not, as implied by the dissent, an unwarranted secular trespass into religious fields, nor does it amount to judicial sanction of the vagaries of an individual's religion." *Id*., at para. 18.

[54] As Abella J. elaborated: "The test applied by the majority in *Amselem* examines whether an individual's sincerely held and good faith religious belief is being unjustifiably limited to a non-trivial degree. Applying this test to the facts of this case, I see no *prima facie* infringement of Mr. Marcovitz's religious freedom." *Id*., at para. 67. Syrtash, *supra*, note 46, at 114 makes this point: "it is not strictly speaking a religious act, although it does take place in a religious context". To this Van Praagh, *supra*, note 46, responds that "the argument that the granting of the *get* is not per se a religious act in Jewish law, given the fact that the procedure is neither solemnized or holy [will not] overcome the assertion that the court is interfering indirectly with a practice associated with religious belief and affiliation".

[55] There was some debate between the majority and dissenting judgments about the appropriateness of this reliance on s. 21.1. Mr. Marcovitz had agreed not to pursue a constitutional challenge to the *Divorce Act* provision. The agreement provided that Mr. Marcovitz "may argue the question of justiciability in this case as if s. 21.1 of the *Divorce Act* did not exist".

[56] *Bruker*, *supra*, note 43, at para. 35.

is responding, when it pressures the husband to give a *get*, relates to the status of his wife within the religious community.

Justice Abella saw the wrong against Ms Bruker as stemming simply from Mr. Marcovitz's decision to withhold, or threaten to withhold, his consent. This prerogative, however, is granted to him by the religious rules of his community. Justice Abella may be right in her reading of Jewish law, that there are no reasons that justify a husband withholding his consent.[57] The religious divorce rules nevertheless provide that the marriage will be dissolved only when the husband has given his consent voluntarily. As Abella J. observed, the husband has "absolute discretion, to divorce" his wife.[58] This may explain why the state has applied only indirect pressure on recalcitrant husbands. A rabbinical court might not regard a husband's consent as voluntary, if it has been given in response to a direct order by a court.[59] The injustice to which the court is responding stems from the religious community's divorce rules and more generally from the ordinary actions and perceptions of the community's members. These are matters that a court cannot simply control or fix.

However, it may be an oversimplification of Jewish divorce law to say that the husband has absolute discretion to give a *get*. In the past the Jewish community employed a variety of methods to pressure a husband to give a *get*. Patrick Glenn notes that a "rabbinically compelled *gett* was clearly recognized as valid and effective in Jewish law".[60] For a variety of reasons, however, these methods are no longer available or practical. This is why some in the Jewish community asked the state to step in and apply pressure on recalcitrant husbands. The fact that many in the Jewish community do not consider that community pressure vitiates the husband's consent suggests that the requirement that his consent be "voluntary" may be more a matter of form or appearance than substance.

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[57] Justice Abella expressed doubts about the sincerity of Mr. Marcovitz's religious objection to providing a *get*: "I start by querying whether Mr. Marcovitz, in good faith, sincerely believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience. It is not clear to me what aspect of his religious beliefs prevented him from providing a *get*. He never, in fact, offered a religious reason for refusing to provide a *get*." *Id.*, at para. 68.

[58] *Id*., at para. 4.

[59] The drafters of a law dealing with this issue must try to predict whether the particular form or degree of pressure will be viewed by the rabbinical courts as vitiating consent.

[60] H. Patrick Glenn, "Where Heavens Meet: The Compelling of Religious Divorces" (1980) 28 Am. J. Comp. L. 1, at 4.

In support of her argument that the enforcement of Mr. Marcovitz's promise (and the policy promoting the removal of barriers to religious remarriage) did not breach his freedom of religion, Abella J. pointed to the support within the Jewish community (or at least from leading Jewish organizations) for the amendment to the *Divorce Act*, and more generally for the imposition of secular/legal pressure on husbands to give their consent. She noted that within the Jewish community there was "a consensus that the refusal to provide a *get* was an unwarranted indignity imposed on Jewish women and, to the extent possible, one that should not be countenanced by Canada's legal system".[61] Her assumption seemed to be that because section 21.1 was added to the Act as a result of lobbying by the Jewish community, it should not be regarded as an interference with the religious practices of the community, and indeed might even be viewed as an accommodation of the religious community — as a response to the community's needs and interests.

If the religious authorities in the community do not think that indirect state pressure on a recalcitrant husband nullifies his consent, then perhaps such pressure should not be viewed as interference with the community's religious practices. Yet it is not so clear that there is consensus in the Jewish community concerning the acceptability of state intervention. Moreover, as the majority recognizes, in its current form Jewish law provides that a couple is divorced only when both the husband and wife give their consent. The Jewish community, despite its concerns about the fairness of this rule (of the unrestricted power to consent) is either unwilling or unable to change it. The fact that many in the Jewish community regard this rule as unfair in its application, and have asked the public authorities to intervene (specifically to pressure husbands to give their consent) does not change the fact that the state is involved in fixing or limiting a religious rule that is viewed as unfair from the public perspective.

According to Abella J., Mr. Marcovitz's refusal to consent "represented an unjustified and severe impairment of [Ms Bruker's] ability to live her life in accordance with this country's values and her Jewish beliefs".[62] The paradoxical assertion here is that Mr. Marcovitz's refusal to consent, based on Jewish law, is preventing his wife "from

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61 *Bruker*, *supra*, note 43, at para. 81.

62 *Id*., at para. 93.

living her life as a Jewish woman". However, it is Jewish divorce law (and Ms Bruker's commitment to her faith or her faith community) and not simply Mr. Marcovitz's decision that is preventing her from living a full and equal life, as understood by the broader community. The husband's refusal to consent does not, as Abella J. claimed, deny his wife "the right to remarry" or deny her "access to a remedy she independently has under Canadian law".[63] Instead, it denies her "the ability to remarry … in accordance with her religious beliefs".[64] The denial of consent constrains her only because she is committed to her faith — and its rules — or because membership in the community matters deeply to her. The denial of a religious divorce affects only her religious status or her status within the community of believers. (Again this is why state intervention will not be effective, if the community discounts his consent as involuntary and continues to regard his wife as married.) As the dissent pointed out, only Ms Bruker's religious rights are in issue, and only as a result of religious rules: "It was a rule of her religion that prevented her from" divorcing and remarrying.[65]

The issue that Abella J. does not address explicitly is when, if ever, the state should intervene in the affairs of a religious community to protect individual members from unfair or oppressive internal rules. Any argument in support of intervention must rest on a recognition that religious belief is deeply rooted, a matter of identity, and that a religious community is not simply a voluntary association from which an individual may easily exit when she/he disagrees with some of its rules. It must rest on a belief that the individual should not be required to choose between exit from a community to which she/he is deeply attached and membership subject to unfair rules. Justice Abella, in support of intervention, noted that Dickson C.J.C. in *R. v. Big M Drug Mart Ltd.*[66] had "confirmed that religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests".[67] But the purpose of legal intervention in the *Bruker* case was to free religious individuals from the impact of the rules of their religious community — a community with which they identify and continue to associate.

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63 *Id.*, at para. 82.

64 *Id*.

65 *Id.*, at para. 131.

66 [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

67 *Bruker*, *supra*, note 43, at para. 72.

IV. An Aside on Waiver of Freedom of Religion

As noted in the previous section, Abella J. did not think that the enforcement of Mr. Marcovitz's promise breached his freedom of religion (under the Quebec *Charter of human rights and freedoms*), because his religion did not preclude him from consenting to a religious divorce. Justice Abella, however, went on to argue that even if the enforcement of Mr. Marcovitz's promise amounted to a restriction on his freedom of religion, this restriction was justified under section 9.1 of the Quebec Charter.[68] She found that the "public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations … outweigh[ed] Mr. Marcovitz's claim that enforcing Paragraph 12 of the Consent would interfere with his religious freedom".[69] But does holding him to a promise he made, even if that promise required him to act in a way that is inconsistent with his religious beliefs, amount to an interference with his religious freedom that must be justified by the state?

The Quebec Court of Appeal thought that Mr. Marcovitz could not be understood to have waived his freedom of religion right. Justice Hilton of the Court of Appeal, referring to the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*,[70] said that:

> If an observant Jewish man could not be presumed to have contractually waived his freedom of religion and thus be entitled to erect a succah on his balcony, how can Mr. Marcovitz be presumed to have waived his right not to appear before a rabbinical tribunal for the granting of a ghet as a matter of religious conscience, and who is this

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[68] Section 9.1 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12, provides that in exercising their fundamental freedoms and rights — including freedom of religion — persons "shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec".

[69] *Bruker*, *supra*, note 43, at para. 92. As Abella J. put it earlier in her opinion: "I am also persuaded that, applying the balancing mandated by s. 9.1 of the Quebec *Charter*, any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment, is significantly outweighed by the harm caused by his unilateral decision not to honour it." *Id.*, at para. 17.

[70] [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.).

> Court to tell him that he had a civil duty to perform irrespective of the rights he might have according to his religious beliefs?[71]

In *Amselem*, Iacobucci J., for the majority of the Supreme Court, rejected the condominium association's argument that the appellant had waived his freedom of religion right to erect a succah on the balcony of his condominium unit. At the time he purchased the unit, the appellant had signed a Declaration of Co-Ownership, which included a by-law banning alteration of the unit's balcony. According to Iacobucci J., even if it were possible for an individual to waive his right to religious freedom, the appellant could not be understood to have done so in this case for several reasons: first, the waiver was not unconditional (because the prohibition was subject to exemptions); second, it was not voluntary (because the appellant had no choice but to sign the declaration, if he wanted to reside in the building, and because he had not read the by-laws before signing them); and third it was not explicit (because it did not make specific reference to the affected Charter right).[72]

Justice Iacobucci, however, did not decide that an individual could never waive his/her freedom of religion. Indeed, I would suggest that in *Amselem* the principal reason the appellant was not bound by his undertaking not to alter his balcony was that the condominium association had no right to ask for such an undertaking. If the condominium association had a duty to accommodate minority religious practices, then it could not condition the sale of a unit on agreement by the purchaser not to practice his/her religion, or, more specifically, not to erect a succah on the unit's balcony. Any promise to that effect made by the purchaser would not be enforceable. But in the absence of a duty to accommodate on the part of the promisee, it is unclear why an individual, who voluntarily agrees not to perform a particular act, even an act that has religious significance for her/him, should not be held to her/his promise. According to the courts, an individual's religious practice/belief is valuable because she/he has chosen it, or made a personal commitment to it, or because it matters deeply to her/him. A particular religious practice has no intrinsic value from a public perspective. When an individual undertakes not to perform a practice,

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[71] *Marcovitz v. Bruker*, [2005] Q.J. No. 13563, 259 D.L.R. (4th) 55, at para. 77 (Que. C.A.).

[72] For a more general discussion of the *Amselem* case see R. Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 S.C.L.R. (2d) 201.

others might reasonably assume that she/he is not, or at least not deeply, committed to it. Since religion is a personal matter (a matter of conscience) others can only rely on the individual's statements about what is important to him/her — about what she thinks she can and cannot do without. Moreover, if religious practice is personal, and protected as a matter of autonomy or liberty, then an individual should be free to decide that she/he does not want or need to perform a particular practice, or she/he should be free to bind her/himself contractually not to take certain actions. Provided it is given voluntarily, his/her undertaking not to perform a certain act is, no less than her/his religious commitment, an expression of her/his autonomous judgment.

In this case, Ms Bruker and Mr. Marcovitz had agreed to release each other from their religious marriage. There was no evidence that unfair or improper pressure had been brought to bear on Mr. Marcovitz to "extract" his promise and so there was no reason not to hold him to it. Mr. Marcovitz, by his promise, waived his right to "engage" in the particular religious practice or, at least, to exercise the particular power granted to him under the rules of his religion. It was not necessary then to treat his promise (and the public interest in the enforcement of promises) as something that had to be balanced against his freedom of religion interest.

However, the waiver issue is this simple only if Mr. Marcovitz's legal obligation to consent to a religious divorce was based on his promise. As noted above, Abella J. did not view the issue so narrowly. In her view, Mr. Marcovitz was obligated to give his consent not simply because he had given a voluntary undertaking but because public policy supported the removal of barriers to religious remarriage. Framed in this way, as an issue of public policy, Mr. Marcovitz's promise to consent is an important factor, but only a factor, in the decision that he was legally bound to give his consent to a religious divorce.[73]

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[73] In Abella J.'s words:

> … the public policy benefit of preventing individuals from avoiding the usual legal consequences of their contractual breaches, is only one of the factors that weigh against his claim. The significant intrusions into our constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce that flow from the breach of his legal obligation are what *weigh most heavily* against him.

Bruker, *supra*, note 43, at para. 80 (emphasis added).

V. VOLUNTARY ASSOCIATION AND CULTURAL IDENTITY

The majority judgment of Abella J. held that a contract dealing with a religious matter is legally enforceable. But she also held that a promise to consent to a religious divorce was enforceable in particular because public policy supported the removal of barriers to religious remarriage. Indeed, at several points in her judgment, Abella J. seemed to accept that even in the absence of a promise to consent, the state might be justified (through legislative means) in pressuring or compelling an individual to give his consent. She suggested that this policy, whether implemented through the (selective) enforcement of promises, or the application of pressure under section 21.1 of the *Divorce Act*, did not breach the individual's freedom of religion, because his religion did not require him to withhold his consent. She did not consider that the implementation of the policy might be viewed as an interference with the rules and practices of the religious community.

The formal defence of religious freedom, in modern liberal democracies such as Canada, emphasizes the value of individual autonomy or liberty and the protection of spiritual choices or judgments. In *R. v. Big M Drug Mart*, Dickson C.J.C. stated that the constitutional right to freedom of religion protects the individual's liberty to hold and manifest his/her *chosen* religious beliefs.[74] An individual's religious commitment rests on her/his acceptance or assumption that a set of beliefs is true or right (even if that truth cannot be finally or fully proved and must to some degree be accepted on faith) and that other views are false. It is, therefore, potentially revisable, in the face of incompatible scientific evidence or moral experience. For the religious adherent, his/her beliefs should be respected, because they are true, and not just because she/he happens to hold them, or her/his judgment about what is true should be respected, because she/he is an autonomous agent.

Yet, at the same time, religious belief is viewed as a deeply rooted part of the individual's identity that should be treated with equal respect. Religion orients the individual in the world, shaping her/his perception of the social and natural order and providing a moral framework for her/his actions. It represents a significant connection with others — with a community of believers. While an individual may be capable of reflecting upon, and revising incrementally, particular aspects of her/his

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[74] *Supra*, note 66, at 337.

world view, it may be difficult or impossible for her/him simply to discard and replace his/her most basic values and beliefs or to walk away from her/his religious community.

If religious adherence was simply a personal commitment or choice and religious association was purely voluntary, it would be difficult to justify state intervention into the affairs of a religious community. Respect for individual autonomy or liberty would preclude the state from intervening to protect individual members from their adherence to unfair laws or rules. An individual, who chooses to become, or remain, a member of a particular religious group, may be seen as voluntarily submitting to the spiritual laws of that group, or to the group's authority structure. If the individual objects to the group's norms (the group's interpretation/application of higher law), she/he can decide to withdraw from the group and live within the larger community, under state law. The state may have a role in ensuring that membership in the religious community is truly voluntary, and that members have a genuine right of exit, but the state should not otherwise interfere in the internal operation of the community.

Once we recognize that the religious adherent's identity is tied to her/his religious community, then the issue of the "voluntariness" of her/his membership becomes more complicated. The individual's social and psychological ties to her/his community are sometimes described as barriers to her/his exit, similar to the economic costs that may deter her/him from leaving the community. The term "barrier", though, suggests that these ties interfere with the individual's judgment, prevent her/him from making the choices she/he would otherwise make, and, like material restrictions, ought to be removed. But no one argues that the state can or should nullify these "barriers to exit". Instead the argument is that the state should intervene to protect the individual from unjust internal rules because she/he should not have to choose between leaving the community to which she/he is deeply connected and remaining within the community but subject to its unfair rules. The individual's exit from her/his religious community is difficult for the very same reason that community autonomy is important. Exit is difficult, and indeed undesirable, precisely because religious community plays a central role in the individual member's life and identity — because it is the source of meaning and significance for the individual.

In this case there were no material barriers to Ms Bruker's exit from the community. She had been granted a civil divorce along with custody

of her children and financial support. Like other women affected by the unjust divorce rules of Judaism, Ms Bruker chose to remain within the community, presumably because this was important to her identity or her connection with others. The religious divorce rules affected only Ms Bruker's status within the Jewish community. She was free to remarry outside the community but chose not to because she wanted to remain a member.

There may be communities that are so insular, because of factors such as location and language, that even if members are "free" to exit, they may be unable to imagine other forms of association or other value systems. Membership in such a community may be viewed as involuntary and state intervention may sometimes be justified to protect the individual from unjust rules or to ensure that she/he is exposed to other options. Certainly Ms Bruker's connection to her community was not involuntary in this sense. She had not always lived within the community and even when she became more closely tied to it, she took a selective approach to its rules. Moreover, it appears that the *Divorce Act* amendments were requested by members of the Jewish community precisely because the community is no longer insulated from the larger society — so that internal pressure on recalcitrant husbands is now far less effective.[75]

Yet it seems unfair that Ms Bruker must choose between remaining within the community subject to its oppressive or discriminatory rules and leaving the community to which she feels a deep connection. Should the state intervene to protect Ms Bruker from a rule that it regards as unfair? State intervention in this case might be seen as supporting her religious commitment or association by making life within the community more tolerable for her. But is it appropriate for the state to decide that a particular religious rule is unfair and dispensable because it is inconsistent with public conceptions of equality or freedom? The religious community is defined by its rules and practices, even if those

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[75] Syrtash, *supra*, note 46, at 59-60:

> Community social sanction traditionally used by fellow members of the Jewish community to force a husband to grant the *get* are in decline. Social measures such as moral persuasion and social boycott or ostracism are no longer widely employed; they are even irrelevant if the recalcitrant spouse can acquire a divorce in accordance with state law, but still confine his spouse to a religious marriage. Such sanctions also lose their effectiveness in a setting where an anchoring husband can maintain his group membership while supporting himself financially from outside the community.

rules are sometimes contested. The state is in no position to decide that some rules or practices are not essential to the community. While our commitment to religious freedom may rest in part on a recognition that the individual's religious commitment is deeply rooted, a part of her/his identity, it must also, and finally, rest on a belief that religious adherence is a personal commitment — a choice or judgment by the individual — that should be respected by the larger community. The freedom protects the individual's right to associate with others, who share a commitment to certain values, rules, and practices, and to disassociate if she/he disagrees with the religious community's values and cannot live under its rules.

Because the court is not simply removing a material barrier to exit but is instead seeking to limit an internal practice or norm that it regards as unjust, it cannot be sure of the effectiveness of its intervention. The divorce rules at issue in this case affect the status of individuals within the Jewish community, as married, or as adulterous (and in the case of children as illegitimate or as non-members). Yet how is the state to prevent this sort of internal status harm? In this case state intervention may be effective because many in the Jewish community — and not just the affected women — are willing to say that indirect state pressure on a husband to give a *get* does not make his "consent" involuntary. However, if the religious community (and in particular the religious authorities) took the view that any form of state pressure on the husband made the *get* invalid, it is difficult to see what the state could do to protect the interests of these women within the community.

The dissenting judgment's reluctance to enforce a contract with a religious object rests on an assumption that religious values or practices are different from other values or concerns, that they are based on faith or socialization and lie outside the realm of secular or public reason and so cannot be interpreted or applied by secular public institutions. Yet the strong position adopted by the dissent against state intervention into the affairs of religious communities seemed to be based on the very different view that these communities are voluntary associations: "Where religion is concerned, the state leaves it to individuals to make their own choices".[76] Ms Bruker, said the dissent, is bound by the rules of religious divorce only because she has chosen to be or because she wishes to

[76] *Bruker*, [2007] S.C.J. No. 54, 2007 SCC 54, at para. 132 (S.C.C.).

remain within the community. There is nothing to prevent her from leaving the faith community, if she objects to its rules and practices.

Justice Abella, in her majority judgment, was willing to treat the husband's promise as an enforceable voluntary obligation. Yet her enforcement decision was significantly based on a public policy favouring the removal of barriers to religious remarriage. At a deeper level, her decision to enforce the consent promise rested on a recognition that membership in a religious community is not simply voluntary and that individual members cannot easily exit the community or escape its rules. She was enforcing a voluntary obligation made by the husband, but she was also acting to mitigate the inequity of the divorce rules of Judaism.

The issue addressed only obliquely in this case is when, if ever, the state is justified in intervening to protect vulnerable group members from oppressive or unjust religious rules. A commitment to religious freedom involves respecting the individual's spiritual choices and commitments. However, to regard a religious community as an association that members join and quit at will, is to miss both the value of religious association and its potential to limit and sometimes even to oppress its members.