When I first began teaching about the injustices of Jewish divorce, I had no idea I would end up on Parliament Hill in Ottawa twice: once giving testimony for national legislation and years later submitting an affidavit for a Supreme Court decision. I was naive and optimistic, but the divorce law of Canada was changed and the Supreme Court of Canada upheld a decision of damages in a very messy and very old divorce case.

We, the Coalition of Jewish Women for the Gett amongst others, went up against the cherished principles of separation of Church and State and Religious Freedom to argue for the Human Rights of Agunot—women chained to dead marriages—and we prevailed. But let me begin at the beginning and clarify some basic details.

The problem of agunot is found in Jewish law (halakha). Only Jewish law can solve it! Jewish law is the source of the problem and while in the past it may have dealt with it, today it is failing that task. Hence many of us here today have been working to implement solutions both temporary and definitive.

Jewish divorce, like any other, can be simple or complicated; a release or a tragedy; straightforward or a swindle. It can set people free to resume or reinvent their lives, or it can embroil individuals and families in a never ending cycle of abuse. The intent of rabbinic Judaism

1 An agunah (singular) is a woman who cannot remarry because her husband is unable or unwilling to give her a get (Jewish divorce). The term actually means anchored or tied down and is first found in verb form in the biblical story of Ruth (1:13). The original talmudic use of the word was limited to cases in which the man had disappeared and literally could not act as a legal instrument in the Jewish divorce proceedings. In America, popular usage has expanded the term to apply to all cases of women who are unable to remarry because their husbands will not acquiesce and give the divorce document. Since the rabbinic court cannot authorize the writing of the get, and only a man can initiate the proceedings, problems arise most frequently for women although the term can be applied to men (agun).
was to ensure a tolerable disengagement. Regrettably, the current implementation of the halakhic (Jewish law) system does not meet that minimal standard.

Many individuals, women and men, rabbis and volunteers, have labored to maintain a fair practice. And in some cases it does work.

However, the biblical account of divorce found in Deuteronomy, while accepting marital break ups, establishes a procedure that is at the heart of the problem. “When a man has taken a wife, and married her, and it come (sic) to pass that she find (sic) no favour in his eyes, because he has found some unseemliness in her: then let him write her a bill of divorce, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man’s wife.” (Deut. 24: 1,2) Clearly, the man is the initiator, the actor. And while rabbinic law established that there need be no grounds for divorce other than mutual consent, it enforced the structured order of the verse: the male is the active legal principle. He must initiate, author, and give the document to her. She receives it and only then is free to resume control.

While in most cases Judaism’s tolerant acceptance of divorce enables a decent split, in too many situations this male prerogative becomes the means for extortion, vengeance and affliction. Certainly not a biblical ideal. Thus, although her consent to the divorce is necessary, the woman is still at the mercy of the man. In the course of the centuries long development of Jewish law, many improvements have been incorporated into the system in an attempt to limit the man’s unilateral power and prevent the misery. The rabbis were aware of and sensitive to women’s vulnerability. But...

A Jewish divorce requires a get, a document that a man freely gives to his wife and she must voluntarily accept. Without this document neither partner may remarry according to classic Jewish law. Today, this affects Conservative, Orthodox and all Israeli Jews. The Reform movement often relies on local civil divorce courts and the Conservative movement has empowered its central court to intervene and act unilaterally to effect a divorce when there are insurmountable problems. But throughout Israel and in the Orthodox community outside of Israel, the pattern of insisting on the biblical directive has left too many women agunot.

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The problems for women within this system are obvious. Procedurally dependent on her husband and on a rabbinic court, her future children also become pawns in this tug of war. If a woman without a get gives birth, her newborn children will be considered the product of an adulterous union and hence be categorized as mamzerim, Jews who are not allowed to marry other Jews. A mamzer can be a rabbi, but can only marry a non Jew or another mamzer. There is no remedy. To be sure, both a man and a woman can be found guilty of adultery, but the category depends on the marital status of the woman only. The applicable result is that the woman suffers the most from an incomplete divorce.

The irony is that if the Jewish process of divorce was established to set one free, even to encourage remarriage, the current reality is one in which the process itself has created a group of people who are not free. And the numbers and problems are increasing.

Exact numbers are actually hard to come by, but the numerical dimensions of this issue should not become the primary consideration. We cannot subordinate our concerns for human rights to arithmetic. Our social activism should not become a matter of counting heads. Where
there is injustice, we are commanded to pursue justice. I personally know many silenced women suffering the fate of an anchored life. Their stories not their numbers are our call to action.

For Jewish society today, for all of us, divorce constitutes a major moral problem. Not because of the increase in numbers, nor because of the guilt of either party - but because of the inequities of the process and the indifference of the larger community. People no longer married, no longer living together, are still tied to each other. Bound together and abandoned. The credibility, viability and continuity of Judaism is on the line.

The claims of justice and morality are displaced by the cries of the agunah. That is why, in the absence of a accessible halakhic solution, some of us decided to use any means available to advance the cause of any woman who was suffering this kind of religiously endorsed abuse.

In Canada, in the 1980's, (after I raised this topic in Toronto) some activists worked out a legal solution for Ontario family law\(^2\). We in Quebec wondered if we should do the same in 1985 but were persuaded to go national. By 1990, an amendment to the federal divorce law, 21.1, was enacted. It stated that no spouse shall maintain barriers to the religious remarriage of their spouse that is within their control. This legislation has been enormously successful, though there are still some lawyers who do not know how to use the law on behalf of their client (usually the woman). Its mere existence has reduced the use of extortion in gett cases and avoided many long years of waiting for many women. According to one study and our rough estimate 2/3 of the cases have been eliminated before they even get to court. It is an interesting piece of legislation that has been analyzed\(^3\) and borrowed and criticized. It was carefully constructed so as not to violate the Canadian Charter of Rights and Jewish legal concerns. It involves affidavits and court procedures to ensure that the respondent spouse can present a case for non compliance. So far noone has successfully argued that they should be allowed to maintain barriers to the religious remarriage of a spouse after a civil divorce. Arguments for religious freedom fail to convince when someone is impeding the religious freedom of their ex spouse. In effect, the gett is the mere voiding of a previously entered into contract. The ceremony is a ritual within Jewish law but it does not require any religious act or worship.

Often Americans do not understand how this law does not violate the Church State separation principle. The concerns over these issues are certainly different in Canada, but the Attorney General at the time also felt that it was important to draft legislation so that no one would use religion to”violate the integrity of the civil process.” “A spouse should not be able to refuse to participate in a Jewish religious divorce...in order to obtain concessions in a civil

\(^2\) See John Syrtash, Religion and Culture in Canadian Family Law.

divorce. We all felt that it was the government’s duty to protect its citizens from extortion, and that the civil divorce was meant to allow her to marry etc., should she so desire. The state took on a protective role while avoiding a clash with religious authorities by making sure there was no conflict. So instead of worrying about separation of Church and State, our government worried about the misuse of state procedures and the limiting of her freedom to remarry.

But freedom of religion was again a critical factor in the 2007 case before the Supreme Court: Bruker v Markovitz

This case is a complicated and unusual one. Many think it was about the law – 21.1—just discussed It was not (although the justices do discuss it). The man signed a separate contract stating that he would give a gett immediately. He gave the gett 15 years later. She sued for damages. Is a contract whose basic provision is a religious ritual act justiciable? That is the heart of the matter!

The Case

Stephanie Bruker married Jason Marcovitz in 1969. Mr. Marcovitz had been previously married and had granted his first wife a gett. Divorce was granted 1981. In 1980 they had negotiated a contract that included (paragraph 12) an agreement to appear before rabbinical authorities to obtain the gett immediately upon granting the decree nisi. The gett was not given until 1995 despite her repeated requests. During this time there were several court proceedings and accusations.

Courts

In Quebec Superior Court, Judge Mass ruled that Marcovitz signed a civil agreement, which voluntarily moved his obligation to appear before a rabbinical court into the realm of the civil courts. He found the consent therefore valid and binding. Jewish persons and institutions were involved but the courts were not being asked to examine the principles of Jewish law. He therefore, ordered a total of $47,500 in damages.

Mr. Marcovitz appealed and won the appeal. Judge Hilton found that since the fundamental issue of the agreement of paragraph 12 is a religious ritual, the form (ie contract) is not relevant, and therefore the agreement is unenforceable by the courts. This decision viewed Marcovitz’ signed promise in a contract as a moral obligation but not a contract that has any legal significance.

Issues

1. Should a contract be justiciable if entered into voluntarily no matter what? No. it cannot violate Canadian law. Ok. But Marcovitz agreed to this knowingly. This was part of a long deal in which compromises were negotiated and accepted. Conceivably, he got something in return for this promise. Why should it be moral with no legal impact or consequences?
2. If a contract’s base is religious and does not violate the law, is it justiciable?

4 Minister of Justice Doug Lewis, February 15, 1990.
Are all contracts with religious factors null and void? If I hire a caterer and sign a contract for a kosher meal and they bring non kosher food, do I have no recourse to law? Can a Church not work out contracts with its personnel or for weddings to be done according to certain rituals, or is that not justiciable simply because religion is involved? Surely separation of Church and State does not deteriorate into such legislative chaos.

3. Is freedom of religion the issue here as has been argued?

**What is freedom of religion:** to be free to practice one’s own religion and to be free from any form of established religion or compulsory religious performance.
But religious freedoms are subject to limitations when they collide with public rights and interests.

a. Marcovitz willingly signed the agreement initially.
b. he once gave a gett.
c. what religious freedom is being denied him? (One of the justices kept asking his counsel this in court)
In fact, this is a very important point. The gett is a document that voids a previous document. It sets someone free. What sort of religious freedom is at stake here. Even if he does not wish to appear he can appoint a representative. He might have argued before the judge why he should not be forced to give her a gett, but had no argument in terms of freedom of religion to present. Significantly, Marcovitz claims to be an Orthodox Jew.
See page 33 in which the Judge notes that he never offered a religious reason for not giving the gett. His reasons pointed at revenge.
d. he is denying her religious freedom to remarry and have children in the Jewish tradition.
In a previous Supreme Court decision, the court ruled that freedoms are granted “provided ... that such manifestations do not injure his or her neighbors or their parallel rights ....” Freedom of religion can be limited if the exercise is harmful to others. (Quebec charter 9.1)
Thus, his freedom of religion must be weighed against hers and his power over her.
Interestingly, the court cited Israeli cases in terms of freedom of religion and we believe that Israeli courts cited our laws in their damages case.
e. what changed between 1980 when he refused to give the gett and 1995 when he gave the gett in terms of his religious freedom???

4. Why did he deny her the Gett?
The only reasons given were her lousy character, her lack of religion, her poor behaviour. “She stole from me, she alienated my kids, she harassed me...” No real reason in terms of law was given other than to renegotiate the civil agreement. In other words, he wished to use the gett “to obtain concessions in the civil divorce” from 1981. Extortion. Exactly what the Justice Minister established 21.1 to eliminate.

5. The Supreme Court Decision
It took the Court over one year to produce this decision.
a. The decision of 7 Justices is that it is justiciable to remove religious barriers to the remarriage.
b. The law today is that if a man signs a contract that he will give a gett, and he then refuses, the
woman can sue him for damages in a court of law.
c. The form of the promise counts. A civil contract is to be upheld and not considered merely moral. The agreement’s “religious elements does not thereby immunize it from judicial scrutiny.”
d. The court also found that the agreement was valid under Quebec law. Justice Abella noted that moral obligations can be transformed into civil ones and enforceable by the courts. Examining contract law, “the religious aspect of paragraph 12 should not be construed as a barrier to its civil validity... as there was an exchange of consents between persons having capacity to contract...”
e. There is dissent on one complicated aspect of contract law, that of cause and object. Marcovitz argued that the object of paragraph 12 was contrary to “public order” and therefore, rendered the clause illegal. But Justice Abella argued that given 21.1 it is clear the giving of a gett is consistent with and in the interest of public order. How can an agreement to give a gett breach the principle of public order?
f. The law exists to protect its citizenry from legal and religious abuse. “On the contrary, Parliament manifested a clear intention to encourage the removal of religious barriers to remarriage. Moreover, ...the enforceability of a promise by a husband to provide a gett harmonizes with Canada’s approach to religious freedom, to equality rights, ..”

g. Judge Abella cites many international courts and cases in which damages are awarded; she also refers to the famous Israeli one that Susan Weiss was so successful with. (p39) her position is that the international cases support the view of the court that “an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies.”

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6. The Dissent
Two Justices dissented. They argue the form, the contract does not count. The substantive issue is that religion is involved and the State cannot interfere. Obviously, they do not see that he is using freedom of religion to restrict her freedom of religion. They claim that the question is whether the civil court can be used as ‘a weapon to sanction a religious undertaking.’ 41 For them freedom of religion means the court has to remain neutral in all matters of religion. They maintain a very strict non-intervention in all areas of religious practice.

7. 21.1 is present in the decision. Justice Abella uses it as supportive in parts of her argument. Justice Deschamps argues it was not to be used as its constitutionality was expressly excluded from this decision. The disagreement is complex and not necessarily relevant now.
8. The argument over equality
Justice Abella added another element to her 64 page report. Aside from the contractual element of the case she found that the respondent violated the constitutional and legal commitment to

5Justice Rosalie Abella p.32
equality, religious freedom and autonomous choice in marriage and divorce. She claimed these breaches weighed most heavily against him. These were not argued by the appellant nor by the intervener. She concludes that the appellant remained restricted in her personal life despite being civilly divorced because she could not remarried and have children. In fact, in the Orthodox community she could not even date. Although the problem is due to her allegiance to Jewish law, it was in Mr. Marvcitz’ control whether she would be free to exercise her rights. This unfair or “unjustified and severe impairment of her ability to live her life in accordance with this country’s values and her Jewish beliefs” rendered him responsible in the courts opinion. It ruled that any infringement of his freedom of religion was “inconsequential compared to the disproportionate disadvantaging effect” on her life.

9. The Justices then ruled on the issue of damages. Damages are available for breach of contract. This is a very important point in terms of both civil and Jewish law. If the money was to be used as a fine then it might be seen as coercive, as forcing him to give her a gett. That would render the gett invalid. Every gett must be voluntarily given. But breach of contract is a different matter as is money promised to pay for marital maintenance until a divorce is granted. Those funds that are reasonable are not seen as coercive and do not invalidate a gett.

Conclusion
In conclusion, this case brought forward years of arguing about the intersection of Jewish law and civil law. It is obvious to everyone that the problem of Jewish divorce lies solely within Jewish law. There can be no absolute solution without a Jewish legal resolution. Many – rabbis, legal scholars, activists – are working towards that end. There are many possible paths such as annulments, forcible gittin, conditional marriages or divorces, empowering courts to act when the man refuses, etc. I would like to see a new format that enables either spouse to initiate simpler divorce proceedings. But that will not come quickly. I cannot wait. I cannot in good conscience ask a woman to put her life on hold to wait. If I want to help, I must use whatever means are practicable and available. Canadian law has just announced yet again that it is able to help its citizens.

But the importance of this decision goes far beyond Jewish divorce in Canada. -It situates the relationship between church and state where it should be: the state has a vested interested in certain ways religion is used and applied. Sometimes the state refuses to allow religious law to operate, as was seen in Ontario’s recent decision to exclude religious courts from acting as arbitrators in family law matters. This is the law in Quebec also. But at other times and in other cases, the state takes a very active role in welcoming and working with religious laws, educators and legalists. The process depends on a case by case situation with the government deciding what is best for its citizens and in what ways is it mandated to act as protector.
-This decision significantly applies freedom of religion so that it clearly cannot be used to shirk from an obligation or restrict or disadvantage another.
-Moreover, the court’s decision guarantees the obligatory and legal nature of signed contracts. There is no wiggle room in a contract even if the object is a religious item as long as the court is not asked to enter into determining religious value or meaning.
-The court followed through on Canada’s tradition of multiculturalism. Different people with different faiths and practices can live here and the law can protect them and recognize their legal
needs here too.
- The court joined international law makers in extending a protective shield to Jewish women while waiting anxiously for rabbinic law to eliminate the need for it.
- Finally, the court publically and officially applied the principle of equality as a Canadian value.