

# Cultural Membership in *Bruker v. Marcovitz*

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## Cultural Membership in *Bruker v. Marcovitz*

### 1. Introduction

Canadian courts have, on many occasions, been required to deal with cases involving issues of membership in a cultural group. In *Bruker v. Marcovitz*,<sup>1</sup> though the dispute was between two private individuals, the issue of membership in a particular segment of the Canadian Jewish community looms large. The case was brought by a woman whose husband refused to grant her a *get* (Jewish religious divorce), despite having contracted to do so. Both Ms. Bruker and Mr. Marcovitz were adherents of a form of Judaism that vests the right to initiate a religious divorce - granting a *get* - with the husband. It seems safe to assume that if membership within the particular segment of the Jewish community was not highly meaningful to Ms. Bruker, the dispute would not have progressed as far as it did.

Due to the particular facts in *Bruker*, the Court was not required to directly assess the legitimacy of the community's marriage and divorce rules or their relationship to continued membership in the community. Rather, the Court was able to focus on the familiar mechanism of a contract to reach its conclusions. Furthermore, Ms. Bruker did not ask the Court to compel Mr. Marcovitz to grant her a *get*, and by the time the case was heard by the Supreme Court of Canada, Mr. Marcovitz had already done so. Instead, she sought damages for the years when Mr. Marcovitz withheld the *get*, during which she could not remarry within her community and was thereby prevented from having legitimate children with another partner.

Nonetheless, the majority of the Court engaged in a public policy analysis in which it adopted a normative position on the people's actions in a religious context. By presenting four alternate models of ways in which courts have dealt with questions of communal membership, I

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<sup>1</sup> 2007 SCC 54, (2007), 288 D.L.R. (4th) 257 [*Bruker*].

will show how this marks an important departure from previously established modes of approaching community membership issues.

This paper will proceed as follows. In Part 2, I will set out the facts in *Bruker* in greater detail, as well as the majority and dissenting decisions. In Part 3, I will discuss out four alternative approaches to community membership: (1) Group-based Autonomy, (2) Group-based Autonomy by Consent, (3) Group-Based Autonomy by Consent + Natural Justice, and (4) Joint Governance. I will present critical perspectives on these approaches, and explore how the facts in *Bruker* might have been treated under each. In Part 4, I will argue that the dissenting judgment in *Bruker* fits fairly comfortably into the group-based autonomy approach, but that the majority judgment is harder to situate. While it bears the hallmarks of the group-based autonomy by consent model, it also adopts a normative stance on how religious rights should be exercised. I will argue that the Court in *Bruker* would have been more prudent to stay more closely within the limits of a consent-based approach, or, alternatively, to adopt the “transformative accommodation” approach advanced by Shachar. This would have avoided implicating the court in passing a value judgment on a religious matter.

## **2. *Bruker v. Marcovitz***

### **a. *The Facts***

Mr. Marcovitz married Ms. Bruker in 1969.<sup>2</sup> They had two children together. In 1980, the couple commenced divorce proceedings. They negotiated, with the assistance of their respective counsel, a separation agreement which “included terms regarding the custody of their two children, child support payments, and lump sum spousal support.”<sup>3</sup> As part of this agreement, Mr. Marcovitz agreed to appear before a *Beth Din* (rabbinical court) to grant a *get* to

Ms. Bruker.

Despite this, Mr. Marcovitz refused to provide the *get* for a period of 15 years. Ms. Bruker was, during this period, what the Jewish tradition calls an *agunah* - a “chained woman” who cannot remarry or have legitimate children in her community’s faith.<sup>4</sup> In 1989, Ms. Bruker commenced proceedings seeking damages for Mr. Marcovitz’s breach of the Consent. Eventually, in 1995, Mr. Marcovitz granted Ms. Bruker a *get*.<sup>5</sup>

### *b. The Supreme Court’s Response*

Abella J. wrote the majority opinion for the Court, in which six other justices concurred. She began her analysis by discussing amendments made in 1990 to the federal *Divorce Act*.<sup>6</sup> Effectively, these amendments provide courts with the discretion to dismiss any application for divorce made by a man who refuses to provide a *get*; the courts may also strike out any pleadings or affidavits filed by a man who refuses to provide a *get*.<sup>7</sup> According to the Ministers of Justice who participated in these amendments’ incorporation into the *Divorce Act*, the intention of the amendments is to prevent a husband from withholding a *get* in order to extract a more favourable separation agreement.<sup>8</sup> These amendments were made with the support of many Jewish community organizations, including the Toronto Board of Orthodox Rabbis.<sup>9</sup>

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<sup>2</sup> *Ibid.* at para. 21.

<sup>3</sup> *Ibid.* at para. 23.

<sup>4</sup> See Rabbi Jonathan Reiss, “Jewish Divorce and the Role of Beit Din” (1999) 60 *Jewish Action*, online: <[http://www.ou.org/publications/ja/5760winter/biet\\_din.pdf](http://www.ou.org/publications/ja/5760winter/biet_din.pdf)>, <<http://www.jlaw.com/Articles/divorcebeit.html>>.

<sup>5</sup> *Bruker*, *supra* note 1 at paras. 26-29.

<sup>6</sup> R.S.C. 1985, c. 3 (2nd Supp.).

<sup>7</sup> Ontario’s *Family Law Act*, R.S.O. 1990, c. F.3 makes similar provisions at s. 2(4)-(6) and s. 54(4)-(7). While the *Civil Code of Quebec*, that applied to the parties in *Bruker*, does not contain similar provisions, Quebec judges have readily employed the provisions of the *Divorce Act*, see e.g. *Droit de la famille 2296*, [1995] R.D.F. 796; *K.N.H. v. J.S.*, [2000] R.D.F. 268; *A.D. v. J.P.*, [2004] J.Q. no 1078 (Q.L.); *E.F. v. A.K.*, [2001] Q.J. No. 2067 (Q.L.). There is at least one case where the provisions of the *Divorce Act* and its analogues in Ontario’s *Family Law Act* were used to impose consequences on a woman who refused to consent to receiving a *get*, making it impossible for the couple to have a religious divorce: see *Tanny v. Tanny* (2000), 8 R.F.L. (5th) 427.

<sup>8</sup> *Bruker*, *supra* note 1 at paras. 7-8.

<sup>9</sup> *Ibid.* at para. 8.

Abella J.'s extended reference to these amendments is interesting because they did not directly apply to Ms. Bruker and Mr. Marcovitz. The couple had already been granted a divorce; there were no applications to dismiss or pleadings to strike out. Instead, the crucial matter for the Court was whether the couple's agreement was enforceable by the state courts. If so, the breach of the agreement was compensable in damages. Mr. Marcovitz argued that the enforcement of the agreement by the state courts would violate his right to freedom of religion. After concluding that the agreement was justiciable<sup>10</sup> and valid under Quebec law,<sup>11</sup> Abella J. interpreted the 1990 amendments to the *Divorce Act* as a statement of public policy. In her view, the amendments reflected 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."<sup>12</sup>

Abella J. concluded that Ms. Bruker's interests outweighed Mr. Marcovitz's right to freedom of religion. Ms. Bruker's interests, according to the Court, included the right to rely on Mr. Marcovitz's contractual undertaking<sup>13</sup> and "the ability to remarry and get on with her life in accordance with her religious beliefs."<sup>14</sup> Ultimately, the Court reinstated the damage award of the trial judge, which had been overturned by the Quebec Court of Appeal, of "\$47,500 in damages: \$2,500 for each of the 15 years between the Decree Nisi and the *get*, and \$10,000 for Ms. Bruker's inability to have children considered 'legitimate' under Jewish law."<sup>15</sup>

### *c. The Dissenting Judgment*

Deschamps J. wrote a dissenting opinion, with which Charron J. concurred. Deschamps

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<sup>10</sup> *Ibid.* at paras. 39-47.

<sup>11</sup> *Ibid.* at paras. 48-63.

<sup>12</sup> *Ibid.* at para. 81.

<sup>13</sup> *Ibid.* at paras. 79-80.

<sup>14</sup> *Ibid.* at para. 82.

J. began her analysis by noting the state’s stated policy of neutrality with respect to religion:<sup>16</sup>

“The requirements for issuing a *get* and the consequences of not having a religious divorce are governed by the rules of the Jewish religion. The state does not interfere in this area.”<sup>17</sup>

Ultimately, Deschamps J. held that Mr. Marcovitz’s agreement to provide a *get* to Ms. Bruker did not satisfy all the criteria of a civil contract in Quebec. In particular, the couples’ agreement was deficient in that it failed to disclose a valid “object.” The “object” of a contract, according to the Civil Code of Quebec, “is the juridical operation envisaged by the parties at the time of its formation.”<sup>18</sup> In Deschamps J.’s view, the parties did not have in mind any “juridical operation” with respect to the *get*, because

[o]btaining a religious divorce is not capable of legal characterization. The rabbinical authorities are not responsible for civil divorce in the way that certain religious authorities are for marriage. The act they perform or the judgment they render is not recognized in civil law. Neither the undertaking to consent to a religious divorce nor the religious divorce itself has civil consequences.<sup>19</sup>

Accordingly, this obligation could, at most, be considered a “moral obligation,” making it unenforceable in the state courts.<sup>20</sup>

#### *d. Beginning to Unpack the Majority and Dissenting Opinions*

What are the values espoused by the majority and dissenting judgments in *Bruker* as they relate to the court’s treatment of a cultural community’s membership rules? While this case does not involve the question of the expulsion of a group member or a person who was denied membership in a group, the incidents of membership are certainly at play.<sup>21</sup> Ms. Bruker’s desire

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<sup>15</sup> *Ibid.* at para. 33.

<sup>16</sup> *Ibid.* at para. 120.

<sup>17</sup> *Ibid.* at paras. 126, 129.

<sup>18</sup> Art. 1412 C.C.Q.

<sup>19</sup> *Bruker*, *supra* note 1 at para. 174.

<sup>20</sup> *Ibid.* at paras. 176-179.

<sup>21</sup> Interestingly, most (if not all) interpretations of *Halakha* (Jewish law) adopt the view that a Jewish person can never leave the community – a person who is born into a Jewish family is always Jewish in the eyes of *halakha*

to be granted a *get* is linked intimately to her desire to remarry within her religious community. This opportunity is open only to group members. Further, without the *get*, any children Ms. Bruker had with another partner would not be able to marry within the community.<sup>22</sup>

The majority of the court adopts an approach that encompasses two aspects. First, the majority displays a commitment to individual autonomy as regards the rules of membership in a cultural community, including the autonomy to alter those rules by agreement. This commitment is displayed in the majority's focus on the agreement signed by the parties.

Second, the majority advocates for modifications in community rules through the use of the state apparatus. The majority is openly supportive of the 1990 amendments to the *Divorce Act*; indeed, the spirit of these amendments is used to support the majority's disposition of the case. While these two aspects are not necessarily contradictory, there is a tension between them. If the Court were fully committed to a consent-based understanding of community membership rules, this implies that people should be allowed to be bound by rules of their choosing. The majority adds another component however: the state can legitimately structure this consent by creating incentives to play by other rules, which may not be the rules of the community.

In contrast, the dissenting judges adopt an approach that views cultural communities and state law as operating in separate worlds:

Mosaic law — like canon law — has no influence on secular law. The reverse is also true: secular law has no effect in matters of religious law. Where religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. This is left to religious authorities.<sup>23</sup>

This view leads to Deschamps J.'s conclusion that the problems of *agunoth* and *mamzerim*

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(Babylonian Talmud, Tractate Sanhedrin, p. 49a).

<sup>22</sup> See Reiss, *supra* note 4.

<sup>23</sup> *Bruker*, *supra* note 1 at para. 132.

(illegitimate children) are issues for “Hebrew law” to resolve.<sup>24</sup>

### 3. Four Approaches to Group Membership

The values animating the majority and dissenting judgments come into sharper relief when viewed in the context of the multiple approaches to rules of group membership adopted by other courts and commentators. Contrasting these approaches will help situate the positions adopted in *Bruker*.

#### a. Group-based Autonomy

In some cases, courts adopt a “hands-off” stance to questions of community membership. In *Santa Clara Pueblo v. Martinez*, for example, the Court dealt with the claim of a woman, Julia Martinez, who was a “fullblooded member of the Santa Clara Pueblo.”<sup>25</sup> The rules of membership of the Santa Clara Pueblo denied tribal membership to children of women who married outside the tribe. At the same time, however, membership was extended to the children of male Santa Clarans who married outside the tribe. Having had several children with a Navajo man, Ms. Martinez was concerned that her children could not vote in tribal elections, hold public offices within the tribe, remain on the Santa Clara reservation after their mother’s death, or inherit their mother’s home or “possessory interests in the communal lands.”<sup>26</sup>

Ms. Martinez alleged that the membership rule was discriminatory, and sought relief on the basis of the *Indian Civil Rights Act* (ICRA).<sup>27</sup> The ICRA did not expressly authorize the use of civil actions for the enforcement of its provisions. The Supreme Court was concerned, therefore, with whether the Santa Clara Pueblo tribe should be subjected to the jurisdiction of the federal

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<sup>24</sup> *Ibid.* at para. 184.

<sup>25</sup> *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670 at 1674 (1978) [*Martinez*].

<sup>26</sup> *Ibid.* at 1674.

<sup>27</sup> 25 U.S.C. §§ 1301-1303.

courts. Justice Marshall held for the majority that, in the absence of an explicit grant of jurisdiction, the rules of sovereign immunity apply to Native American tribes.<sup>28</sup> He held:

“subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,”... may “undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves.” . . . A fortiori, resolution in a foreign forum of intratribal disputes of a more “public” character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority.

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[E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.<sup>29</sup>

The US Supreme Court took a similar stance in *Mississippi Band of Choctaw Indians v. Holyfield*. There, the Court was concerned with the tribal membership of twin babies in a Native American tribe. The biological parents of the twins sought to have them adopted by a non-Native couple. The *Indian Child Welfare Act*<sup>30</sup> established that for children “domiciled” on a reservation, tribal courts had exclusive jurisdiction to determine questions of adoption. Further, the Act provided that “adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.”<sup>31</sup>

The biological parents of the twins went to some length to ensure that the children were born 200 miles from the reservation in order to avoid the finding that the twins were “domiciled” on the reservation.<sup>32</sup> In holding that the parents’ actions and intentions could not suffice to avoid the application of the *Indian Child Welfare Act*, Justice Brennan reasoned for the majority of the Court:

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<sup>28</sup> *Martinez, supra* note 25.

<sup>29</sup> *Ibid.* at 1677-1678, 1684.

<sup>30</sup> §§ 2-403, 101(a), 25 U.S.C.A. §§ 1901-1963, 1911(a)

<sup>31</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S.Ct. 1597 at 1602 (1989) [*Holyfield*].

Tribal jurisdiction... was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves.<sup>33</sup>

The majority decisions in both *Holyfield* and *Martinez* reflect the courts' choice not to interfere with the membership rules of a cultural community. Of course, it cannot be ignored that the courts were there dealing with Native American communities. The fact of prior occupation, the history of injustices suffered by First Nations under colonialism, and the fact that First Nations receive and distribute state resources among their members, set First Nations apart from other cultural communities.<sup>34</sup>

Nonetheless, for some proponents of group rights, the non-interventionist model set out by the US Supreme Court provides is attractive.<sup>35</sup> Indeed, for perhaps different reasons, this non-interventionist stance is reflected by the dissenting judges in *Bruker*. In *Martinez*, the Court's granting a large measure of autonomy is justified in part on the basis of the quasi-sovereign status of Native American tribes; in *Bruker*, the justification for autonomy stems from the idea that state rules and religious rules operate in isolation. Still, the result is similar. Justice Marshall's argument that autonomy allows the Santa Clara Pueblo to maintain a distinct political and cultural identity might be said to apply with similar force to the Orthodox Jewish community.

*Holyfield* provides a particularly powerful statement in favour of group-based autonomy.

While the biological parents attempted to circumvent the community's membership rules, the

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<sup>32</sup> *Ibid.* at 1601-1602.

<sup>33</sup> *Ibid.* at 1608-1609.

<sup>34</sup> Clearly, much more can be said about the uniqueness of these related and complex issues, but such comments are beyond the scope of this essay. For an illuminating argument about the specificity of indigenous difference in the Canadian context, see Patrick Macklem, *Indigenous difference and the Constitution of Canada* (Toronto, University of Toronto Press, 2001).

<sup>35</sup> See e.g. Chandran Kukathas, *The Liberal Archipelago : A Theory of Diversity and Freedom* (Oxford : Oxford University Press, 2003).

Court remained committed to the value of group-based autonomy. In contrast, in *Bruker*, where the couple consented to operate by a modified version of their community's rules, the majority of the Court is content to enforce this decision.

*i. Critiques and Rejoinders of the Group-based Autonomy Model*

The strong version of group-based autonomy espoused by the US Supreme Court in *Holyfield* and *Martinez* allows groups to adopt and enforce illiberal rules. In *Holyfield*, the freedoms afforded to non-Aboriginal parents who wish to place their children for adoption seem more extensive than those of Aboriginal parents. In *Martinez*, the male-preferential rules of community membership and entitlement to resources would likely not withstand constitutional challenge if they applied to a benefit emanating directly from the state, like citizenship.

Will Kymlicka argues against the rights of cultural communities to restrict the liberties of their own members. He contrasts these “internal restrictions” with what he terms “external protections,” which he defines as a “right of the group to limit the economic or political power exercised by the larger society over the group, to ensure that the resources and institutions on which the minority depends are not vulnerable to majority decisions.”<sup>36</sup> Kymlicka argues that while “external protections” can be consistent with individual liberty, “internal restrictions” are not. Kymlicka points to the practice of the Pueblo of disentiing members who do not share the tribal religion from community benefits as a clear example of an unacceptable “internal restriction.”<sup>37</sup> Presumably, such a position would apply to the male-preferential rules adopted by the Pueblo at issue in *Martinez*.<sup>38</sup>

At first glance, the membership rules of the Orthodox Jewish community at play in *Bruker*

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<sup>36</sup> Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at 7.

<sup>37</sup> *Ibid.* at 40.

<sup>38</sup> For another critique of the approach taken in *Martinez*, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural*

appear to fall under Kymlicka's rubric of "internal restriction." The women of that community are deprived of the freedom to remarry and have legitimate children in the community in the absence of a *get*, and men control the provision of *gittin*.<sup>39</sup> On closer inspection, however, it is not clear that these rules can be placed with certainty on either side of Kymlicka's internal/external divide. The rules of marriage and legitimate children might equally be seen as an "external protection" from the political influence of the dominant societal views on such matters. On this view, the rules are part of a broader scheme designed to ensure that members of the community only marry other members of the community, and that the traditional family structures of the community be maintained. As Ayelet Shachar notes, Kymlicka's "distinction between 'external' and 'internal' aspects of multiculturalism tends to collapse when put into practice."<sup>40</sup> In other words, most "external protections" limit the freedoms of group members to some degree, and can thus equally be characterized as "internal restrictions."

If Kymlicka's internal/external divide proves difficult to apply in practice, it at least highlights the consequences of group-based autonomy that are most disconcerting for liberal states. When presented with community rules that restrict the individual freedoms of group members, courts have adopted other ways of approaching issues of community membership rules; I now turn to these alternate approaches.

### *b. Group-based Autonomy by Consent*

In 1970, the Supreme Court of Canada dealt with a claim by four members of a Hutterite

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*Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 19.

<sup>39</sup> While an Orthodox Jewish man may find himself in a similar position if his wife refuses to consent to a *get* (see *Tanny v. Tanny*, *supra* note \*) there is an inequality between men and women in that only men may initiate the granting of a *get*

<sup>40</sup> Shachar, *supra* note 38 at 30. See also: Jacob T. Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000) at 158.

colony in Manitoba in the case of *Hofer v. Interlake Colony of Hutterian Brethren*.<sup>41</sup> Hutterite colonies are distinguished by a shared religious faith which values “a communal form of life in which private ownership is not recognized and all real and personal property is held for the purposes of the colony and for the benefit of each and all members thereof.”<sup>42</sup> To achieve this, the group established a corporation to hold the colony’s land in trust for the benefit of the colony members. When new members join the colony, they are required to sign the articles of association of the corporation. Ritchie J., for a plurality of the Supreme Court of Canada, held that these articles of association use language that conveys clearly to signatories that membership in the Church was required for continued membership in the colony.<sup>43</sup>

*Hofer 1970* centred on the expulsion of four members of the colony following their adoption of a different faith. The majority of the Court focused on the fact that the expelled members had consented to the rules of membership of the community by signing the articles of association, and held that the claim of the expelled members could not be accepted.<sup>44</sup> Ritchie J. held:

There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians, but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that *if any individual either through birth within the community or by choice wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so*. I can see nothing contrary to public policy in the continued existence of these communities living as they do in accordance with their own rules and beliefs, and as I have indicated, I think it is for the Church to determine who is an who is not an acceptable member of any of its communities.<sup>45</sup>

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<sup>41</sup> [1970] S.C.R. 958 [*Hofer 1970*].

<sup>42</sup> *Ibid.* at 966. See also Alvin Esau, “Communal Property and Freedom of Religion: *Lakeside Colony of Hutterian Brethren v. Hofer*” in John McLaren and Harold Coward, eds., *Religious Conscience, the State, and the Law* (Albany, NY : State University of New York Press, 1999).

<sup>43</sup> *Hofer 1970*, *supra* note 41 at 970-971.

<sup>44</sup> The claimants sought a declaration that they had been improperly expelled from the colony, and then an order winding up the colony’s corporation and the equal distribution of the corporation’s property among the members.

<sup>45</sup> *Hofer 1970*, *supra* note 41 at 974-975 (emphasis added).

Pigeon J. wrote a strong dissenting judgment. The crux of his disagreement with the rest of the Court was his concern for the freedom of religion of the expelled members, which, he held,

includes the right for each individual to change his religion at will. While Churches are otherwise free like other voluntary associations to establish whatever rules they may see fit, freedom of religion means that they cannot make rules having the effect of depriving their members of this fundamental freedom.<sup>46</sup>

It follows from this view that if the articles of association of the Hutterite colony purported to limit the abilities of its members to change their religious beliefs, such contracts would not be enforceable in the state courts.

There is a parallel between the dissenting judgments in *Hofer 1970* and in *Bruker*. Both judgments imply that rules of membership of a religious community are not to be enforced by state courts; rather, the religious community must employ internal mechanisms for this purpose. Implementing this view, however, raises problems. Though Pigeon J. held that the expelled members should be entitled to a declaration that they were still members of the colony, he declined to comment on the further remedies sought by the claimants, namely the winding up of the colony and the distribution of its assets.<sup>47</sup> Two outcomes seem possible: either the colony would remain intact, with expelled members able to use the communal property, or the assets of the colony would be distributed among the members. Both outcomes potentially infringe the religious and associational rights of the other members of the colony. Given that communal ownership is an important tenet of the Hutterite faith, a distribution of the colony's assets would compromise the religious beliefs of the remaining members of the colony. If the expulsions were simply quashed, this would impinge upon the community's ability to organize itself in a manner consistent with its religious doctrines.

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<sup>46</sup> *Ibid.* at 984.

Interestingly, though the dissenting view in *Bruker* shares the view of Pigeon J. in *Hofer 1970* that at least some religious agreements should not be enforced by state courts, its result with respect to deciding who sets the rules of membership of a cultural community are quite different. The dissenting judges' refusal to enforce the couple's agreement preserves the autonomy of the religious group to set its own rules of membership. The message to Ms. Bruker is that it is up to her community to alter its norms, and that alternatively, she is free to live by the state's norms.

In contrast, the majority view in *Bruker* has important justificatory parallels with the majority view in *Hofer 1970*. Both accept the proposition that individuals can enter into enforceable agreements involving aspects of their religion. A critical distinction is that the agreement in *Bruker* operated as a supplement to communal rules of membership by establishing an additional obligation owing by Mr. Marcovitz to deliver a *get*. On the other hand, the agreement in *Hofer 1970* established basic rules of membership, which the *Hofer 1970* claimants invited the Court to assess directly.

*i. Critiques and Rejoinders of the Group-based Autonomy by Consent Model*

Because of his view on "internal restrictions," Kymlicka is sympathetic to Pigeon J.'s dissent in *Hofer 1970*.<sup>48</sup> Kymlicka frames this issue as a conflict between the rights of an individual to refine his or her views and the rights of a group to adopt a particular conception of the good life. His view, however, implies a limit on individual autonomy as well: a person cannot effectively consent to be bound by rules of membership that would limit his or her ability to revise his or her religious views.

Further, Kymlicka's concern for the expelled members' economic well-being misses a

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<sup>47</sup> *Ibid.* at 992.

crucial piece of the puzzle. As Denise Réaume points out,

the state has various income support programs that could have been made available to [the expelled members]... one might argue that the Hutterites could fairly consider the welfare schemes that their taxes support to be adequate contribution to the relief of [expelled members'] urgent need in the aftermath of... expulsion.<sup>49</sup>

These economic concerns seem beside the point in assessing the facts in *Bruker*. Though Ms. Bruker sought damages, her husband's refusal to provide a *get* did not leave her financially destitute; their settlement agreement on support and custody had already been enforced by the courts. The fact that the Canadian state has taken jurisdiction over these aspects of marital breakdown may operate in a similar fashion as welfare programs in the *Hofer 1970* scenario to soften concerns with adopting a consent-based model. If an Orthodox Jewish couple were to explicitly or implicitly consent to that a religious divorce can only be instigated by the husband, concerns with state courts enforcing such agreements are mitigated by the role that the state has occupied in the division of property and child custody. Nonetheless, as will be seen in the following section, courts have not only been concerned with the substantive rules of community membership, but also *how* community enforces its own norms.

### *c. Group-Based Autonomy by Consent + Natural Justice*

In 1992, the Supreme Court of Canada again had occasion to deal with a dispute that arose on a Hutterite colony in *Lakeside Colony of Hutterian Brethren v. Hofer*.<sup>50</sup> This time, the dispute did not focus on the conversion of members of the community, but rather on conflicting claims to the patent rights in a hog feeder. Again, however, the issue before the Court was the

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<sup>48</sup> Kymlicka, *supra* note 36 at 161.

<sup>49</sup> Denise Réaume, "Legal Multiculturalism from the Bottom Up" in Ronald Beiner and Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Toronto: Oxford University Press, 2000) 194 at 200-201.

validity of the expulsion of certain members of the community.

In this case, the Court held that while the Hutterite colony could validly expel its members (consistent with the holding in *Hofer 1970*), the colony was nonetheless required to act in good faith and observe the principles of “natural justice.”<sup>51</sup> The most basic requirements of natural justice are “notice, opportunity to make representations, and an unbiased tribunal.”<sup>52</sup> These requirements have been described elsewhere as the “duty of procedural of fairness.”<sup>53</sup> They do not create substantive rights between parties, but rather provide procedural protections aimed at ensuring a fair process. In *Hofer 1992*, the Court held that the expelled members had received no notice that their expulsion would be considered at a meeting of the colony.<sup>54</sup> On this basis, the Court set aside the expulsions. While members could still be expelled, expulsions had to be carried out in accordance with the principles of natural justice.<sup>55</sup>

This decision raises the interesting question of whether the membership rules at issue in *Bruker* would be considered to comply with the requirements of natural justice. The rules of natural justice might be said to have little bearing on a situation where a woman finds herself trapped in a religious marriage to a man who will not provide a *get*. The problem, on this view, is that the woman does not have the substantive right to initiate religious divorce proceedings. On the other hand, can a woman, who cannot initiate *get* proceedings, be said to have an adequate opportunity to make representations to the *Beth Din*?

It is difficult to imagine a situation in which this question would be put before the courts. In order to determine the legitimacy of the rules themselves, it is likely that a woman would need

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<sup>50</sup> [1992] 3 S.C.R. 165 [*Hofer 1992*].

<sup>51</sup> *Ibid.* at para. 10. As the Court noted, the question of natural justice was explicitly raised in *Hofer 1970*; in the earlier case, Ritchie J. noted that the expulsion had been carried out in accordance with the principles of natural justice.

<sup>52</sup> *Ibid.* at para. 79.

<sup>53</sup> See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 18-28.

<sup>54</sup> *Hofer 1992*, *supra* note 50 at para. 155.

to sue an organ of the community, perhaps a *Beth Din* that denied her the right to initiate *get* proceedings. Further, if a woman was not suing her husband on the basis of a contract, she would likely have to make a novel claim in tort (or extra-contractual liability in Quebec) that both the husband and the *Beth Din* had deprived her of the civil right to remarry. The woman might, alternatively, impugn the rules under the aegis of human rights legislation, such as Quebec's *Charter of Human Rights and Freedoms*.<sup>56</sup> If such a situation arose, the state courts would be in the position of directly evaluating the religious norms of the Orthodox Jewish community. This would likely go beyond the court's comfort level of evaluating the procedural fairness of a community's rules.<sup>57</sup> Thus, an *agunah* making an argument from natural justice would have little chance of success in litigation. The "group-based autonomy by consent + natural justice" approach may thus ultimately not be helpful in the context of a dispute over a *get* in the state courts.

#### ***d. Joint Governance***

Ayelet Shachar has proposed an alternative model for dealing with questions of community membership. She gives credence to the important role that cultural membership plays in peoples' lives, but is concerned that vulnerable individuals, most often women, are put in disadvantaged positions by groups' adherence to traditional religious and cultural rules. Her approach, "transformative accommodation," involves dividing up jurisdiction in relation to particular matters between the state and the cultural community. Instead of giving each entity jurisdiction over a particular matter, she suggests dividing matters into sub-matters. For example, with respect to marriage, Shachar writes:

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<sup>55</sup> *Ibid.* at para. 170.

<sup>56</sup> R.S.Q., c. C-12. See the discussion below in Part 4.

<sup>57</sup> See David Schneiderman, "Associational Rights, Religion and the *Charter*" in Richard Moon, ed., *Law and*

There is a demarcating function which regulates... the change of one's marital status or one's entitlement to membership in a given community. And then there is a distributing function which covers... the definition of the rights and obligations that married spouses are bound to honor... These "demarcating" and "distributive" functions parallel the two key legal aspects of marriage and divorce rules: status and property relations... The special feature of sub-matters – the fact that each is necessary to making a given social arena work as a whole – provides an important new way to slice the jurisdictional pie, so that each competing entity has a vital share in the governance of a social arena, yet none gets a monopoly over it.<sup>58</sup>

Shachar argues that this approach will create incentives for both the state and cultural communities to "become more responsive to *all* [their] constituents."<sup>59</sup> To achieve this, Shachar suggests allowing members of cultural communities various occasions to "choose between the jurisdiction of the state and the *nomoi* group... As a last resort, they can discipline the relevant power-holder by 'opting out' of a jurisdiction."<sup>60</sup> The option available to an individual of opting between state and community jurisdiction will engender, according to Shachar, a competition between the state and the community to retain the individuals subject to their jurisdiction.

What would adopting Shachar's "transformative accommodation" approach mean in the *Bruker* scenario? Arguably, aspects of Shachar's approach already form part of the Canadian legal landscape. For marriages on the civil register, distributive issues (property distribution, spousal and child support, and custody issues) are matters within the state's jurisdiction. For cultural communities (other than Aboriginal communities, where membership is partly legislated and can be subject to judicial review), the demarcating aspects of marriage are left in the hands of the community: Orthodox rabbis can refuse to solemnize marriages that their communal rules do not recognize, such as inter-faith marriages and same sex marriages. Individuals can, however, marry each other in civil ceremonies, and avoid these restrictions. This latter is

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*Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 65 at 75.

<sup>58</sup> Shachar, *supra* note 38 at 119-120.

<sup>59</sup> *Ibid.* at 117.

consistent with Shachar's proposal that individuals be granted opportunities to "opt out" of community norms.

The 1990 amendments to the *Divorce Act* operate as a link between communal rules and state rules, and are thus harder to fit into Shachar's paradigm. On one hand, this would seem to encroach on a community's ability to regulate its own rules of membership. On the other hand, because the amendments were adopted with the apparent consent of Canada's Orthodox Jewish communities, they may be seen as an example of the community becoming more responsive to the needs of its members. The amendments provide a meaningful opportunity for Orthodox Jewish women to opt out of marriages without opting out of the community by providing an incentive for husbands to grant a *get*.<sup>61</sup>

#### **4. Situating *Bruker* Among the Models**

Where do the majority and dissenting judgments fall among the four models outlined above? As noted above in section 3.b, there is a strong affinity between the dissenting judgment in *Bruker* and the dissenting judgment in *Hofer 1970*. These judgments share the view that obligations of a religious nature should be enforced only by religious institutions, not by the state courts. This can be seen as a particular type of group-based autonomy; it views state norms and religious norms as operating in separate spheres, with no overlap. It is not a formal division of jurisdiction; indeed, it is likely that, on this view, if a religion purported to distribute a couple's assets upon the dissolution of a marriage, the state would step in to ensure the fairness of this

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<sup>60</sup> *Ibid.* at 122. Shachar uses the term *nomoi* group to refer to a community with distinct norms and practices.

<sup>61</sup> See also Rosalie Jukier and Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What should we *get* out of *Bruker v. Marcovitz*?" (2008) Sup. Ct. L. Rev. (forthcoming): "religious women may have the motivation and capacity to mobilize and harness energies for change. They may be the ones who initiate transformation, and who may identify the state as an effective partner. The story of s. 21.1 of the Divorce Act, enacted largely through the efforts of orthodox Jewish women, underscores that kind of potential." Alternatively, Adrienne Barnett has proposed viewing women who use state laws in attempts to obtain a *get* as engaging in "an act

distribution. The division of assets would need to be formalized in a manner cognizable by state courts, and only the “non-religious” aspects of the agreement would be enforceable. Thus, the community is given a zone of autonomy, but it cannot expect to exceed this realm.

Abella J.’s decision is harder to situate. With its focus on the contract between Ms. Bruker and Mr. Marcovitz, it has much in common with the “group-based autonomy by consent” model. But there is an additional current in the decision that does not sit comfortably within this approach. As noted above in section 2.b, Abella J. cites public policy concerns in support of the decision to hold Mr. Marcovitz liable in damages. She notes:

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 [Mr. Marcovitz].

Section 21.1 of the *Divorce Act*, which gives a court discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage, is a clear indication that it is in this country that such barriers are to be discouraged. As the comments of the then Ministers of Justice show, these amendments received overwhelming support from the Jewish community, including its more religious elements, reflecting 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.*

We also accept the right of Canadians to decide for themselves whether their marriage has irretrievably broken down and we attempt to facilitate, rather than impede, their ability to continue their lives, including with new families. Moreover, under Canadian law, marriage and divorce are available equally to men and women. A *get*, on the other hand, can only be given under Jewish law by a husband. For 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... The 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.<sup>62</sup>

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of resistance against oppression within their own culture.” (Adrienne Barnett, “Getting a ‘Get’ – The Limits of Law’s Authority?” (2000), 8 Fem. Legal Stud. 241 at 253.

<sup>62</sup> *Bruker*, *supra* note 1 at paras. 81-83 (emphasis added).

The public policy rationale appealed to by Abella J. goes well beyond relying on the consent of individuals to frame the rules of membership in their cultural communities. Abella J. takes the stance that husbands who refuse to provide a *get* to their wives commit a wrong that offends their wives' equal status as persons, religious liberties, and rights to remarry. While this logic certainly supports the enforcement of the contract signed in *Bruker*, it is not directed at the contract *per se*; it could equally support a woman's request to compel her husband to provide a *get* even in the absence of an agreement.<sup>63</sup> While Mr. Marcovitz may have had "little to put on the scales,"<sup>64</sup> it is hard to imagine that even a husband who had not signed such an agreement could raise an argument that would outweigh the public policy concerns articulated by Abella J.

This is an important step out of the "group-based autonomy by consent" model; it supplements the consent-based approach with a normative view of how men should behave with respect to religious divorces. Abella J. is careful to state that her view on this matter is consistent with the view of a broad cross-section of the Jewish community in Canada, and thus grounded the consent, writ large, of the Jewish community. However, her approach is also a clear disapproval of any man who avails himself of the religious rights offered by Orthodox Judaism. Thus, while Abella J.'s approach shares many common themes with the majority judgment in *Hofer 1970*, it also takes an explicit position on a particular religious issue. Notably, however, it does so in a context where the legislature had done what the courts could not have done on their own. The 1990 amendments to the *Divorce Act* allow courts to exert state pressure upon a man to provide a *get*. In this way, Abella J.'s judgment also tracks the minority judgment of Hall J. in *Hofer 1970*, who held:

While agreeing that this appeal fails, I must, however, express my abhorrence at the

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<sup>63</sup> For a different view, see Schneiderman, *supra* note 57 at 77.

<sup>64</sup> *Bruker*, *supra* note 1 at para. 79.

treatment accorded the appellants by their erstwhile co-religionists. The insults and gross indignities inflicted on these men and their families... is foreign to the whole concept of life in Canada... The rigidity of the law... should, I think, be softened by appropriate legislation.<sup>65</sup>

On the other hand, though Abella J.'s public policy rationale could be raised in support of a court's intervention in the absence of a contract, this does not mean that the court would have the necessary tools intervene. Could an *agunah* sue on the alleged wrong of being denied the opportunity to remarry, as suggested above in section 3.c? Such a claim would certainly be novel, and it is difficult to imagine a court finding a legal wrong in such conduct.<sup>66</sup> Could a woman in Ms. Bruker's make a complaint pursuant to legislation such as Quebec's *Charter of Human Rights and Freedoms*<sup>67</sup> to make a complaint against her husband? The statute applies as between private parties, and the rights it guarantees include freedom of religion and the right to dignity,<sup>68</sup> which figure prominently in Abella J.'s reasoning. It also provides that "[m]arried or civil union spouses have, in the marriage or civil union, the same rights, obligations and responsibilities,"<sup>69</sup> and that "[a]ny unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom."<sup>70</sup> Taken together, these provisions could provide a court or tribunal with a compelling basis on which to order a husband to provide a *get*.

A different, but similarly challenging question is raised by the prospect of an *agunah* seeking the specific performance of a contractual promise to provide a *get*. The answer in the Quebec context would seem clear, at least from a pure contract law perspective. Under the *Civil*

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<sup>65</sup> *Hofer 1970, supra* note 41 at 975.

<sup>66</sup> On the other hand, as Jukier and Van Praagh note, French courts have found an extra-contractual wrong in the refusal to provide a *get*, *supra* note 51.

<sup>67</sup> R.S.Q. c. C-12

<sup>68</sup> *Ibid.* at ss. 3, 4

<sup>69</sup> *Ibid.* at s. 47.

<sup>70</sup> *Ibid.* at s. 49.

*Code of Quebec*, a person who is owed a contractual obligation has the clear right to enforce the specific performance of that obligation.<sup>71</sup> If the contract is justiciable and enforceable, as held by Abella J., it is difficult to imagine a legal reason to deny specific performance. As regards the common law provinces, while the law of specific performance may be somewhat more complicated, this does seem like a situation where damages are insufficient and recourse to specific performance would be justified.<sup>72</sup>

Both the above scenarios raise the possibility that a husband who refused provide a *get*, and also refused to comply with a court order to do so, could be subject to imprisonment for the exercise of a religious right. This raises the stakes of the discussion, and may give pause to reconsider the strong language of Abella J. in *Bruker*. If faced with either of the above scenarios, a reversion to a more strictly consent-based approach would be a more prudent path for the courts to follow. While this would still support the specific performance of an agreement to provide a *get*, it would also disentangle the Court from asserting a position on how a right available under religious law ought to be exercised, and thus interfering with religious practices. Put otherwise, a stricter focus on consent would have led to the same result in *Bruker*, without some of the troubling implications of Abella J.'s public policy analysis.

An additional consideration is worth bearing in mind, however. Under Jewish law, the *get* must be provided voluntarily in order to be valid. On some views, this voluntariness is vitiated by a court order.<sup>73</sup> Thus, some interpretations of Jewish law can limit the effectiveness of a

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<sup>71</sup> Art. 1590 C.C.Q.

<sup>72</sup> Indeed, as Abella J. noted, American courts have ordered the specific performance of a prenuptial agreement in which the parties consented to appear before a *Beth Din* in the event of marital breakdown (see *Bruker*, *supra* note 1 at para. 88; see also *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983); *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976) (aff'd, 394 N.Y.S.2d 253 (App. Div. 1977)); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ch. 1981)). The English High Court has, however, come to the opposite conclusion, but based in part on the view that pre-nuptial agreements are not specifically enforceable under English law: *N. v. N. (Jurisdiction: Pre-Nuptial Agreement)*, [1999] EWHC Fam 838, [1999] 2 F.L.R. 745.

<sup>73</sup> See Rabbi Michael J. Broyde, "The 1992 New York Get Law" (1995) 29 Tradition 5; Barnett, *supra* note 51 at

state-based attempt to directly compel a religious divorce; even attempts to hold a couple to their agreement might not be able to assist an *agunah* in all cases. Employing the force of the state may be counterproductive, as state attempts to make liberalize traditional cultural norms more through court orders might cause cultural communities to adopt a reactivist, conservative stance in the name of protecting their culture.<sup>74</sup>

This fact favours Shachar's transformative accommodation approach. Providing meaningful opportunities for group members to opt out of their traditional norms, and leaving the demarcating functions of religious divorce matters to the cultural community, may create the right set of incentives for communities to become more responsive to the needs of their members. While the 1990 amendments to the *Divorce Act* can serve as an example of a community becoming more responsive to its own members, the "public policy" that animates them may be more nuanced than the Court appreciated. They might be more appropriately seen as a power sharing arrangement between the community and the state, and Abella J.'s reliance upon them may be somewhat misplaced in the *Bruker* context, especially given that they did not directly apply to the facts.

## 5. Conclusion

I have argued that the majority decision in *Bruker* cannot be neatly categorized as an expression of any of the four approaches to community membership identified above. While Abella J.'s decision reflects a commitment to honouring the intentions of couples who make marital agreements with religious aspects, it also makes an important step beyond the commitment to consent. Abella J. articulates a general statement of public policy as regards a husband's insistence on the rights afforded him by his religious tradition. This raises at least

three problems. First, in other cases, the line between disapproval of a person's behaviour and disapproval of religious rules themselves may be harder to draw. Second, stakes may be higher where a recalcitrant husband refuses to comply with a court order and imprisonment is a real possibility. Third, a court's attempt to steer the norms of a cultural community in a particular direction may give rise to resistance on the part of the community, and lead to a further entrenchment of male-preferential norms. A stricter focus on the consent of the parties would allow a broader scope for religious freedom, while allowing the court to ensure that all participants are willing. Alternatively, following Shachar, allowing the community to assume responsibility for the demarcation of its members and their membership rights, while allowing community members a meaningful opportunity to opt out of community rules, may yield transformations in the community's understanding of its own rules.

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<sup>74</sup> See Shachar, *supra* note 38 at 37; Jukier and Van Praagh, *supra* note 51.