V. RELIGIOUS STATUS AND SECULAR CONSTITUTIONAL LAW

Dr. Rowan Williams, The Archbishop of Canterbury
Civil and Religious Law in England: A Religious Perspective[*]

The title of this series of lectures signals the existence of what is very widely felt to be a growing challenge in our society—that is, the presence of communities which, while no less "law-abiding" than the rest of the population, relate to something other than the British legal system alone. But, as I hope to suggest, the issues that arise around what level of public or legal recognition, if any, might be allowed to the legal provisions of a religious group, are not peculiar to Islam. . . .

There is a position—not at all unfamiliar in contemporary discussion—which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state, in such a way that any other relations, commitments or protocols of behaviour belong exclusively to the realm of the private and of individual choice. As I have maintained in several other contexts, this is a very unsatisfactory account of political reality in modern societies; but it is also a problematic basis for thinking of the legal category of citizenship and the nature of human interdependence. . . . [Anthony Bradney offers] some examples of legal rulings which have disregarded the account offered by religious believers of the motives for their own decisions, on the grounds that the court alone is competent to assess the coherence or even sincerity of their claims. And when courts attempt to do this on the grounds of what is "generally acceptable" behaviour in a society, they are open, Bradney claims to the accusation of undermining the principle of liberal pluralism by denying someone the right to speak in their own voice. The distinguished ecclesiastical lawyer, Chancellor Mark Hill, has also underlined in a number of recent papers the degree of confusion that has bedevilled recent essays in adjudicating disputes with a religious element, stressing the need for better definition of the kind of protection for religious conscience that the law intends. . . .

The implications are twofold. There is a plain procedural question—and neither Bradney nor Malik goes much beyond this—about how existing

[*] *Excerpted from* the foundation lecture the Archbishop of Canterbury, Dr. Rowan Williams, gave at the Royal Courts of Justice on Feb. 7, 2008.

courts function and what weight is properly given to the issues we have been discussing. But there is a larger theoretical and practical issue about what it is to live under more than one jurisdiction . . . the role of sharia (or indeed Orthodox Jewish practice) in relation to the routine jurisdiction of the British courts. In general, when there is a robust affirmation that the law of the land should protect individuals on the grounds of their corporate religious identity and secure their freedom to fulfil religious duties, a number of queries are regularly raised. I want to look at three such difficulties briefly. They relate both to the question of whether there should be a higher level of attention to religious identity and communal rights in the practice of the law, and to the larger issue I mentioned of something like a delegation of certain legal functions to the religious courts of a community; and this latter question, it should be remembered, is relevant not only to Islamic law but also to areas of Orthodox Jewish practice.

The first objection to a higher level of public legal regard being paid to communal identity is that it leaves legal process (including ordinary disciplinary process within organisations) at the mercy of what might be called vexatious appeals to religious scruple. A recent example might be the reported refusal of a Muslim woman employed by Marks and Spencer to handle a book of Bible stories. Or we might think of the rather more serious cluster of questions around forced marriages, where again it is crucial to distinguish between cultural and strictly religious dimensions. While Bradney rightly cautions against the simple dismissal of alleged scruple by judicial authorities who have made no attempt to understand its workings in the construction of people's social identities, it should be clear also that any recognition of the need for such sensitivity must also have a recognised means of deciding the relative seriousness of conscience-related claims, a way of distinguishing purely cultural habits from seriously-rooted matters of faith and discipline, and distinguishing uninformed prejudice from religious prescription. There needs to be access to recognised authority acting for a religious group: there is already, of course, an Islamic Shari'a Council, much in demand for rulings on marital questions in the UK; and if we were to see more latitude given in law to rights and scruples rooted in religious identity, we should need a much enhanced and quite sophisticated version of such a body, with increased resources and a high degree of community recognition, so that "vexatious" claims could be summarily dealt with. The secular lawyer needs to know where the potential conflict is real, legally and religiously serious, and where it is grounded in either nuisance or ignorance. There can be no blank cheques given to unexamined scruples.

The second issue, a very serious one, is that recognition of "supplementary jurisdiction" in some areas, especially family law, could have the effect of reinforcing in minority communities some of the most repressive or retrograde elements in them, with particularly serious consequences for the role and liberties of women. The "forced marriage" question is the one most often referred to here, and it is at the moment undoubtedly a very serious and scandalous one; but precisely because it has to do with custom and culture rather than directly binding enactments by religious authority, I shall refer to another issue. It is argued that the provision for the inheritance of widows under a strict application of sharia has the effect of disadvantaging them in what the majority community might regard as unacceptable ways. . . . The problem here is that recognising the authority of a communal religious court to decide finally and authoritatively about such a question would . . . actually deprive members of the minority community of rights and liberties that they were entitled to enjoy as citizens; and while a legal system might properly admit structures or protocols that embody the diversity of moral reasoning in a plural society by allowing scope for a minority group to administer its affairs according to its own convictions, it can hardly admit or "license" protocols that effectively take away the rights it acknowledges as generally valid.

To put the question like that is already to see where an answer might lie, though it is not an answer that will remove the possibility of some conflict. If any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no "supplementary" jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights. This is in effect to mirror what a minority might themselves be requesting—that the situation should not arise where membership of one group restricted the freedom to live also as a member of an overlapping group, that (in this case) citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship—or, better, to recognise that citizenship itself is a complex phenomenon not bound up with any one level of communal belonging but involving them all.

But this does not guarantee an absence of conflict. In the particular case we have mentioned, the inheritance rights of widows, it is already true that some Islamic societies have themselves proved flexible (Malaysia is a case in point). But let us take a more neuralgic matter still: what about the

historic Islamic prohibition against apostasy, and the draconian penalties entailed? In a society where freedom of religion is secured by law, it is obviously impossible for any group to claim that conversion to another faith is simply disallowed or to claim the right to inflict punishment on a convert. We touch here on one of the most sensitive areas not only in thinking about legal practice but also in interfaith relations. A significant number of contemporary Islamic jurists and scholars would say that the Qur'anic pronouncements on apostasy which have been regarded as the ground for extreme penalties reflect a situation in which abandoning Islam was equivalent to adopting an active stance of violent hostility to the community, so that extreme penalties could be compared to provisions in other jurisdictions for punishing spies or traitors in wartime; but that this cannot be regarded as bearing on the conditions now existing in the world….

[T]his is a delicate and complex matter. . . . I mention it partly because of its gravity as an issue in interfaith relations and in discussions of human rights and the treatment of minorities, partly to illustrate how the recognition of what I have been calling membership in different but overlapping sets of social relationship (what others have called "multiple affiliations") can provide a framework for thinking about these neuralgic questions of the status of women and converts. Recognising a supplementary jurisdiction cannot mean recognising a liberty to exert a sort of local monopoly in some areas. The Jewish legal theorist Ayelet Shachar, in a highly original and significant monograph on *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001), explores the risks of any model that ends up "franchising" a non-state jurisdiction so as to reinforce its most problematic features and further disadvantage its weakest members: "we must be alert," she writes, "to the potentially injurious effects of well-meaning external protections upon different categories of group members here—effects which may unwittingly exacerbate preexisting internal power hierarchies." She argues that if we are serious in trying to move away from a model that treats one jurisdiction as having a monopoly of socially defining roles and relations, we do not solve any problems by a purely uncritical endorsement of a communal legal structure which can only be avoided by deciding to leave the community altogether. We need, according to Shachar, to "work to overcome the ultimatum of 'either your culture or your rights."'

So the second objection to an increased legal recognition of communal religious identities can be met if we are prepared to think about the basic ground rules that might organise the relationship between

jurisdictions, making sure that we do not collude with unexamined systems that have oppressive effect or allow shared public liberties to be decisively taken away by a supplementary jurisdiction. Once again, there are no blank cheques. . . .

I want to move on to the third objection, which grows precisely out of the complexities of clarifying the relations between jurisdictions. Is it not both theoretically and practically mistaken to qualify our commitment to legal monopoly? So much of our thinking in the modern world, dominated by European assumptions about universal rights, rests, surely, on the basis that the law is the law; that everyone stands before the public tribunal on exactly equal terms, so that recognition of corporate identities or, more seriously, of supplementary jurisdictions is simply incoherent if we want to preserve the great political and social advances of Western legality.

There is a bit of a risk here in the way we sometimes talk about the universal vision of post-Enlightenment politics. The great protest of the Enlightenment was against authority that appealed only to tradition and refused to justify itself by other criteria—by open reasoned argument or by standards of successful provision of goods and liberties for the greatest number. Its claim to override traditional forms of governance and custom by looking towards a universal tribunal was entirely intelligible against the background of despotism and uncritical inherited privilege which prevailed in so much of early modern Europe. The most positive aspect of this moment in our cultural history was its focus on equal levels of accountability for all and equal levels of access for all to legal process. . . . But this set of considerations alone is not adequate to deal with the realities of complex societies: it is not enough to say that citizenship as an abstract form of equal access and equal accountability is either the basis or the entirety of social identity and personal motivation. Where this has been enforced, it has proved a weak vehicle for the life of a society and has often brought violent injustice in its wake (think of the various attempts to reduce citizenship to rational equality in the France of the 1790's or the China of the 1970's). Societies that are in fact ethnically, culturally and religiously diverse are societies in which identity is formed, as we have noted by different modes and contexts of belonging, "multiple affiliation." The danger is in acting as if the authority that managed the abstract level of equal citizenship represented a sovereign order which then allowed other levels to exist. But if the reality of society is plural—as many political theorists have pointed out—this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a ghettoised pattern of

social life, in which particular sorts of interest and of reasoning are tolerated as private matters but never granted legitimacy in public as part of a continuing debate about shared goods and priorities.

But this means that we have to think a little harder about the role and rule of law in a plural society of overlapping identities. Perhaps it helps to see the universalist vision of law as guaranteeing equal accountability and access primarily in a negative rather than a positive sense—that is, to see it as a mechanism whereby any human participant in a society is protected against the loss of certain elementary liberties of self-determination and guaranteed the freedom to demand reasons for any actions on the part of others for actions and policies that infringe self-determination. This is a slightly more gentle or tactful way of expressing what some legal theorists will describe as the "monopoly of legitimate violence" by the law of a state, the absolute restriction of powers of forcible restraint to those who administer statutory law. This is not to reduce society itself primarily to an uneasy alliance of self-determining individuals arguing about the degree to which their freedom is limited by one another and needing forcible restraint in a war of all against all—though that is increasingly the model which a narrowly rights-based culture fosters, producing a manically litigious atmosphere and a conviction of the inadequacy of customary ethical restraints and traditions—of what was once called "civility." The picture will not be unfamiliar, and there is a modern legal culture which loves to have it so. But the point of defining legal universalism as a negative thing is that it allows us to assume, as I think we should, that the important springs of moral vision in a society will be in those areas which a systematic abstract universalism regards as "private"—in religion above all, but also in custom and habit. The role of "secular" law is not the dissolution of these things in the name of universalism but the monitoring of such affiliations to prevent the creation of mutually isolated communities in which human liberties are seen in incompatible ways and individual persons are subjected to restraints or injustices for which there is no public redress.

The rule of law is thus not the enshrining of priority for the universal/abstract dimension of social existence but the establishing of a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity as such, independent of membership in any specific human community or tradition, so that when specific communities or traditions are in danger of claiming finality for their own boundaries of practice and understanding, they are reminded that they have to come to terms with the actuality of human diversity—and that the only way of doing

this is to acknowledge the category of "human dignity as such"—a non-negotiable assumption that each agent (with his or her historical and social affiliations) could be expected to have a voice in the shaping of some common project for the well-being and order of a human group. It is not to claim that specific community understandings are "superseded" by this universal principle, rather to claim that they all need to be undergirded by it. The rule of law is—and this may sound rather counterintuitive—a way of honouring what in the human constitution is not captured by any one form of corporate belonging or any particular history, even though the human constitution never exists without those other determinations. Our need, as Raymond Plant has well expressed it, is for the construction of "a moral framework which could expand outside the boundaries of particular narratives while, at the same time, respecting the narratives as the cultural contexts in which the language [of common dignity and mutually intelligible commitments to work for certain common moral priorities] is learned and taught."

[To defend] an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to "activate" this whenever called upon. Earlier on, I proposed that the criterion for recognising and collaborating with communal religious discipline should be connected with whether a communal jurisdiction actively interfered with liberties guaranteed by the wider society in such a way as definitively to block access to the exercise of those liberties; clearly the refusal of a religious believer to act upon the legal recognition of a right is not, given the plural character of society, a denial to anyone inside or outside the community of access to that right. . . .

I labour the point because what at first seems to be a somewhat narrow point about how Islamic law and Islamic identity should or might be regarded in our legal system in fact opens up a very wide range of current issues, and requires some general thinking about the character of law. It would be a pity if the immense advances in the recognition of human rights

led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties and the law's function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups which concretely compose a plural modern society. Certainly, no-one is likely to suppose that a scheme allowing for supplementary jurisdiction will be simple, and the history of experiments in this direction amply illustrates the problems. But if one approaches it along the lines sketched by Shachar, it might be possible to think in terms of what she calls "transformative accommodation": a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that "power-holders are forced to compete for the loyalty of their shared constituents." This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution—the main areas that have been in question where supplementary jurisdictions have been tried, with native American communities in Canada as well as with religious groups like Islamic minority communities in certain contexts. In such schemes, both jurisdictional stakeholders may need to examine the way they operate; a communal/religious nomos, to borrow Shachar's vocabulary, has to think through the risks of alienating its people by inflexible or over-restrictive applications of traditional law, and a universalist Enlightenment system has to weigh the possible consequences of ghettoising and effectively disenfranchising a minority, at real cost to overall social cohesion and creativity. Hence "transformative accommodation": both jurisdictional parties may be changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.

It is uncomfortably true that this introduces into our thinking about law what some would see as a "market" element, a competition for loyalty as Shachar admits. But if what we want socially is a pattern of relations in which a plurality of divers and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable. In other settings, I have spoken about the idea of "interactive pluralism" as a political desideratum; this seems to be one manifestation of such an ideal, comparable to the arrangements that allow for shared responsibility in education: the best argument for faith schools from the point of view of any aspiration towards social harmony and understanding is that they bring communal loyalties into direct relation with the wider society and inevitably lead to mutual questioning and sometimes

mutual influence towards change, without compromising the distinctiveness of the essential elements of those communal loyalties.

In conclusion, it seems that if we are to think intelligently about the relations between Islam and British law, we need a fair amount of "deconstruction" of crude oppositions and mythologies, whether of the nature of sharia or the nature of the Enlightenment. But as I have hinted, I do not believe this can be done without some thinking also about the very nature of law. It is always easy to take refuge in some form of positivism; and what I have called legal universalism, when divorced from a serious theoretical (and, I would argue, religious) underpinning, can turn into a positivism as sterile as any other variety. If the paradoxical idea which I have sketched is true—that universal law and universal right are a way of recognising what is least fathomable and controllable in the human subject—theology still waits for us around the corner of these debates, however hard our culture may try to keep it out. And, as you can imagine, I am not going to complain about that.

Ben Russell & Colin Brown

*Archbishop of Canterbury Warns Sharia Law in Britain Is Inevitable**

The Archbishop of Canterbury provoked a chorus of criticism yesterday by predicting that it was "unavoidable" that elements of Islamic sharia law would be introduced in Britain.

Christian and secular groups joined senior politicians to condemn Rowan Williams' view that there was a place for a "constructive accommodation with some aspects of Muslim law" over such issues as marriage.

Dr Williams told BBC Radio 4's *The World At One*: "It seems unavoidable and, as a matter of fact, certain conditions of sharia are already recognised in our society and under our law, so it is not as if we are bringing in an alien and rival system. We already have in this country a number of situations in which the internal law of religious communities is recognised by the law of the land as justifying conscientious objections in certain circumstances."

* THE INDEPENDENT (London), Feb. 8, 2008.

He added: "There is a place for finding what would be a constructive accommodation with some aspects of Muslim law as we already do with aspects of other kinds of religious law."

Dr Williams insisted there was no place for "extreme punishments, the attitudes to women" in some Islamic states. He said: "That principle that there is only one law for everybody is an important pillar of our social identity as a Western democracy. But I think it is a misunderstanding to suppose that people don't have other affiliations, other loyalties which shape and dictate how they behave in society and that the law needs to take some account of that."

Gordon Brown has spearheaded government efforts to persuade Muslims to integrate. But Downing Street immediately distanced itself from Dr Williams' remarks, insisting that sharia law could not be used to override the will of Parliament or the courts.

The Prime Minister's official spokesman said the Government had moved to accommodate some aspects of sharia law, such as stamp duty on mortgages (without special provision, the tax would be payable twice), but declared: "The Prime Minister believes British law should apply in this country, based on British values."

He added: "Our general position is that sharia law cannot be used as a justification for committing breaches of English law, nor should the principles of sharia law be included in a civil court for resolving contractual disputes."

[A] government minister said: "I can't understand what the Archbishop was thinking of. This is very unhelpful."

Nick Clegg, the Liberal Democrat leader, said: "Equality before the law is part of the glue that binds our society together. We cannot have a situation where there is one law for one person and different laws for another."

Baroness Warsi, the Tory spokeswoman on community cohesion and social action, also described the Archbishop's comments as unhelpful. She said: "Let's be absolutely clear. All British citizens must be subject to British laws developed through Parliament and the courts."

Dr Williams said it would be "quite wrong" to deny people a right of appeal. But he said there were "ways of looking at marital disputes, for example, which provide an alternative to the divorce courts as we understand them." He added: "Nobody in their right mind would want to see in this country the kind of inhumanity that has sometimes been associated with the practice of the law in some Islamic states: the extreme punishments, the attitudes to women. "But I do not think we should instantly spring to the conclusion that the whole of that world of jurisprudence and practice is somehow monstrously incompatible with human rights just because it doesn't immediately fit with how we understand it."

The Labour MP Harry Cohen, who has a large Muslim community in his east London constituency, accused the Archbishop of being naïve. He said: "This will not assist integration. Sharia law is muddled on the question of divorce and can be cruel to women. People should live by the law of the land in the country where they live and most Muslims accept that."

How the different faiths are governed:

Roman Catholic Church

Roman Catholic courts are governed by Canon law. A single judge handles normal contentious and penal cases. However, at least three judges must try cases involving an excommunication, the dismissal of a cleric or a contested marriage or ordination annulment. Generally, the burden is on the Church to prove its case, which means a defendant can win by default. Some matters cannot be dealt with at diocesan level and can be heard only by an appeal tribunal. The Pope may hear cases where a Cardinal, Eastern Orthodox patriarch, papal legate or head of state is a defendant, and any penal case involving a bishop.

Church of England

Ecclesiastical courts have jurisdiction over matters dealing with the rights and obligations of worshippers, but are limited to disputes in areas of church property and disciplinary action against clergy. In England, the courts are based upon and operate along civil law procedures, as well as on Canon law—the collection of ancient decrees which concerned the discipline of the Early Christian church.

Judaism

The Beth Din, or rabbinical courts, hear cases involving the validation of religious bills of divorce, or gettin. They also rule on kosher certification of restaurants and food manufacturers and religious conversions. Determination of "personal status" under the laws of Judaism are heard by the Beth Din, as well as other questions arising out of Jewish law. Rabbis will also settle disputes or areas of uncertainty relating to burial practices and mourning. Some Battei Din maintain their community's marriage and death records.

Pratibha Jain

Balancing Minority Rights and Gender Justice:
The Impact of Protecting Multiculturalism on Women's Rights in India[*]

A classical liberal rights scheme bestows rights on individuals rather than groups. These rights are generally "negative" rights such as freedom from government interference in one's speech, religion, and political ideology, or the right to freedom from discrimination. . . . Those concerned with maintaining the existence of minority cultures within a dominant national majority culture worry that such a classical scheme based on individual rights cannot adequately protect minority cultures. They seek the implementation of specific legal obligations on the state not only to abstain from interfering with the group rights of minorities but also to provide affirmative support for the enjoyment of such rights. . . . Article 27 of the International Convention on Civil and Political Rights (ICCPR) exemplifies this conception of group rights, guaranteeing "ethnic, religious, or linguistic minorities . . . the right . . . to enjoy their culture, to profess and practice their own religion, or to use their own language." Couched in both individualistic and collective terms, the notion of group rights has been used to advocate for the governance of minority groups by separate and culturally specific laws. In India, such group rights include personal law regimes, the concept of which can be traced back to the colonial era wherein the early colonial states promised the various religious communities their own set of laws to govern "inheritance, marriage, caste, and other religious usages or institutions." Personal laws are sometimes used as cultural defenses to criminal prosecutions and as justification for the observation of cultural practices that have a tendency to discriminate against women. Such

[*] *Excerpted from* 23 BERKELEY J. INT'L L. 201 (2005).

discriminatory personal or group laws govern women in various Indian communities. . . .

An ideal strategy . . . would be for the Indian legislature to honor the Constitution by drafting a uniform secular civil code that meets the test of equality guaranteed under the Constitution, providing individuals with the option to be governed by their personal laws. This uniform civil code would achieve twin objectives: protecting the individual rights of citizens from being subsumed by group rights, and offering individuals the privilege to choose to be governed by their personal laws. In addition, the code would put pressure on minority groups and less powerful individuals within these groups, whether they are women or other sub-groups, to take the initiative to bring their personal laws into parity with the secular civil code with regard to the equality of rights to all members within the group.

Multicultural Approaches to Law and Governance

A. The Three Multicultural Approaches to National Governance: Assimilation, Integration, and Social or Cultural Pluralism

1. Assimilation

An assimilationist approach imposes the dominant national culture on minority groups. . . . I do not believe, however, that such drastic measures would necessarily be in the interest of women within minority groups in such countries. [A]ny such attempt would be met with strong resistance within the community, which might result in strengthening the cultural practices, thus putting a stronger pressure on the women in these groups to observe those oppressive cultural practices. A state can do very little to control the exercise of cultural practices in the private sphere; it could not, for example, realistically prevent a Muslim woman from wearing a veil inside her home. . . .

As an example, consider the interpretation of Muslim personal laws in India, where Muslims are a minority, as compared to other Muslim countries. In India, attempts to modernize Muslim personal laws, especially the laws affecting women's rights, have met with stiff resistance within the Muslim community. Courts in other Islamic countries, however, have modernized their interpretations of Muslim personal laws without any outcry from the religious clerics or the community in general. . . .

2. Integration

An integrationist approach asks citizens to restrict the practice of their minority religion, language, or ethnic heritage to the private domain. Article 44 of the Indian Constitution, which directs the state to create a uniform civil code, is representative of an integrationist approach towards multiculturalism, as it aims to create a civil code that applies to all communities in India, irrespective of religion, while simultaneously protecting individuals' right to practice their religion privately.

3. Social/Cultural Pluralism Approach

A social or cultural pluralism approach allows the existence of different religious, cultural, and ethnic principles in the public sphere. India's framework of separate personal laws for various religious communities is representative of this model and is also a good example of how a multiculturalist approach to law and governance in India has resulted in undermining women's rights. . . .

B. Multicultural Governance in India

The task of creating a democratic system of governance after India's independence was enormous. The sheer linguistic, ethnic, religious, racial, and cultural diversity of the Indian populace posed special challenges to the constitutional framers, who understood that national unity and inter-group harmony would require protection for minority groups. While the members of the Constituent Assembly agreed on the need for a solid framework of fundamental rights, they did not agree on how to blend a scheme of civil and political rights with the concurrent challenges of forging structures for economic and social governance. It is in this context of formational dilemmas that the contemporary debate surrounding multiculturalism and its impact on women's rights in India needs to be examined.

1. The Indian Constitution

Post-independence India followed a policy of cultural pluralism by maintaining systems of separate personal laws for Hindu, Muslim, and Christian communities, while concurrently assigning itself the goal of working towards a uniform civil code. Including a Declaration of Rights was very important to the early drafters. As Granville Austin noted: "India was a land of communities, of minorities, racial, religious, linguistic, social

and caste. . . . Indians believed that in their 'federation of minorities' a declaration of rights was as necessary as it had been for the Americans."

2. Legislation

[T]he Indian Constitution exhorts the state to create a uniform civil code. . . . Historians have noted that the institutionalization of separate laws reinforced the boundaries between minority communities and solidified identities along religious affiliations. Instead of moving toward a secular, equality-based legal system, the recognition of personal laws under the guise of protecting minorities from a dominant majority culture helped institutionalize patriarchal traditional practices that disadvantage Indian women. In particular, support for personal laws relating to polygamy, divorce, property inheritance, and maintenance, all of which directly impact the lives of women, lies at the center of the historical resistance to the implementation of a uniform civil code.

At present, India does not have a uniform civil code that would apply to all citizens irrespective of their religious or cultural identity. However, all Indians can choose a civil marriage under the Special Marriage Act of 1954 irrespective of their religion. Should a couple register under this Act, they are bound by the Act's provisions, along with the provisions of the Indian Succession Act, which relates to the succession of property, instead of their respective personal laws. If a couple does not register under the Special Marriage Act, their respective personal laws apply. Thus the Special Marriage Act is an "opt out" provision for individuals who do not want to be bound to the marriage rules of their religious communities. Other examples of optional civil codes are the Guardian and Wards Act of 1890, which allows civil courts to appoint a guardian for a minor. While the court is required to consider the minor's religion and governing personal laws, the minor's overall welfare is paramount. Also, the Medical Termination of Pregnancy Act of 1971 permits any woman in India to have an abortion irrespective of her religious or cultural identity. . . .

3. Role of the Judiciary

The Indian judiciary, especially the Supreme Court, in its role as the defender of the Constitution, has been the forerunner in protecting minorities and safeguarding the multicultural ethos of the polity. . . . The question of who has the power to interpret the personal laws of the various

religious communities within India has plagued the judiciary from its post-independence beginnings. . . .

Mohammed Ahmed Khan v. Shah Bano Begum
Supreme Court of India
AIR 945 (1985)

Y.V. CHANDRACHUD, C.J.

[1] This appeal does not involve any question of constitutional importance but, that is not to say that it does not involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. . . .

[2] This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code . . . asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable *talaq*.[*] His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years, and that he had deposited a sum of Rs. 3000 in the court by way of dower during the period of *iddat*.[**] In August, 1979 the learned Magistrate directed the appellant to pay a princely

[*] Editor's Note: *Talaq* is an Islamic divorce. According to traditional law, a husband may simply pronounce the word "*talaq*" in the wife's presence to effectuate a divorce (although some courts have ruled that the wife's presence is not even necessary).

[**] Editor's Note: *Iddat* (Arabic for "period of waiting") is the time a woman must wait under Islamic law before remarrying. After a divorce, this period is usually three menstrual cycles.

sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

[3] Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reason good, bad or indifferent. Indeed, or no reason at all. But, is the only price of that privilege the dole of a pittance during the period of *iddat*? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of *iddat*, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife "on divorce?" These are some of the important, though agonising, questions which arise for our decision.

[4] The question [is] whether Section 125 of the Code applies to Muslims. . . .

[5] Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus:

> Order for maintenance of wives, children and parents—(1) If any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself . . . a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife, . . . at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit. . . . For the purposes of this Chapter . . . (b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. . . .

[6] Section 127(3)(b), on which the appellant has built up the edifice of his defense, reads thus:

> [Where] any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that . . . (3) . . . (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, (i) in the case where such sum was paid before such order, from the date on which such order was made, (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.

[7] Under Section 125 a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding five hundred rupees. ["Wife"] includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouse has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that the Section 125 is a part of the Code of Criminal Procedure, not of the civil laws which define and govern the rights and obligations of the parties belonging to particular regions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of those persons to maintain themselves are the objective criteria which determine the applicability of Section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the personal law of the parties but, equally, the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the

law and morality cannot be clubbed with religion. Clause (b) of the Explanation to Section 125(1), which defines "wife" as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character. . . .

[10] [U]nmistakably . . . Section 125 overrides the personal law, if there is any conflict between the two.

[11] [T]he whole of this discussion as to whether the right conferred by Section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by reason of Section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, insofar as it lies in our power, we wanted to set at rest, once for all, the question whether Section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

[12] The next logical step to take is to examine the question, on which considerable argument has been advanced before us, whether there is any conflict between the provisions of Section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

[13] The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of *iddat*. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. In Mulla's *Mahomedan Law*, there is a statement to the effect that, "[a]fter divorce, the wife is entitled to maintenance during the period of *iddat*." The learned author says:

> Where an order is made for the maintenance of a wife under Section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the exploration of the period of *iddat*. The result is that a Mahomedan may defeat an order made against him under Section 488 by divorcing his wife immediately after

> the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*.
>
> Tyabji's *Muslim Law* contains the statement that:
>
> > On the expiration of the *iddat* after *talaq*, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code.
>
> According to Dr Paras Diwan:
>
> > When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of *iddat*. . . . On the expiration of the period of *iddat*, the wife is not entitled to any maintenance under any circumstances. Muslim law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced.

[14] These statements in the text books are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay *Mahr*[*] to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees. But, one must have regard to the realities of life. *Mahr* is a mark of respect to the wife. The sum settled by way of *Mahr* is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is

[*] Editor's Note: *Mahr* is a gift given by the husband to the wife upon marriage. The gift becomes the exclusive property of the wife. The gift is frequently promised in full at marriage, but paid only in part then. The amount deferred would become immediately due upon divorce.

no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject-matter of Section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of *iddat*, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of *iddat*, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of *iddat*, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of *iddat*. If she is unable to maintain herself, she is entitled to take recourse of Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

[15] There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will." Verses (Aiyats) 241 and 242 of the Quran show that there is an obligation on Muslim husbands to provide for their divorced wives. . . .

[16] The English version of the two Aiyats in Muhammed Zafrullah Khan's *The Quran* reads thus:

> For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His Commandments clear to you that you may understand.

[17] The translation of Aiyats 240 to 242 in *The Meaning of the Quran* reads thus:

> Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All-Powerful, All-wise. Like-wise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.
>
> Thus Allah makes clear His commandments for you: It is expected that you will use your commonsense. . . .

[22] These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran. As observed by Mr M. Hidayatullah in his introduction to Mulla's *Mahomedan Law*, the Quran is Al-furqan, that is, one showing truth from falsehood and right from wrong. . . .

[28] It does appear . . . that the Government did not desire to interfere with the personal law of the Muslims through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystallise on the reforms in their personal law. However, we are not concerned with the question whether the Government did or did not desire to bring about changes in the Muslim Personal Law by enacting Sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. . . .

[31] It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorcee should maintain herself. The facile answer of the Board is that the Personal Law has devised the system of *Mahr* to meet the requirements of women and if a woman is

indigent, she must look to her relations, including nephews and cousins, to support her. This is a most unreasonable view of law as well as life. . . .

[32] It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that: "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

[33] Dr Tahir Mahmood in his book *Muslim Personal Law* has made a powerful plea for framing a uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion-based personal laws." He wants the lead to come from the majority community but, we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community:

> Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India.

At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, he also made an appeal to the Muslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce.

[34] Before we conclude, we would like to draw attention to the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question 5 is that a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children. The Report concludes thus:

> In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative."

[35] For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under Section 127(1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

Pratibha Jain

Balancing Minority Rights and Gender Justice:
The Impact of Protecting Multiculturalism on Women's Rights in India[*]

The *Shah Bano* judgment caused agitation among Muslim religious communities, especially the portion of the Court's opinion that held the Quran itself supported the argument that continuing maintenance did not violate the tenets of Islam. Under political pressure from the leaders of the Muslim community, which resulted from the *Shah Bano* judgment,

[*] *Excerpted from* 23 BERKELEY J. INT'L L. 201 (2005).

Parliament, dominated by a Congress Party majority, passed the Muslim Women's (Protection of Rights on Divorce) Act in 1986 (MWA). The effect of the MWA was to reverse the right to continuing maintenance for divorced Muslims pursuant to Section 125 of the Criminal Code. The MWA provides for a one-time payment within the *iddat* period. Section 3(1), "*Mahr* or other properties of Muslim women to be given to her at the time of divorce," states:

> Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband; (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

Recently, various high courts in India have interpreted the scope of Section 3(1) to hold that a divorced Muslim woman is entitled to fair and reasonable maintenance within the *iddat* period, contemplating her future needs.

Siobhan Mullally

Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano *Case*[*]

In the *Shah Bano* case, the Indian Supreme Court departed from traditional interpretations of Muslim Personal law, appealing to a more egalitarian Islam. The spectre of an exclusively Hindu court choosing between competing interpretations of Islam and pronouncing on the appropriate interpretations of Qur'anic verses provoked a furious outcry from conservative forces within the Muslim community. Previous

[*] *Excerpted from* 24 OXFORD J. LEG. ST. 671 (2004).

judgments arriving at similar conclusions had provoked little response. The *Shah Bano* judgment, however, came at a time of heightened communal tensions. The Hindu right party, the *Bharatiya Janata Party* (BJP), although sitting in opposition, was gaining in popularity, leading to an increased sense of vulnerability amongst the Muslim minority. The Congress Government responded to the heightening communal crisis by passing the 1986 MWA, yielding to the claims of cultural conservatives within the Muslim community and attempting to reverse the *Shah Bano* judgment. . . .

Many feminist activists in India have called for reform of religious personal laws and for the application of fundamental rights principles to the sphere of marriage and family relations. In more recent years, however, the rise of the Hindu right and *Hindutva* as a political phenomenon led to fears that reform of personal laws would become yet another tool to silence religious minorities. Secularism became a powerful weapon in the Hindu right's quest for power, as did the discourse of human rights. Against this background, calls for a uniform civil code ran the risk of becoming a vehicle for greater Hinduization of the state and its institutions. This hijacking of the secular agenda left feminists and human rights activists without their traditional supports, reluctant to challenge the discriminatory practices of religious minorities lest this added further support to the Hindu right. . . .

3. Reinstating the Ties that Bind: the Aftermath of Shah Bano

The spectacle of an exclusively Hindu Supreme Court determining the scope and content of Muslim personal law provoked an outcry from conservatives within the Muslim community. Shah Bano, under pressure from her own community, disassociated herself from the judgment of the Court and withdrew her claim for maintenance. The All India Muslim Personal Law ("MPL") Board called for legislation to reverse the Court's ruling. Their call led to the enactment of the 1986 MWA, which attempted to reverse the Supreme Court's judgment in *Shah Bano* and provided for a limited obligation to pay maintenance to divorced Muslim women only for the period of *iddat.* Beyond the period of *iddat,* the duty to provide for a divorced woman's well-being fell to the extended family, or failing that, to the broader community through its *waqf* boards.[*]

[*] Editor's Note: A *waqf* is a religious endowment, in some ways similar to the common law trust, the distributions of which are dedicated to charitable purposes.

The Congress Government yielded to conservative forces within the Muslim community. The mass rallies and political power of the legislation's proponents were important considerations for the Government. The Congress Party had lost support in a number of Muslim dominated districts in the 1985 elections. The Muslim community had been a key constituency of the Congress Party since independence. By passing the 1986 Act and granting continuing autonomy in the area of personal law, the Government hoped to assure the support and votes of the Muslim community. The Government tempered its deference to the claims of conservative Muslims by recommending the adoption of a Uniform Civil Code by the year 2000. The pursuit of gender equality was deferred, yet again, in the interests of placating communal sensibilities. . . .

The pursuit of a feminist agenda following on from the *Shah Bano* case was further complicated by the response of the Hindu right. The BJP campaigned against the 1986 Act, arguing that it violated both the constitutional principle of secularism and the rights of Muslim women. It violated the principle of secularism because the Muslim community was allowed to opt out of the general Code of Criminal Procedure and it violated Muslim women's right to equal treatment because they were to be treated differently from Hindu women. Bal Thackeray, a Hindu nationalist politician argued that the issue was "not of religion, but of poisonous seeds of treacherous tendencies . . . Those who do not accept our Constitution and laws, should quit the country and go to Karachi or Lahore . . . There might be many religions in the country, but there must be one constitution and one common law applicable to all."

[T]he role of the judiciary in adjudicating cultural claims was again the subject of debate in *Danial Latifi & Anr. v. Union of India* (2001). This case followed on from the *Shah Bano* controversy and arose from a constitutional challenge brought against the MWA. The *Shah Bano* controversy and the enactment of the 1986 Act had given rise to a series of constitutional challenges and conflicting judgments in High Courts throughout India. The Kerala, Bombay and Gujarat High Courts had each concluded that a husband's duty to make "fair and reasonable provision" for his divorced wife, (provided for under section 3 of the 1986 Act), included a duty to make arrangements for his wife's future well-being beyond the *iddat* period. A similar conclusion was arrived at by a full bench of the Punjab and Haryana High Court. Opposing views had been adopted in other High Courts, however, limiting Muslim women's right to maintenance to the *iddat* period, following the letter of the 1986 Act. These judgments contributed to the emergence of a complex web of institutional materials on

the subject of Muslim women's right to maintenance following divorce. They also brought into question the compatibility of the 1986 Act with the constitutional guarantee of equality and the terms of India's multicultural arrangement.

In the *Danial Latifi* case, the Supreme Court was finally given the opportunity to review the constitutional validity of the 1986 Act. The case arose from a series of petitions claiming that the Act violated the constitutional guarantees of equality, life and liberty and that it undermined the secular principles underpinning India's constitutional text. The Solicitor General, defending the constitutionality of the Act, urged the Supreme Court to adopt a contextual approach to the claims raised. He argued that in assessing the fairness and reasonableness of the Act, the Court should take account of the distinct personal laws of the Muslim community. In other words, he argued, religion-based personal laws could not be subject to the same tests of justice as applied to other legislation. That there was no right of exit for Muslim women, no "opt out" of the personal laws that applied to them was not considered problematic. The All India MPL Board, intervening in the case, argued that the Supreme Court judgment in *Shah Bano* was based on an erroneous interpretation of MPL, which the 1986 Act had attempted to correct. The Board criticized the "unsafe and hazardous" route taken by the Supreme Court in *Shah Bano*, and also criticized the Court's failure to recognize the distinct social ethos of the Muslim community, in particular, the role of the extended family network in providing for the needs of divorced women. The 1986 Act, they argued, attempted to correct these failings and to recognize the legitimacy of the Muslim Community's claim to a distinct religious-cultural identity. The National Commission for Women, also intervening in the case, urged the Supreme Court to follow the judgments adopted by the Kerala, Gujarat and Bombay High *Courts—viz.* that the duty to make fair and reasonable provision for a divorced Muslim woman extended beyond the *iddat* period. The Commission argued that any other construction of the 1986 Act would be a denial of Muslim women's equal right to life and liberty, as guaranteed by the Constitution.

In its judgment on the competing claims brought to it, the Supreme Court adopted what might be viewed as a quintessentially universalist stance. Questions relating to basic human rights and the pursuit of social justice, it held, should be decided on considerations other than religion or other "communal constraints." In the Court's view, the duty to secure social justice was one that was universally recognized by all religions. Vagrancy and destitution were societal problems of universal magnitude and had to be

resolved within a framework of basic human rights. Applying a literal interpretation to the 1986 Act, the Court concluded, would deny Muslim women the remedy claimed by *Shah Bano* under section 125 of the Criminal Procedure Code. The Court concluded that this reading of the 1986 Act would lead to a discriminatory application of the criminal law, excluding Muslim women from the protection afforded to Christian, Hindu or Parsi women, simply because of their religious membership. Applying the presumption of constitutionality to the Act, the Court concluded that this reading could not have been intended by the legislature as it would be contrary to the constitutional guarantees of equality and non-discrimination. The Court concluded, therefore, that while the duty to pay maintenance was limited to the *iddat* period, the requirement to make fair and reasonable provision for a divorced Muslim woman extended to arrangements for her future well-being. Adopting this interpretation of the 1986 Act enabled the Court to uphold the constitutionality of the Act and to avoid the communal triumphalism that might have accompanied a finding of unconstitutionality. It also enabled the Supreme Court to go beyond the limited remedy provided for in the Code of Criminal Procedure under which a statutory amount is set out for the payment of maintenance. The duty to make reasonable provision for a divorced woman allowed for much greater flexibility and attention to the particular needs of divorced women.

Bruker v. Marcovitz
Supreme Court of Canada
2007 SCC 54

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Rothstein JJ. was delivered by

[1] ABELLA J. — Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

[2] The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.

Background

[3] A *get* is a Jewish divorce. Only a husband can give one. A wife cannot obtain a get unless her husband agrees to give it. Under Jewish law, he does so by "releasing" his wife from the marriage and authorizing her to remarry. The process takes place before three rabbis in what is known as a Beth Din, or rabbinical court.

[4] The husband must voluntarily give the get and the wife consent to receive it. When he does not, she is without religious recourse, retaining the status of his wife and unable to remarry until he decides, in his absolute discretion, to divorce her. She is known as an *agunah* or "chained wife". Any children she would have on civil remarriage would be considered "illegitimate" under Jewish law.

[5] For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all.

[6] The vast majority of Jewish husbands freely give their wives a *get*. Those who do not, however, represent a long-standing source of concern and frustration in Jewish communities. . . .

[9] For many years, civil courts have attempted to remedy, or compensate for the husband's recalcitrance in refusing to provide a *get* to his wife. They are often faced with assertions by the husband that such interventions are a violation of his freedom of religion.

[10] This is one such case. The husband and wife, each represented by counsel, voluntarily negotiated and signed a "Consent to Corollary Relief" in order to settle their matrimonial disputes. One of the commitments made in the agreement was that they would attend before the rabbinical court to obtain a *get*.

[11] The husband refused to do so for 15 years, challenging the very validity of the agreement he freely made, claiming that its religious aspect rendered it unenforceable under Quebec law, and arguing that he was entitled to be shielded by his right to freedom of religion from the consequences of refusing to comply with his commitment.

[12] The wife, on the other hand, asserted that the agreement to attend and obtain a *get* was part of the trade-offs negotiated by the parties (they signed mutual releases) and was consistent with Quebec law and values. She sought a remedy in the form of damages to compensate her for the husband's extended non-compliance. She did not seek an order of specific performance directing him to appear before the rabbis.

[13] There are, therefore, two issues raised by this case. The first is whether the agreement in the Consent to give a *get* is a valid and binding contractual obligation under Quebec law. This first question involves examining the relevant provisions and principles of the Civil Code of Québec.

[14] If the commitment is a legally binding one under Quebec law, we must determine whether the husband can rely on freedom of religion to avoid the legal consequences of failing to comply with a lawful agreement. This inquiry takes place within the boundaries set by the provisions and principles of the Quebec Charter of human rights and freedoms, where the claim of the husband to religious freedom is balanced against the claim of the wife that acceding to the husband's argument is disproportionately harmful to her personally, and, more generally, to democratic values and Quebec's best interests.

[15] The judicial role in balancing and reconciling competing interests and values when freedom of religion is raised, is one that protects the tolerance Quebec endorsed in the Quebec Charter. Section 9.1 states 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." This provision is a legislative direction that the courts are to protect the rights of

Quebec's citizens in a way that is balanced and reconciled with other public values.

[16] In my view, 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. As the comments of the former Ministers of Justice reveal, such agreements are consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination.

[17] I am also persuaded that, applying the balancing mandated by § 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.

[18] This 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. In deciding cases involving freedom of religion, the courts cannot ignore religion. To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right.

[19] Mediating these highly personal claims to religious rights with the wider public interest is a task that has been assigned to the courts by legislatures across the country. It is a well-accepted function carried out for decades by human rights commissions under federal and provincial statutes and, for 25 years, by judges under the Canadian Charter of Rights and Freedoms, to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion.

[20] This case fits comfortably in that tradition. It represents yet another case in which the claim to religious protection is balanced against competing interests. The Court is not asked to endorse or apply a religious norm. It is asked to exercise its responsibility, conferred by the Quebec Charter, to determine whether the husband is entitled to succeed in his argument that requiring him to pay damages for the breach of a legally binding agreement violates his freedom of religion. No new principle emerges from the result in this case. Courts are routinely asked whether a contract is valid. And the inquiry under the Quebec Charter is the

application of a classic and cautious balancing that courts are required to undertake in determining whether a particular claim to religious freedom is sustainable, one case at a time, attempting always to be respectful of the complexity, sensitivity, and individuality inherent in these issues.

Prior Proceedings

[21] Stephanie Bruker married Jason Marcovitz on July 27, 1969. Although their degrees of observance differ, both consider themselves to be religious Jews.

[22] Mr. Marcovitz was previously married and had granted his first wife a *get*.

[23] Divorce proceedings were commenced by Ms. Bruker in 1980. She was 31. Mr. Marcovitz was 48. An agreement on corollary matters was negotiated with the assistance of separate legal counsel and signed by both of them three months later. This "Consent to Corollary Relief" included terms regarding the custody of their two children, child support payments, and lump sum spousal support.

[24] Paragraph 12 of the Consent stated that the parties agreed to appear before the rabbinical authorities to obtain a *get* immediately upon the granting of the Decree Nisi. A Decree Nisi was granted on October 23, 1980. Among other provisions, it ordered the parties to comply with the Consent. A Decree Absolute was granted on February 9, 1981.

[25] Despite Ms. Bruker's repeated requests, both personally and through various rabbis, Mr. Marcovitz consistently refused to provide a *get* for 15 years.

[26] Not surprisingly, the relationship between the parties deteriorated as Mr. Marcovitz's refusals continued. In July 1989, nine years after the Decree Nisi, Ms. Bruker began proceedings for breach of the Consent, initially claiming damages in the amount of $500,000 for her inability to remarry and for being prevented from having children who would be considered "legitimate" under Jewish law.

[27] Mr. Marcovitz, in response, argued that Ms. Bruker had repudiated the Consent by continually seeking increases in child support payments, and complained that he saw his two daughters irregularly. He also questioned Ms. Bruker's devotion to the Jewish faith.

[28] In 1990, pursuant to § 21.1 of the Divorce Act, Ms. Bruker filed an affidavit confirming that, despite her formal requests, Mr. Marcovitz had not given her a *get*. As a result, when Mr. Marcovitz brought motions in November 1995 seeking to quash the affidavit and to have his obligation to pay child support retroactively rescinded, Marcelin J. declined to hear the motions and ordered that the matters be put over to December 6, 1995.

[29] On December 5, 1995, Mr. Marcovitz appeared before the rabbinical court of Montréal and agreed to deliver the *get*. He was 63 and Ms. Bruker was almost 47. In 1996, Ms. Bruker substantially increased the amount of damages she was seeking.

[30] Ms. Bruker did not remarry or have any other children. . . .

[41] Unlike my colleague Justice Deschamps, with great respect, I see this case as one properly attracting judicial attention. The fact that a dispute has a religious aspect does not by itself make it non-justiciable. In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, (1999), Lorne Sossin defined what is meant by justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.

[42] In *Religious Institutions and the Law in Canada*, M. H. Ogilvie explained why issues with a religious aspect may be justiciable:

> Subject to any protections accorded to individuals and religious groups pursuant to the Canadian Charter of Rights and Freedoms, which have yet to be worked out in detail by the courts, religious institutions and persons in Canada are subject to the sovereignty of Parliament and the sanctioning powers of the state invoked by the courts when disputes concerning religion are brought for resolution.
>
> Nevertheless, the courts have expressed reluctance to consider issues relating to religious institutions, evidencing some embarrassment that internal church disputes should be

> determined by secular courts and doubting the appropriateness of judicial intervention. *The courts have stated that they will not consider matters that are strictly spiritual or narrowly doctrinal in nature, but will intervene where civil rights or property rights have been invaded.*

[43] The approach is correctly stated by the Canadian Civil Liberties Association in its factum as follows: [N]o case goes so far as to hold that even in cases based upon a civil obligation, where the Court is not required to determine matters of religious doctrine, the Court should be precluded from adjudicating disputes that involve obligations having a religious character.

[44] This is reflected in *McCaw v. United Church of Canada* (1991), a case involving the dismissal of a minister from his church, where the religious aspect of the dispute did not deter the Ontario Court of Appeal from deciding that the dispute was justiciable. Even though the "law of the church as laid out in the provisions of the [church] Manual" was at issue, the court accepted jurisdiction and awarded the minister damages for lost wages and benefits.

[45] Similarly, in *Lakeside Colony of Hutterian Brethren v. Hofer*, (1992) a Hutterite colony decided to expel some of its members from the community without giving them an opportunity to respond to the decision. When the members refused to leave, the colony asked the courts to enforce the expulsion and to order the members to return all colony property to the colony. The members claimed that they had a right to remain in the colony and that the courts could not enforce the expulsion. Gonthier J., writing for the majority, noted that while the courts may not intervene in strictly doctrinal or spiritual matters, they will when civil or property rights are engaged. Once the court takes jurisdiction over a dispute with religious components, he continued, it must try "to come to the best understanding possible of the applicable tradition and custom." Gonthier J. held that, in the absence of a timely and adequate opportunity to make a response, the members could not be expelled.

[46] In the case before us, I find the dissenting reasons in *Re Morris and Morris* (1973) compelling. While the issue in that case was the enforceability of a provision of a *ketubah*, or Jewish marriage contract, an issue we are not called upon to consider, the language of Freedman C.J.M. is nonetheless helpful:

> That the [marriage] contract is deeply affected by religious considerations is not determinative of the issue. That is the beginning and not the end of the matter. Some contracts rooted in the religion of a particular faith may indeed be contrary to public policy. Others may not. Our task is to determine whether the rights and obligations flowing from the . . . contract—specifically, the husband's obligation to give and the wife's right to receive a *Get*—are contrary to public policy.
>
> I find difficulty in pin-pointing the precise aspect of public policy which the [agreement to provide a *get*] may be said to offend. The attack upon it is on more general grounds. It appears that the real basis on which enforcement of the contract is being resisted is simply that it rests on religion, and that on grounds of public policy the Court should keep out of that field. But the law reports contain many instances of Courts dealing with disputes having a religious origin or basis. . . . In each case some temporal right confronted the Court, and it did not hesitate to adjudicate thereon

[47] The fact that Paragraph 12 of the Consent 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 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. . . .

C. Application of the Quebec Charter

[65] There remains Mr. Marcovitz's argument that he is exonerated by § 3 of the Quebec Charter from the consequences of breaching Paragraph 12 of the Consent. He asserts that an award of damages would be a violation of his freedom of religion because it would condemn him ex post facto "for abiding by his religion in the first place." Section 3 states: Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

[66] This Court's most recent decision examining the scope of this provision is *Amselem* (2004). Orthodox Jews who owned units in a condominium building in Montréal sought to construct small enclosed structures known as "succahs" on their balconies for the Jewish festival of Succot. A by-law in the declaration of co-ownership prohibited them from doing so.

[67] 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. . . .

[70] Even if requiring him to comply with his agreement to give a *get* can be said to conflict with a sincerely held religious belief and to have non-trivial consequences for him, both of which I have difficulty discerning, such a prima facie infringement does not survive the balancing mandated by this Court's jurisprudence and the Quebec Charter.

[71] I start the balancing analysis with the provenance of this Court's robust interpretation of freedom of religion, *R. v. Big M Drug Mart Ltd.*, (1985) where Dickson J. confirmed the broad contours of the right in the constitutional context as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

[72] Notably, he also confirmed that religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. . . .
>
> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to

> manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

[73] Other jurisdictions have similarly concluded that the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm. Two examples suffice. In *Temple Mount Faithful v. Jerusalem District Police Commander* (1984), the Israeli Supreme Court allowed a petition from some Jewish worshippers seeking to pray in a location where a clash with Muslim worshippers appeared inevitable. Barak J. warned:

> Freedom of conscience, belief, religion and worship is a relative one. It has to be balanced with other rights and interests which also deserve protection, like private and public property, and freedom of movement. One of the interests to be taken into consideration is public order and security.

[74] And in *Christian Education South Africa v. Minister of Education* (2000), Sachs J., for a unanimous court, explored the limitations of religious freedom in a challenge to a law prohibiting corporal punishment of students in schools. Christian Education South Africa, an association of 196 independent Christian schools, claimed that corporal punishment was mandated by the Bible. In a decision upholding the prohibition against punishment, Sachs J. explained: The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientiousness and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

[75] And in *Amselem*, the majority in this Court observed that:

> [c]onduct which would potentially cause harm to or interfere with the rights of others would not automatically be protected. . . . Indeed, freedom of religion . . . may be made subject to overriding societal concerns.

[76] In Quebec, the fact that rights and freedoms, including freedom of religion, are limited by the extent to which their exercise is harmful to others, finds expression in § 9.1 of the Quebec Charter. Only the first paragraph of § 9.1 is engaged. It states: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well- being of the citizens of Québec."

[77] Section 9.1 confirms the principle that the assertion of a claim to religious freedom must be reconciled with countervailing rights, values, and harm. A balancing of competing rights and values appears to have been what was intended when § 9.1 was introduced in 1982. . . .

[78] Mr. Marcovitz's claim must therefore be weighed against the "democratic values, public order and the general well-being of the citizens of Québec" stipulated by § 9.1. We thereby enter the complex, nuanced, fact-specific territory referred to at the outset of these reasons.

[79] Mr. Marcovitz, it seems to me, has little to put on the scales. To begin, he freely entered into a valid and binding contractual obligation and now seeks to have it set aside based on ex post facto religious compunctions. In my view, it is this attempt to resile from his binding promise, not the enforcement of the obligation, that offends public order.

[80] But the public policy benefit of preventing individuals from avoiding the usual legal consequences of their contractual breaches, is only one of the factors that weighs 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.

[81] 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 public policy 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.

[82] 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. It is true that *get* also requires the consent of the wife, but as Ayelet Shachar points out in *Multicultural Jurisdictions*, the law has a disparate impact on women:

> 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.

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.

[83] There is also support internationally for courts protecting Jewish women from husbands who refuse to provide a religious divorce.

[84] The use of damages to compensate someone whose spouse has refused to provide a *get* was upheld by the European Commission of Human Rights. In *D. v. France* (1983), the husband had been ordered by a French court to pay his ex-wife 25,000 francs to compensate her for his refusal to deliver a *get*. The husband applied to the Commission, arguing that his right to freedom of conscience and religion under the European Convention on Human Rights was violated by this award of damages. The Commission rejected his application, noting that "under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife." It further held that "in refusing to hand over the letter of repudiation establishing the

religious divorce to his ex-wife, the applicant was not manifesting his religion in observance or practice, within the meaning of Article 9, para. 1 of the Convention."

[85] French courts have held that the refusal to provide the *get* is a delictual fault. The remedy provided is the payment of damages to compensate the wife. *Dame Muskat v. Danan* (1957), for example, the husband had divorced his wife under civil law but refused to deliver a *get* to her. The Tribunal Civil de la Seine held:

> Whereas the *get* is a purely religious act of repudiation that can have no effect—from a civil standpoint—on the breakdown of the marital relationship, to which effect has already been given by the divorce; and whereas it cannot therefore be properly maintained that the granting of a *get* is contrary to public order.

Finding that providing a *get* did not require any special form of worship, the Tribunal deemed that the husband's refusal to provide the *get* was a delictual fault and the wife was awarded substantial damages.

[86] In the United Kingdom, courts have also been willing to attach civil consequences to a husband's refusal to provide a *get* and have recognized that the inability to remarry within one's religion represents a serious compensable injury. In *Brett v. Brett* (1969), the English Court of Appeal ordered an additional lump sum spousal support payment by the husband if he refused to deliver a *get* by a certain date.

[87] Australian courts too have provided remedies for a husband's refusal to give his wife a *get*. In *In the Marriage of Shulsinger* (1977), the Family Court of Australia held that a husband's undertaking to a family court that he would obtain a *get* did not violate his freedom of religion, concluding:

> [The trial judge] was concerned with . . . the serious question of the injustice that would arise if the husband sought and obtained a divorce in Australia, but refused to relieve his wife of the obligations of the marriage. It is contrary to all notions of justice to allow such a possibility to arise in a court, and to say that the court can do nothing. And in *In the Marriage of Steinmetz* (1980), the Family Court of Australia awarded the wife a greater amount of spousal maintenance in

> order to "encourage" the husband to give her a religious divorce.

[88] American courts, relying primarily on the rationale that obtaining a *get* is not solely a religious act but one that has the secular purpose of finalizing the dissolution of the marriage, have been willing to order parties to submit to the jurisdiction of the Beth Din. In *Avitzur v. Avitzur* (1983), the New York Court of Appeals found that a clause in a Jewish marriage contract, requiring both parties to appear before the Beth Din upon the breakdown of the marriage for the purposes of obtaining a *get* was enforceable and did not violate the constitutional prohibition against excessive entanglement between church and state. Unlike *Avitzur* and other American cases, this Court has not been asked either to order specific performance or, as previously noted, to determine the enforceability of a Jewish marriage contract, and the reference to these cases should not be taken as endorsing either remedy.

[89] Of particular interest is the judicial treatment of a husband's refusal to provide a *get* in Israel, where judges have awarded damages as compensation to a wife because of her husband's refusal to give her a *get*. In *Jane Doe v. John Doe*, (2004, Jerusalem Family Court), Hacohen J. recognized that "[t]he problem of ghet recalcitrance is one of the fundamental problems of Halakhic Judaism (Jewish Religious Law) and in Jewish family law." He observed that in *Sabag v. Supreme Rabbinical Court of Appeals*, the High Court of Justice stressed that it was imperative "to find effective solutions to this phenomenon . . . in order to free couples . . . and to allow them to begin new lives, and in that way to realize their right to independent lives in the area of personal status." Noting the husband's argument that disputes of this nature should best be left to rabbinical courts because religious law applies to marriage and divorce in Israel, Hacohen J., who ordered the husband to pay 425,000 shekels in damages, including 100,000 shekels in aggravated damages, held:

> The rabbinical courts deal, at one tempo or another, with finding Halachic [religious law] solutions for the phenomenon of *get* recalcitrance and with the development of Halachic tools for exerting pressure on *get* withholders to consent to grant their wives the longed for *get*. However, in this suit the Court is not trespassing on this area. . . . The object of the relief applied for is to indemnify the wife for significant damages caused her by long years of aginut,

> loneliness and mental distress that were imposed on her by her husband.

[90] This international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies.

[91] Mr. Marcovitz cannot, therefore, rely on the Quebec Charter to avoid the consequences of failing to implement his legal commitment to provide the *get*.

[92] 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, are among the interests and values that outweigh Mr. Marcovitz's claim that enforcing Paragraph 12 of the Consent would interfere with his religious freedom.

[93] Despite the moribund state of her marriage, Ms. Bruker remained, between the ages of 31 and 46, Mr. Marcovitz's wife under Jewish law, and dramatically restricted in the options available to her in her personal life. This represented an unjustified and severe impairment of her ability to live her life in accordance with this country's values and her Jewish beliefs. Any infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada. . . .

[100] The appeal is therefore allowed with costs throughout.

[101] DESCHAMPS J. [Dissenting]—The question before the Court is whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking. Many would have thought it obvious that in the 21st century, the answer is no. However, the conclusion adopted by the majority amounts to saying yes. I cannot agree with this decision. . . .

2. Analysis

[120] Despite the religious foundations of Roman law and French civil law, from which Quebec civil law is derived, there should be no doubt today that in Quebec, the state is neutral where religion is concerned. A first break occurred at the time of the Royal Proclamation of 1763. Another step

took place in the 20th century when Quebec opened up to the world and in the early 1960s, during the Quiet Revolution, when the state took charge of institutions controlled by religious communities. A more complete break occurred with the adoption by Canada of the policy of multiculturalism.

[121] This neutrality does not mean that the state never considers questions relating to religion. On the contrary, § 2 of the Canadian Charter of Rights and Freedoms requires that the state respect freedom of religion. Thus, in *Congrégation des témoins de Jéhovah* (2004), it was precisely because of an argument that freedom of religion had been violated that the courts had to consider the municipality's refusal to grant a zoning variance. This reflects a "negative" view of freedom of religion according to which the state must not infringe a fundamental right any more than is necessary. As in the case of freedom of expression, the state does not have to provide preachers with megaphones.

[122] In Canadian law, a court is thus 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. In this regard, there have already been cases in which Canadian courts have been asked to give effect to obligations related to a *get* or a religious marriage contract. The requirement that there 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. In *Re Morris and Morris* (1973), a majority of the Manitoba Court of Appeal held that *gets* were within the jurisdiction of the religious court, not the secular courts. The Court of Appeal quashed an order requiring a husband to consent to a *get* on the basis that the religious marriage contract, the *ketubah*, did not contain a civil obligation.

[123] However, if a spouse can show that the religious marriage contract meets all the requirements for a civil contract under provincial legislation, then the courts may order the fulfillment of undertakings to pay the amounts provided for in the contract.

[124] In every case, the parties and the court must refer to the relevant civil rules to determine whether the undertaking is binding. In the case at bar, the appellant is not questioning recourses that have already been recognized in order to find a solution to the problem of the *get*, but is seeking to create a new one.

[125] The appellant asks the courts to assess the impact the respondent's failure to consent to the *get* has had on her life. No civil rules

provide for the consequences of the absence of a *get*. These consequences flow from religious rules.

[126] The courts have long refused to intervene in the manner proposed by the appellant. The courts' role in matters of religion is neutral. It is limited to ensuring that laws are constitutional and, in the case of a private dispute, to identifying the point at which rights converge so as to ensure respect for freedom of religion. . . .

[128] This Court's decision in *Ukrainian Greek Orthodox Church of Canada v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress* (1940) is just as clear. Crocket J. wrote the following:

> for it is well settled that, *unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order*. (Emphasis added).

He concluded that "[t]he manifest and sole purpose of this claim, as that of the whole action, is to enforce obedience to a purely ecclesiastical sentence or decree. For that reason I am of opinion that the Court of Appeal was fully justified in dismissing the plaintiff's action."

[129] 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. For instance, the Quebec Superior Court has, in refusing to order a husband to grant his former wife a *get*, invoked not only the separation of religious institutions and the state, but also freedom of conscience. On the issue of freedom of conscience, Hurtubise J. wrote the following in *Ouaknine v. Elbilia* (1981):

> From this standpoint, the question that arises is as follows: must the Court compel the respondent to appear before a rabbinical court and grant a religious divorce? Absent any evidence, must we assume that such an order would not be contrary to the precepts of the Jewish religion? And beyond the institution, the church, is it possible, in compelling an individual to do something like this, to avoid interfering with and limiting the free exercise of his or her own freedom of religion and conscience without determining the individual's deeply held beliefs or making assumptions about what the individual intends? We do not think so.

[130] I do not feel that the courts have reversed or qualified their approach to sanctioning purely religious obligations. Whether a court is asked to compel a party to appear before rabbinical authorities or to order the payment of money, the same principle is in issue: can the authority of the courts be based on a purely religious rule? I do not think it can.

[131] Furthermore, this principle of non-intervention in religious practices was one of the most important bases for adoption of the subjective standard of sincere belief, *Syndicat Northcrest v. Amselem* (2004). The principle is an important one, since the circumstances in which the courts might be asked to intervene in religious disputes are manifold. The principle of non-intervention makes it possible to avoid situations in which the courts have to decide between various religious rules or between rules of secular law and religious rules. In the instant case, the appellant has not argued that her civil rights were infringed by a civil standard derived from positive law. Only her religious rights are in issue, and only as a result of religious rules. Thus, she is not asking to be compensated because she could not remarry as a result of a civil rule. It was a rule of her religion that prevented her from doing so. She is not asking to be compensated because any children she might have given birth to would not have had the same civil rights as "legitimate" children. In Canadian law and in Quebec law, all children are equal whether they are born of a marriage or not. The ground for the appellant's claim for compensation conflicts with gains that are dear to civil society. Allowing the appellant's claim places the courts in conflict with the laws they are responsible for enforcing.

[132] It should be noted that the religious consequences of not having a *get* do not override secular law rules. Neither the Divorce Act nor the civil law has exclusionary rules like those related to *agunot* and *mamzerim*.[*] 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.

[133] It has been argued that other countries sanction the conduct of a husband who fails to consent to a Jewish religious divorce. It will therefore be necessary to review, at least summarily, the general approach taken by foreign courts with respect to religion and the legal mechanisms used in those other countries to deal with *gets*.

[*] Editor's Note: The children born from another man to an *aguna* are known as *mamzerim*.

Comparative law

[134] The relationship between religious and secular rules varies a great deal from one country to another, which means that where the *get* is concerned, the solutions adopted are not uniform. In my opinion, there are four countries whose approaches are relevant to the situation in Quebec and in Canada. France comes immediately to mind, since Quebec civil law has been strongly influenced by French law; it is therefore worth looking at the French approach to *gets* as well as at commentary on the decisions of the Court of Cassation. I will also look at the situation in England. Quebec inherited English public law at the time of the Conquest, and English cases are of definite interest. Next, I will summarily review a few decisions from the United States, since our countries have similar realities and several of this Court's decisions have been based on solutions developed by U.S. courts. I will then briefly examine the situation in Israel, since it seems difficult to talk about the Jewish religion without at least referring to the rules that are applied in that country.

France

[135] Despite the secular ideals on which the French Revolution was based, France did not formally incorporate the principle of the separation of the state and religious institutions into its legislation until the early 20th century with the December 9, 1905 law on the separation of church and state. That law established the principle of freedom of religion and worship for individuals and communities; the state relinquished its power over religious institutions, and religious institutions could no longer intervene in the functioning of state institutions.

[136] The earliest cases recognizing the right to compensation for refusal to consent to a *get* were based on the theory of an abuse of rights resulting from malicious intent on the husband's part. The Court of Cassation subsequently stated that for the husband, a *get* is merely an option that is a matter for his freedom of conscience and in respect of which an improper decision can give rise only to damages; however, the court noted the malicious purpose behind the husband's. Intent to harm was no longer found to be a requirement in two subsequent cases, though. Finally, in a later decision, the court reiterated that, for the husband, giving a *get* is merely an option that is a matter for his conscience and in respect of which an improper decision can give rise only to damages.

[137] The developments in French law have not been immune to criticism. Some have said that it is not true that giving a *get* is merely an option. These critics maintain that improper conduct on the husband's part constitutes delictual fault and that there is no reason why a court should not order the husband to grant the *get*, or even that it would be "hypocritical" to deny a penalty (*astreinte*) and that awarding damages to the aggrieved spouse basically amounts to giving effect to religious law. Others have said that denying the religious nature of the *get* amounts to disregarding the text that requires one to be granted, that assessing cases in which a *get* must be issued is beyond the jurisdiction of the secular courts and that it must be asked whether the obligation is not a purely personal one tied to the performance of a religious act.

[138] Thus, although in French law the right to compensation is not based on contract, the conceptual basis of and prerequisites for the remedy are far from clear. In short, some believe that the court has not gone far enough, while others believe it has gone too far; regardless of which position is taken, however, what is involved is not merely the imposition of an objective sanction relating to the time taken to consent to the *get*. The legal basis for the action in damages is sometimes fault, and sometimes abuse of rights.

England

[139] In England, the main source of protection for freedom of religion is art. 9 of the European Convention on Human Rights. Religious debates in England often concern interference with or restrictions on the practice of religion or on religious expression. The threshold for interference with the freedom of religious practice is quite high. Thus, in a recent House of Lords case, *R. (S.B.) v. Governors of Denbigh High School* (2007), Lord Bingham noted that "there remains a coherent and remarkably consistent body of authority [from the Strasbourg institutions] which our domestic courts must take into account and which shows that interference is not easily established." In his view, the educational institution's decision to exclude a student who insisted on wearing the *jilbab* had to be upheld. Lord Bingham found that the dress code was very clear and that it was open to the complainant to attend another school. In his opinion, there was no interference with the freedom of religious practice in the case. He added that, even if there had been interference, it would have been justified under art. 9(2) of the European Convention on Human Rights. In this regard, he observed that the dress code had been developed in co-operation with and been approved by several institutions in Muslim communities.

[140] A husband's failure to consent to a *get* does not seem to lead to sanctions other than those available in family law. Rather, it gives rise to an assessment of its impact on the wife's financial independence. In *Brett v. Brett* (1969), the Court of Appeal considered a Jewish wife's application for support against her husband, who was disinclined to give her a *get*. In deciding on the amount of support the husband would have to pay the wife, the court stated that he could pay less support if he gave her a *get* within three months.

[141] The English approach seems to me to be consistent with our family law. If one spouse becomes dependent because of the other spouse's conduct, the court can have regard to all the circumstances, including that state of dependence, and award support based on the parties' resources and needs.

United States

[142] In the United States, freedom of religion is protected by the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The First Amendment has two components: the first prohibits the promotion of a religion, while the second grants every individual the free exercise of freedom of belief and conscience. In the United States, the courts may not interpret religious laws or interfere with the practice of religion.

[143] Courts in the state of New York have decided cases relating to the *get*. Since that state has a large Orthodox Jewish community, the situation of the *agunah* seems to be a serious social problem. In New York, there are a number of legislative provisions that apply specifically to the *get*. For example, § 253 of the Domestic Relations Law requires a party who commences divorce proceedings to certify that there are no barriers to remarriage. Since 1993, judges can also take account of any barriers to remarriage when dividing up assets and determining support. At the time of the 1993 amendments, the Governor of New York stated that "[t]his bill was overwhelmingly adopted by the state legislature because it deals with a tragically unfair condition that is almost universally acknowledged."

[144] The New York courts have drawn on the principles underlying those provisions to invoke equity and prevent husbands from using the *get* to force their wives to give them advantages. Thus, in *Schwartz v. Schwartz* (1992), the Supreme Court applied the "clean hands" doctrine to deny a

husband an equal division of property on the basis that his refusal to grant a *get* was unacceptable.

[145] In *Giahn v. Giahn* (2000), the New York Supreme Court penalized a husband's use of the *get* to force his wife to make concessions. The court relied on Schwartz to hold that the husband's refusal to grant a *get* was unacceptable. To compensate for that abuse, all the assets of the marriage were awarded to the wife.

[146] A New York court has also enforced a separation agreement and the Jewish marriage contract (*ketubah*) in the same way as it would have done in the case of a secular marriage contract. In *Avitzur v. Avitzur* (1983), the court enforced the spouses' agreements to appear before the beth din. In interpreting the *ketubah* signed by the parties, the New York Court of Appeals noted that the case "can be decided solely upon the application of neutral principles of contract law, without reference to any religious principles." The approach taken by this court is based on the fact that the decision to grant a *get* is not a religious act. According to the court, granting a *get* is a secular act, since "the provisions of the *Ketubah* relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum."

[147] In a more recent New Jersey case, *Segal v. Segal* (1994), the Superior Court invalidated a separation agreement signed by both parties, because the wife had signed it under the threat of not being given a *get*.

[148] The approach of the New York courts cannot be adopted in Canada without qualification. First of all, that state's legislative provisions go further than § 21.1 of our Divorce Act, which only authorizes striking out the pleadings of a spouse who has failed to remove a barrier to religious remarriage. As well, the parties in the case at bar agreed not to use § 21.1 in relation to the issue of the justiciability of the claim. It seems to me that to use the New York case law would have the effect of reintroducing an argument the parties have agreed not to use for this purpose. Moreover, the New York legislative provisions are recognized, on the basis of rules that are broader in scope than ours, as having a broad equitable nature, and this characteristic cannot be imported into Canada. More specifically, our divorce legislation has since 1985 excluded the concept of misconduct from the assessment of the spouses' resources and needs for the purposes of support, which means that the clean hands doctrine cannot be invoked. In addition, the cases in which undertakings to appear before a rabbinical court have been enforced seem to have been based on the premise accepted in

Avitzur, namely that a *get* is a secular act. The evidence in the record in the instant case indicates the contrary. In cases involving decisions based on lack of informed consent or on the dependence of one party, however, a parallel can be drawn with Canadian law.

Israel

[149] The case of Israel is unique because of the fundamental role played by the Jewish religion in that country. Freedom of conscience, faith, religion and worship is guaranteed to every individual in Israel: *Temple Mount Faithful v. Jerusalem District Police Commander*. In addition, the Foundations of Law Act, explicitly authorizes the courts to use Jewish religious law to fill in gaps in legislation:

> Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.

In the context of that statute, the word "Israel" refers to Judaism and the Jewish people. The courts can also determine the limits of the Jewish religion itself. For example, in *Yosifof v. Attorney General*, the court held that a legal prohibition on the practice of bigamy did not infringe the freedom of religion of a Jewish man who was a member of a particular community, because that practice was not mandatory according to the Jewish religion.

[150] In Israel, the rules of family law are different from those of other jurisdictions. Although their decisions are subject to review by the Israeli High Court of Justice, the rabbinical courts have exclusive jurisdiction over marriage and divorce cases.

[151] The rabbinical courts are often reluctant to order a husband to grant his wife a *get*. Some of them say they are powerless to force a husband to give a *get* even where he has clearly transgressed Jewish law.

[152] However, in a more recent case, *Jane Doe v. John Doe* (2004), a family court accepted that a wife aggrieved by her husband's failure to consent to a *get* could receive financial compensation.

[153] In my opinion, the close relationship between religion, civil society and the courts' jurisdiction over religious matters clearly

distinguishes Israel from Canada. As a result of that jurisdiction, the solutions adopted in Israel cannot be imported into Canada without taking account of Canadian legislation and the Canadian context.

Conclusion on Comparative Law

[154] It can be seen from this overview of the solutions adopted in the four countries in question that some of these solutions are already available to Quebec and Canadian litigants. Others are not, however, because the rules are different in Canada. For example, the French solution based on fault or abuse of rights is not precluded but, first, this is not what the appellant's action is based on and, second, the conditions for application of the doctrine of abuse of rights are not necessarily the same in Quebec as in France. In my opinion, it is impossible in the circumstances of the case at bar to draw any inspiration from the situation in France. As for the solution adopted in England in *Brett*, although it is compatible with our law, it is not applicable in the instant case because the appellant claims to have suffered moral injury and not to have been placed in a situation of financial dependence. The U.S. cases in which the wife's dependence was taken into account may also be helpful, but those based on a punitive objective must be disregarded. The situation in Israel is unique, but it is relevant simply in that it shows that, even in a context in which a close interrelationship exists between the state and religion, the possibility of a civil court awarding financial compensation for failure to consent to a *get* has been recognized in only one decision.

[155] This review leads me to conclude that, in the countries whose law is most similar to ours, the *get* issue is governed by internal private law rules. The solutions that have been adopted are quite varied. The decisions of each country's courts are based on mechanisms proper to that country. They establish no principle of public law that is so persuasive that Canadian courts should alter their approach. The Canadian solutions discussed above are both sensible and sufficient.

Conclusion

[181] The restraint shown by Canadian civil courts with respect to religious questions enables them not only to limit their action to rules they are explicitly responsible for applying, but also to maintain a neutrality that is indispensable in a pluralistic and multicultural society. It allows them to focus on conformity to the civil standard without having to decide between various customs or practices.

[182] It has taken the Canadian state centuries to reach the still-precarious balance we now have. In Quebec, the transition to state neutrality is referred to as the Quiet Revolution. Would attaching opprobrium to a child born to unmarried parents not be to slip into a sort of "Quiet Regression?" The role of the courts cannot be altered without calling into question the foundations of the relationship between the state and religion. The majority suggest proceeding on a case-by-case basis. In my opinion, that is a short-sighted approach. Canada opens its doors to all religions. All of them are entitled to receive the same protection, but not, I believe, to be provided with weapons.

[183] Although, like the Court of Appeal, I am sensitive to how difficult it is for the Jewish community to modify the rules of religious divorce, the fact remains that the courts are limited to deciding cases that originate in positive law. The instant case is one in which the religious and civil worlds collide. In my opinion, the problem is a matter for Hebrew law. I see no reason to change, for this case, the clear rule that religion is not an autonomous source of law in Canada.

[184] I will conclude by noting that the reserved approach taken by the Canadian courts to religious precepts is in my view a sound one. Civil rights arise out of positive law, not religious law. If the violation of a religious undertaking corresponds to the violation of a civil obligation, the courts can play their civil role. But they must not be put in a situation in which they have to sanction the violation of religious rights. The courts may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts' role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Quebec law. Gandhi is credited with saying that each person is responsible for his or her own religion. That responsibility goes hand in hand with the neutrality of the state toward religious precepts and, in the case at bar, favours dismissing the appellant's action.

[185] For these reasons, I would have dismissed the appeal.

Avitzur v. Avitzur
Court of Appeals of New York
58 N.Y.2d 108 (1983)

This appeal presents for our consideration the question of the proper role of the civil courts in deciding a matter touching upon religious concerns. At issue is the enforceability of the terms of a document, known as a *Ketubah*, which was entered into as part of the religious marriage ceremony in this case. The Appellate Division held this to be a religious covenant beyond the jurisdiction of the civil courts. However, we find nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement. There should be a reversal.

Plaintiff and defendant were married on May 22, 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed both a Hebrew/Aramaic and an English version of the *Ketubah*. According to the English translation, the *Ketubah* evidences both the bridegroom's intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition. By signing the *Ketubah*, the parties declared their "desire to live in accordance with the Jewish law of marriage throughout [their] lifetime" and the marriage contract further "authorized the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

Defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment on May 16, 1978. In order that a *Get* may be obtained plaintiff and defendant must appear before a "Beth Din," a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law. Plaintiff sought to summon defendant before the Beth Din pursuant to the provision of the *Ketubah* recognizing that body as having authority to counsel the couple in the matters concerning their marriage.

Defendant has refused to appear before the Beth Din, thus preventing plaintiff from obtaining a religious divorce. Plaintiff brought this action, alleging that the *Ketubah* constitutes a marital contract, which defendant has breached by refusing to appear before the Beth Din, and she seeks relief both in the form of a declaration to that effect and an order compelling defendant's specific performance of the *Ketubah*'s requirement

that he appear before the Beth Din. Defendant moved to dismiss the complaint upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action, arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in impermissible consideration of a purely religious matter. Plaintiff, in addition to opposing the motion, cross-moved for summary judgment.

Special Term denied defendant's motion to dismiss, noting that plaintiff sought only to compel defendant to submit to the jurisdiction of the Beth Din, an act which plaintiff had alleged defendant bound himself to do. That being the only object of the lawsuit, Special Term was apparently of the view that the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue. The court also denied plaintiff's motion for summary judgment, concluding that issues concerning the translation, meaning and effect of the *Ketubah* raised factual questions requiring a plenary trial.

Accepting plaintiff's allegations as true, as we must in the context of this motion to dismiss, it appears that plaintiff and defendant, in signing the *Ketubah*, entered into a contract which formed the basis for their marriage. Plaintiff has alleged that, pursuant to the terms of this marital contract, defendant promised that he would, at plaintiff's request, appear before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a *Get*. It should be noted that plaintiff is not attempting to compel defendant to obtain a *Get* or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.

Viewed in this manner, the provisions of the *Ketubah* relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable. Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity. This agreement—the *Ketubah*—should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State.

Defendant argues, in this connection, that enforcement of the terms of the *Ketubah* by a civil court would violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice. It is urged that the obligations imposed by the *Ketubah* arise solely from Jewish religious law and can be interpreted only with reference to religious dogma. Granting the religious character of the *Ketubah*, it does not necessarily follow that any recognition of its obligations is foreclosed to the courts.

It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine. In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with constitutional limitations (*Jones v. Wolf*). This approach contemplates the application of objective, well-established principles of secular law to the dispute, thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony. Similarly, that the obligations undertaken by the parties to the *Ketubah* are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the *Ketubah's* provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum. The courts may properly enforce so much of this agreement as is not in contravention of law or public policy.

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way affect the civil divorce. To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. Consideration of other substantive issues bearing upon plaintiff's entitlement to a religious divorce, however, is appropriately left to the forum the parties chose for resolving the matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.

Odatalla v. Odatalla
New Jersey Superior Court
810 A.2d 93 (2002)

Sekser, J.S.C., This case presents the novel issue of whether a civil court can specifically enforce the terms of an Islamic Mahr Agreement, and arises in this action brought by plaintiff for a divorce based upon grounds of extreme cruelty. . . . The court has had the benefit of testimonial evidence from both plaintiff and defendant. In addition, the Court had an actual copy of the Islamic marriage license, a videotape of the entire marriage ceremony and documents relating to the alimony and equitable distribution issues in this case.

Plaintiff and defendant were married in a religious ceremony on June 15, 1996 by an Islamic Imam at the home of the plaintiff's parents in Linden, New Jersey. Prior to the actual ceremony of marriage, the family of the plaintiff and the defendant negotiated the terms and conditions of a Mahr Agreement. The videotape of the entire ceremony showed the families sitting on separate couches in the living room negotiating the terms and conditions of the entire Islamic marriage license including those of the Mahr Agreement. After the negotiations, when a sum of money was determined for the Mahr Agreement, both families went to a table where the Imam began preparing the written Islamic marriage license including the Mahr Agreement. When the Islamic marriage license, including *Mahr*, was completed, the Imam presented it to each party for their signature. Each

party read the entire license and Mahr Agreement and signed the same freely and voluntarily. The signatures were witnessed and the Imam continued performing the remaining parts of the Islamic ceremony of marriage. During the ceremony defendant handed plaintiff the one golden pound coin as called for in the Mahr Agreement.

The Mahr Agreement, a section of the Islamic marriage license in the lower left portion of the license, read:

According to Islamic Law Dower is:

Prompt *One golden pound coin*

Postponed *Ten Thousand U.S. Dollars*

Personal conditions

The defendant, Zuhair Odatalla, opposes the Court ordering specific performance of the Mahr Agreement on [the ground that] the First Amendment to the Constitution preclud[es] this court's authority to review the Mahr Agreement under the separation of Church and State Doctrine . . .

The first clause of the First Amendment of the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This constitutional proscription has, over the years, been applied in various settings concerning the separation of Church and State. Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? Defendant answers that enforcement of the Mahr Agreement would violate the spirit of the separation of Church and State clause of the First Amendment of the Constitution. Clearly, this court can enforce a contract which is not in contravention of established law or public policy.

It is this court's opinion that it can specifically enforce the terms of a Mahr Agreement provided it meets certain conditions. The first requirement is that the agreement can be enforced based upon "neutral principles of law" and not on religious policy or theories. The "neutral principles of law" approach was clearly explained in [the Supreme Court case] *Jones v. Wolf* (1979). . . .

A logical extension of this principle is applicable to the enforcement of a Mahr Agreement contained within an Islamic marriage license at the time of the marriage ceremony. As in *Jones*, no doctrinal issue is involved-hence, no constitutional infringement. In order for laws, indeed, constitutional principles, to endure, they must be flexible in their application to the facts of the case presented. The community we live in today is vastly different from the community of the late 1700's when our Constitution was drafted by the founding fathers. At that time, our founding fathers were concerned with a state sponsored church such as existed in many European communities that they had sought to escape when they came to this country. Today's community is not as concerned with issues of a state sponsored church. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members to today's diverse community. The United States has experienced a significant immigration of diverse people from Japan, China, Korea, the Middle East, and South America of various religious beliefs. Can our constitutional principles keep abreast of these changes in the fabric of our community? . . .

Furthermore, the Mahr Agreement is not void simply because it was entered into during an Islamic ceremony of marriage. Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise" of religious beliefs, no matter how diverse they may be. If this Court can apply "neutral principles of law" to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications. Enforcement of this Agreement will not violate the First Amendment proscriptions on the establishment of a church or the free exercise of religion in this country. "The primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."

This principle has been applied in other jurisdictions. In New York, the court specifically enforced a *Ketubah*, a marriage contract in the Jewish faith. In a well written decision in *Avitzur v. Avitzur*, (1983), [the court] used the "neutral principles of law" approach to order the specific performance of a *Ketubah*. Similarly Judge Minuskin ruled that the Superior Court of New Jersey had the power to specifically enforce a *Ketubah*, as it related to the husband securing a Jewish "*Get*" as provided for in the *Ketubah*. . . .

Agreements, though arrived at as part of a religious ceremony of any particular faith, are capable of being enforced if they meet the two prong

test of (1) being capable of specific performance under "neutral principles of law" and (2) once those "neutral principles of law" are applied, the agreement in question meets the state's standards for those "neutral principles of law."

[A]n agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals.

Clearly, the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals.

Ayelet Shachar
Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law[*]

In this Article, I offer an alternative to the presently popular vision of "privatized diversity." Instead of resorting to a traditional public model, however, I explore the idea of permitting *regulated interaction* between religious and secular sources of law, so long as the baseline of citizenship guaranteed rights remains firmly in place. Unlike the strict separation model, which is willfully blind to the intersection of manifold affiliations in individuals' lives—to their state, religion, gender, and so on—I take this multiplicity as the point of departure for my analysis. These overlapping "belongings" offer religious women a significant source of meaning and value; at the same time, they may also make them vulnerable to a double or triple disadvantage, especially in a legal and governance system that categorically denies cooperation between their overlapping sources of obligation.

Although limiting intervention by the courts in cases where religious and civil worlds collide has had a long history, the urgency of my plea for rethinking this approach is informed by the contemporary revival of

[*] *Excerpted from* 9 THEORETICAL INQUIRIES IN LAW 573 (2008).

demands for privatized diversity in Canada, England, and elsewhere. The reincarnation of this debate raises a slew of important questions for our conception of citizenship in contemporary societies in the context of a wider trend towards the privatization of justice in family law. Consider the following examples: should a court be permitted to enforce a civil divorce contract that also has a religious aspect, namely a promise by a Jewish husband to remove all barriers to remarriage by granting his wife the religious *get* (Jewish divorce decree)? Is it legitimate to establish private religious tribunals—as alternative dispute resolution (ADR) forums—in which consenting adults arbitrate family law disputes according to the parties' religious personal laws in lieu of the state's secular family laws? And, is there room for considerations of culture, religion, national-origin, or linguistic identity in determining a child's best interests in cases of custody, visitation, education, and so on? None of these examples are hypothetical. They represent real-life legal challenges raised in recent years by individuals and families who are seeking to redefine the place of culture and religion in their own private ordering, and, indirectly, in the larger polity as well.

Family law serves as a casebook illustration of these tensions. Take, for example, the situation of observant religious women who may wish—or feel bound—to follow the requirements of divorce according to their community of faith, in addition to the rules of the state, in order to remove barriers to remarriage. Without the removal of such barriers, women's ability to build new families, if not their very membership status (or that of their children), may be adversely affected. This is particularly true for Muslim and Jewish women living in secular societies who have entered into the marital relationship through a religious ceremony—as permitted by law in many jurisdictions. For them, a civil divorce is merely part of the story; it does not, and cannot, dissolve the religious aspect of the relationship. Failure to recognize their "split status" position—namely, that of being legally divorced according to state law, though still married according to their faith—may leave these women prey to abuse by recalcitrant husbands who are well aware of the adverse effect this situation has on their wives, as they fall between the cracks of the civil and religious jurisdictions.

To illustrate this growing trend, I focus on an acrimonious debate that recently broke out in Canada following a community-based proposal to establish a "Private Islamic Court of Justice" (*darul-qada*) to resolve family law disputes among consenting adults according to Shari'a principles. This proposal didn't come to the fore in the usual way, through democratic deliberation, constitutional amendment, or a standard law-reform process.

Instead, a small and relatively conservative nongovernmental organization, named the Canadian Society of Muslims, declared in a series of press releases its intention to establish the said darul-qada, or Shari'a tribunal, as this proposal came to be known in the ensuing debate. In a nutshell, their idea was to rely upon a preexisting legal framework, the Arbitration Act, which (at the time) permitted a wide array of family-law disputes to be resolved under its extensively open-ended terms. The envisioned tribunal would have permitted consenting parties not only to enter a less adversarial, out-of-court, dispute resolution process, but also to use the Act's choice of law provisions to apply religious norms to resolve family disputes, according to the "laws (fiqh) of any [Islamic] school, e.g. Shiah or Sunni (Hanafi, Shafi'i, Hambali, or Maliki)."

[T]he Shari'a tribunal proposal was seen as challenging the normative and juridical authority, not to mention legitimacy, of the secular state's asserted mandate to represent and regulate the interests and rights of *all* its citizens in their family-law affairs, irrespective of communal affiliation. It was therefore seen by some as a foundational debate about some of the most basic questions concerning hierarchy and lexical order in the contexts of law and citizenship: which norms *should* prevail, and who, or what entity, ought to have the final word in resolving value conflicts between equality and diversity, if they arise. The vision of privatized diversity, in its full-fledged "unregulated islands of jurisdiction" variant, thus poses a challenge to the superiority of secular family law by its old adversary: religion.

Indeed, the prospect of tension, if not a direct clash, between religious and secular norms governing the family—and the fear that women's hard-won equal rights would be the main casualties of such a showdown—largely informed the opposition to the Shari'a tribunal variant of privatized diversity. Add to that the charged political environment surrounding Muslim minorities in North America and Europe in the post-9/11 era, and we can easily understand why this tribunal initiative became a lightning-rod for the much larger debate about what unites us as citizens, and what may divide us. And were this not enough to create an explosive situation on its own, we must take account of the fact that once these charged gender and religious questions caught the attention of the mass media, they quickly fell prey to reified notions of the inherent contrast between (idealized) secular norms and (vilified) religious traditions. The recent storm in the United Kingdom that followed the "civil and religious law" speech by the Archbishop of Canterbury exhibits the same pattern at work. In this war of images, secular family laws were automatically

presented as unqualified protectors of equality as well as the deterrents to destitution or dependency (though they may leave women and children in a far poorer state than divorced husbands, for example); by contrast, religious principles were uncritically defined as inherently reinforcing inequality and as the source of disempowerment for women (although certain interpretations could lead to results that are equitable and respectful to the divorcing spouses). Eventually, the Shari'a tribunal came to represent a polarized oppositional dichotomy that allows *either* protecting women's rights *or* promoting religious extremism. Under these conditions, it is not surprising that the government chose the former over the latter. But were there other, less oppositional, alternatives that were missed in this politicized debate, alternatives which might better have responded to devout women's multiple affiliations and identities as group members and citizens of the larger polity?

[For] the tribunal's principal advocates, the Canadian Society of Muslims, what seemed to matter most was not so much the theoretical ingenuity of privatized diversity's intermingling with the larger trend of "private justice" as it was the pragmatic bottom-line result that this permitted: in their words, it would allow Muslims living in a non-Muslim country to "live our faith to the best of our ability." But the tribunal's advocates further argued (alarming many critics in the process) that once the possibility of turning to a Shari'a tribunal becomes readily available, it *should* represent a clear choice for Muslim Canadians: "[d]o you want to govern yourself by the personal laws of your religion, or do you prefer governance by secular Canadian family law?" It is here that the difficulty lies with the envisioned tribunal: it quickly came to represent an "either/or" choice for group members, dividing them between loyalty to the faith and governance by the state. This is an artificially constructed dichotomy, however, which in many ways replicates the logic of a rigid public/private divide. Let me provide two quick illustrations of the "cracks" in this either/or vision. For one, the advocates of the tribunal argued that any arbitral awards rendered by their proposed religious tribunal would be enforceable by the *secular* court system. Though described as a selling point to its potential users, this partial reliance on (or interaction with) the state and its legal system to enforce the tribunal's legal "product" created much public confusion on the ground. It also revealed the tribunal's selective, if not opportunistic, "disengagement" with state institutions. While they sought to escape the normative order of the state, the tribunal's advocates at the same time wanted to procedurally rely on Canada's (public) court system to enforce their "private" tribunal's awards. This is a shaky proposition: using state law inevitably brings with it certain public

values of fairness and accountability; it is not an empty vessel to be used as dictated by convenience. Furthermore, the expectation that parties will turn to the private arbitration tribunal (in lieu of the state's public system) as an expression of *their* loyalty to the community, as implicitly and explicitly asserted by the tribunal's advocates, itself relies on an over-unified vision of the "Muslim community" in Canada. This community consists of members who hold different degrees of identification with religiosity, subscribe to a range of linguistic and cultural traditions, and originate from a wide variety of countries. Instead of recognizing multiplicity of affiliation, the tribunal's variant of privatized diversity, by posing a dichotomous choice: "do you want to govern yourself by the personal laws of your religion, or do you prefer governance by the secular state's family laws," contributed to creating a presumably unbridgeable chasm between one's identity as citizen and as group member.

These issues become even more charged when the gendered dimension is added: the main concern here is that the push towards privatized diversity places disproportionate pressure on women to prioritize their communal loyalty over and above shared citizenship, given their often heightened responsibility as emblems of culture and "bearers" of tradition. This last point is intensified by the fact that we are focusing on the family: a site that has become deeply intertwined with struggles over communal identity and expressions of "loyalty."

[F]or a complex set of reasons, women and the family often serve a crucial symbolic role in constructing group solidarity vis-à-vis society at large. Under such conditions, women's indispensable contribution in transmitting and manifesting a group's collective identity is coded as both an instrument and symbol of group integrity. As a result, idealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of "authentic" group identity. These carefully crafted, gendered images of devout religiosity then become cultural markers that help erase internal diversity and disagreement, while at the same time allowing both minority and majority leaders to politicize selective and often invented boundaries between the "self" and the "other."

Such hardening of the borders of inclusion and exclusion may unfortunately serve as a ready made rationale for conservative group leaders to impose further restrictions on women; this may occur in the name of the collective effort to preserve the group's distinct identity in the face of (real or imagined) external threats. It may also motivate aggressive responses by

the majority community, which may feel threatened by the resurgence and radicalization of religious minority-group identity. In this way, the conflation of increasingly "revivalist" claims of culture, involving gendered images of idealized womanhood, becomes a focal point for an unprecedented spate of state versus religion conflicts over foundational collective identity and basic citizenship questions. . . .

[A] significant part of the anxiety that surrounded the Shari'a tribunal debate was the fact that its advocates never fully clarified what would happen if their interpretation of customary or religious personal laws provided women with less equitable divorce settlements than those that could have been obtained under the state's secular family laws. According to the tribunal's opponents, nothing less than an attempt to use a technique of "privatized diversity" to redefine the relationship between state and religion in regulating the family was underway. This is an "existential" threat that no secular state authority is likely to accept with indifference, not even in tolerant, multicultural Canada. And so, after much contemplation, the response chosen to the challenge presented by the proposed tribunal was to quash it with all the legal force the authorities could muster. This took the shape of an absolutist solution: prohibiting by decree the operation of *any* religious arbitration process in the family law arena. Such a response, which relies on imposition by state fiat, sends a strong symbolic message of unity, albeit a unity that is manufactured by ensuring compliance with a single monopolistic jurisdictional power-holder.

A less heavy-handed approach might have required religious tribunals themselves to determine, through their actions and deeds, whether to enjoy the benefits of binding arbitration—including the boon of public enforcement of their awards—if they *voluntarily* agreed to comply with statutory thresholds and default rules defined in general family legislation. These safeguards typically establish a "floor" of protection, above which significant room for variation is permitted. These basic protections were designed in the first place to address concerns about power and gender inequities in family relations, concerns that are not typically absent from religious communities, either. If anything, they probably apply with equal force in the communal context as in the individualized, secular case. Under this "self-restraint" scenario—which offers an alternative to the top-down prohibition model that was eventually chosen by the government—if a resolution by a religious tribunal falls within the margin of discretion that any secular family-law judge or arbitrator would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision-maker used a different tradition to reach a

permissible resolution. Put differently, the operative assumption here is that, in a diverse society, we can safely assume that at least some individuals might prefer to turn to their "communal" institutions, knowing that their basic state-backed rights are protected by these alternative forums. Add to this the guarantee that any solution reached through a dispute resolution process that was the result of duress, coercion, or violence will automatically be invalidated as a matter of law. Against this backdrop, permitting community members to turn to a faith-based tribunal may, perhaps paradoxically, provide the conditions for promoting a moderate interpretation of the tradition, as authorized by religious arbitrators themselves. The prospect for such "change from within"—or what I have elsewhere labeled *transformative accommodation*—in this context may translate into a recognition by the tribunal's arbitrators themselves that if they wish to issue final and binding decisions (which permit parties to turn to the state for enforcement where needed), they cannot breach the basic protections to which each woman is entitled by virtue of her equal citizenship status. To ignore these entitlements is to lose the ability to provide relevant legal services to members of the community. Counter-intuitively, the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, non-coercive encouragement of egalitarian and reformist change from within the religious tradition itself. The state system, too, is transformed from strict separation to regulated interaction. In this way, the "multilayered" or intersectionist identity of the individuals involved may be fostered. This approach also discourages an underworld of unregulated religious tribunals and offers a path to transcend the either/or choice between culture and rights, family and state, citizenship and islands of "privatized diversity."

[T]he government ultimately decided to respond to the Shari'a tribunal challenge by barring the operation of *any* faith-based family arbitration process. Such a universal ban ensures that Islam is not singled out as being more (or less) friendly to women's interests than any other religious or customary tradition. It further aims to realign the regulation of the family exclusively within the state, leaving no room (except for informal religious mediation, which has no legal effect in the eyes of civil courts or legislatures) for communities' own institutions and authorities to exercise any formal role in defining the parties' marriage and divorce status. In effect, this resolution reasserts a strict public/private divide, thus shutting down—rather than encouraging—coordination or dialogue between civil and religious jurisdictions. The government's legislative response thus stands in tension with the *Marcovitz* decision, which did not take the route of recommending that the wife's damages claim be dropped simply because

the operation of the *beth din* (the only authority that can supervise the granting of a Jewish *get* decree) is not recognized in the eyes of state law.

Jones v. Wolf
Supreme Court of the United States
443 U.S. 595 (1979)

Justice BLACKMUN delivered the opinion of the Court.

This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of "neutral principles of law," or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.

I

The Vineville Presbyterian Church of Macon, Ga., was organized in 1904, and first incorporated in 1915. Its corporate charter lapsed in 1935, but was revived and renewed in 1939, and continues in effect at the present time.

The property at issue and on which the church is located was acquired in three transactions, and is evidenced by conveyances to the "Trustees of [or "for"] Vineville Presbyterian Church and their successors in office," or simply to the "Vineville Presbyterian Church." The funds used to acquire the property were contributed entirely by local church members. Pursuant to resolutions adopted by the congregation, the church repeatedly has borrowed money on the property. This indebtedness is evidenced by security deeds variously issued in the name of the "Trustees of the Vineville Presbyterian Church," or, again, simply the "Vineville Presbyterian Church."

In the same year it was organized, the Vineville church was established as a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). The PCUS has a generally hierarchical or connectional form of government, as contrasted with a congregational form. Under the polity of the PCUS, the government of the local church is committed to its Session in the first instance, but the

actions of this assembly or "court" are subject to the review and control of the higher church courts, the Presbytery, Synod, and General Assembly, respectively. The powers and duties of each level of the hierarchy are set forth in the constitution of the PCUS, the Book of Church Order, which is part of the record in the present case.

On May 27, 1973, at a congregational meeting of the Vineville church attended by a quorum of its duly enrolled members, 164 of them, including the pastor, voted to separate from the PCUS. Ninety-four members opposed the resolution. The majority immediately informed the PCUS of the action, and then united with another denomination, the Presbyterian Church in America. Although the minority remained on the church rolls for three years, they ceased to participate in the affairs of the Vineville church and conducted their religious activities elsewhere.

In response to the schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted "the true congregation of Vineville Presbyterian Church," and withdrawing from the majority faction "all authority to exercise office derived from the [PCUS]." The majority took no part in the commission's inquiry, and did not appeal its ruling to a higher PCUS tribunal.

Representatives of the minority faction . . . brought this class action in state court, seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the Vineville church property as a member congregation of the PCUS. The trial court, purporting to apply Georgia's "neutral principles of law" approach to church property disputes, granted judgment for the majority. The Supreme Court of Georgia, holding that the trial court had correctly stated and applied Georgia law, and rejecting the minority's challenge based on the First and Fourteenth Amendments, affirmed.

II

Georgia's approach to church property litigation has evolved in response to *Presbyterian Church v. Hull Church,* (1969) (*Presbyterian Church I*). That case was a property dispute between the PCUS and two local Georgia churches that had withdrawn from the PCUS. The Georgia Supreme Court resolved the controversy by applying a theory of implied trust, whereby the property of a local church affiliated with a hierarchical

church organization was deemed to be held in trust for the general church, provided the general church had not "substantially abandoned" the tenets of faith and practice as they existed at the time of affiliation. This Court reversed, holding that Georgia would have to find some other way of resolving church property disputes that did not draw the state courts into religious controversies. The Court did not specify what that method should be, although it noted in passing that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."

On remand, the Georgia Supreme Court concluded that, without the departure-from-doctrine element, the implied trust theory would have to be abandoned in its entirety. In its place, the court adopted what is now known as the "neutral principles of law" method for resolving church property disputes. The court examined the deeds to the properties, the state statutes dealing with implied trusts and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church. Finding nothing that would give rise to a trust in any of these documents, the court awarded the property on the basis of legal title, which was in the local church, or in the names of trustees for the local.

The neutral-principles analysis was further refined by the Georgia Supreme Court in *Carnes v. Smith* (1976). That case concerned a property dispute between The United Methodist Church and a local congregation that had withdrawn from that church. The court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational church.

In the present case, the Georgia courts sought to apply the neutral-principles analysis to the facts presented by the Vineville church controversy. Here, as in those two earlier cases, the deeds conveyed the property to the local church. Here, as in the earlier cases, neither the state statutes dealing with implied trusts, nor the corporate charter of the Vineville church, indicated that the general church had any interest in the property. And here the provisions of the constitution of the general church, the Book of Church Order, concerning the ownership and control of property failed to reveal any language of trust in favor of the general church. The courts accordingly held that legal title to the property of the Vineville church was vested in the local congregation. Without further analysis or elaboration, they further decreed that the local congregation was

represented by the majority faction, respondents herein.

III

The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga. There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.

It is also clear, however, that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."

At least in general outline, we think the "neutral principles of law" approach is consistent with the foregoing constitutional principles. . . . The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious

organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

This is not to say that the application of the neutral-principles approach is wholly free of difficulty. The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of "States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.

The dissent would require the States to abandon the neutral-principles method, and instead would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the "authoritative resolution of the dispute within the church itself." It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has "placed ultimate authority over the use of the church property." After answering this question, the courts would be required to "determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made." They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

The dissent also argues that a rule of compulsory deference is necessary in order to protect the free exercise rights "of those who have formed the association and submitted themselves to its authority." This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. . . .

Mr. Justice POWELL, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice WHITE join, dissenting.

This case presents again a dispute among church members over the control of a local church's property. Although the Court appears to accept established principles that I have thought would resolve this case, it superimposes on these principles a new structure of rules that will make the

decision of these cases by civil courts more difficult. The new analysis also is more likely to invite intrusion into church polity forbidden by the First Amendment.

I

The Court begins by stating that "[t]his case involves a dispute over the ownership of church property," suggesting that the concern is with legal or equitable ownership in the real property sense. But the ownership of the property of the Vineville church is not at issue. The deeds place title in the Vineville Presbyterian Church, or in trustees of that church, and none of the parties has questioned the validity of those deeds. The question actually presented is which of the factions within the local congregation has the right to control the actions of the titleholder, and thereby to control the use of the property, as the Court later acknowledges.

Since 1872 disputes over control of church property usually have been resolved under principles established by *Watson v. Jones*. Under the new and complex, two-stage analysis approved today, a court instead first must apply newly defined "neutral principles of law" to determine whether property titled to the local church is held in trust for the general church organization with which the local church is affiliated. If it is, then the court will grant control of the property to the councils of the general church. If not, then control by the local congregation will be recognized. In the latter situation, if there is a schism in the local congregation, as in this case, the second stage of the new analysis becomes applicable. Again, the Court fragments the analysis into two substeps for the purpose of determining which of the factions should control the property.

As this new approach inevitably will increase the involvement of civil courts in church controversies, and as it departs from long-established precedents, I dissent.

A

The first stage in the "neutral principles of law" approach operates as a restrictive rule of evidence. A court is required to examine the deeds to the church property, the charter of the local church (if there is one), the book of order or discipline of the general church organization, and the state statutes governing the holding of church property. The object of the inquiry, where the title to the property is in the local church, is "to determine whether there [is] any basis for a trust in favor of the general church." The

court's investigation is to be "completely secular," "rel[ying] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." Thus, where religious documents such as church constitutions or books of order must be examined "for language of trust in favor of the general church," "a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." It follows that the civil courts using this analysis may consider the form of religious government adopted by the church members for the resolution of intrachurch disputes *only* if that polity has been stated, in express relation to church property, in the language of trust and property law.

One effect of the Court's evidentiary rule is to deny to the courts relevant evidence as to the religious polity—that is, the form of governance-adopted by the church members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them "in purely secular terms" is more likely to promote confusion than understanding. Moreover, whenever religious polity has not been expressed in specific statements referring to the property of a church, there will be no evidence of that polity cognizable under the neutral-principles rule. Lacking such evidence, presumably a court will impose some rule of church government derived from state law. In the present case, for example, the general and unqualified authority of the Presbytery over the actions of the Vineville church had not been expressed in secular terms of control of its property. As a consequence, the Georgia courts could find no acceptable evidence of this authoritative relationship, and they imposed instead a congregational form of government determined from state law.

This limiting of the evidence relative to religious government cannot be justified on the ground that it "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." For unless the body identified as authoritative under state law resolves the underlying dispute in accord with the decision of the church's own authority, the state court effectively will have reversed the decisions of doctrine and practice made in accordance with church law. The schism in the Vineville church, for example, resulted from disagreements among the church members over questions of doctrine and practice. Under the Book of Church Order, these questions were resolved authoritatively by the higher church courts, which then gave control of the local church to the faction loyal to that resolution. The Georgia courts, as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the

doctrinal decision of the church courts. This indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.

When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself. The new analysis, under the attractive banner of "neutral principles," actually invites the civil courts to do the latter. The proper rule of decision, that I thought had been settled until today, requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose.

B

The Court's basic neutral-principles approach, as a means of isolating decisions concerning church property from other decisions made within the church, relies on the concept of a trust of local church property in favor of the general church. Because of this central premise, the neutral-principles rule suffices to settle only disputes between the central councils of a church organization and a unanimous local congregation. Where, as here, the neutral-principles inquiry reveals no trust in favor of the general church, and the local congregation is split into factions, the basic question remains unresolved: which faction should have control of the local church?

The Court acknowledges that the church law of the Presbyterian Church in the United States (PCUS), of which the Vineville church is a part, provides for the authoritative resolution of this question by the Presbytery. Indeed, the Court indicates that Georgia, consistently with the First Amendment, may adopt the *Watson v. Jones* rule of adherence to the resolution of the dispute according to church law—a rule that would necessitate reversal of the judgment for the respondents. But instead of requiring the state courts to take this approach, the Court approves as well an alternative rule of state law: the Georgia courts are said to be free to "adop[t] a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means." This showing may be made by proving that the church has "provid[ed], in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way."

On its face, this rebuttable presumption also requires reversal of the state court's judgment in favor of the schismatic faction. The polity of the PCUS commits to the Presbytery the resolution of the dispute within the local church. Having shown this structure of church government for the determination of the identity of the local congregation, the petitioners have rebutted any presumption that this question has been left to a majority vote of the local congregation.

The Court nevertheless declines to order reversal. Rather than decide the case here in accordance with established First Amendment principles, the Court leaves open the possibility that the state courts might adopt some restrictive evidentiary rule that would render the petitioners' evidence inadequate to overcome the presumption of majority control. But, aside from a passing reference to the use of the neutral-principles approach developed earlier in its opinion, the Court affords no guidance as to the constitutional limitations on such an evidentiary rule; the state courts, it says, are free to adopt any rule that is constitutional. . . .

In essence, the Court's instructions on remand therefore allow the state courts the choice of following the long-settled rule of *Watson v. Jones* or of adopting some other rule—unspecified by the Court—that the state courts view as consistent with the First Amendment. Not only questions of state law but also important issues of federal constitutional law thus are left to the state courts for their decision, and, if they depart from *Watson v. Jones*, they will travel a course left totally uncharted by this Court.

II

Disputes among church members over the control of church property arise almost invariably out of disagreements regarding doctrine and practice. Because of the religious nature of these disputes, civil courts should decide them according to principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine. The only course that achieves this constitutional requirement is acceptance by civil courts of the decisions reached within the polity chosen by the church members themselves. The classic statement of this view is found in *Watson v. Jones*:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of

> controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Accordingly, in each case involving an intrachurch dispute—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. By doing so, the court avoids two equally unacceptable departures from the genuine neutrality mandated by the First Amendment. First, it refrains from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church's determination of intrachurch controversies, including those that relate to control of church property. Equally important, by recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority.

III

Until today, and under the foregoing authorities, the first question presented in a case involving an intrachurch dispute over church property was where within the religious association the rules of polity, accepted by its members before the schism, had placed ultimate authority over the use of the church property. The courts, in answering this question have recognized two broad categories of church government. One is congregational, in which authority over questions of church doctrine, practice, and administration rests entirely in the local congregation or some body within it. In disputes over the control and use of the property of such a church, the civil courts enforce the authoritative resolution of the controversy within the local church itself. The second is hierarchical, in which the local church is

but an integral and subordinate part of a larger church and is under the authority of the general church. Since the decisions of the local congregation are subject to review by the tribunals of the church hierarchy, this Court has held that the civil courts must give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute. As we stated in *Serbian Orthodox Diocese v. Milivojevich* (1976):

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution *requires* that civil courts accept their decisions as binding upon them.

A careful examination of the constitutions of the general and local church, as well as other relevant documents, may be necessary to ascertain the form of governance adopted by the members of the religious association. But there is no reason to restrict the courts to statements of polity related directly to church property. For the constitutionally necessary limitations are imposed not on the evidence to be considered but instead on the object of the inquiry, which is both limited and clear: the civil court must determine whether the local church remains autonomous, so that its members have unreviewable authority to withdraw it (and its property) from the general church, or whether the local church is inseparably integrated into and subordinate to the general church.

Religious Status and Constitutional Law in the European Court of Human Rights: **Contributions by Lech Garlicki**

Pellegrini v. Italy

European Court of Human Rights
App. No. 30882/96 (2001)

[*Editor's note: In* Pellegrini v. Italy*, the applicant married Mr. Gigliozzi in 1962 in a religious ceremony that was valid under civil law. In 1987, she petitioned for a judicial separation in the Rome Court of First*

Instance. The proceedings ended with a judgment ordering the applicant's former husband to pay her monthly maintenance installments. Meanwhile, the applicant was summoned to appear before the Latium Regional Ecclesiastical Court in the Vicariate of Rome "to give evidence in the matrimonial case of Gigliozzi-Pellegrini." She attended the Court on the appointed day and was informed that her husband had petitioned for a decree that the marriage was a nullity on the ground that they were too closely related. On examination by the judge, she admitted that she was a close relative of her husband but was unable to say whether she had obtained a special license at the time of the marriage. On December 12, 1987, the applicant received notice from the registry of the ecclesiastical court informing her that a decree of nullity had been issued in expedited proceedings on 6 November 1987 on the ground that she and her husband were too closely related. The Tribunal of the Roman Rota enforced the judgment of the ecclesiastical court even though applicant alleged procedural infirmities like the failure to be provided an adversary proceeding, the absence of notice, and the failure to receive the assistance of a lawyer. The judgment was upheld by the Florence Court of Appeal and by the Court of Cassation. Applicant filed in the ECtHR.]

[40] The Court notes at the outset that the applicant's marriage was annulled by a decision of the Vatican courts which was declared enforceable by the Italian courts. The Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy. The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention,[*] but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention.

[*] Editor's Note: Article 6 of the Convention provides in relevant part:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.

[41] The Court must examine the reasons given by the Florence Court of Appeal and the Court of Cassation for dismissing the applicant's complaints about the proceedings before the ecclesiastical courts.

[42] The applicant had complained of an infringement of the adversarial principle. She had not been informed in detail of her ex-husband's application to have the marriage annulled and had not had access to the case file. She was therefore unaware, in particular, of the contents of the statements made by the three witnesses who had apparently given evidence in favour of her ex-husband and of the observations of the *defensor vinculis*. Furthermore, she was not assisted by a lawyer.

[43] The Florence Court of Appeal held that the circumstances in which the applicant had appeared before the Ecclesiastical Court and the fact that she had subsequently lodged an appeal against that court's judgment were sufficient to conclude that she had had the benefit of an adversarial trial. The Court of Cassation held that, in the main, ecclesiastical court proceedings complied with the adversarial principle.

[44] The Court is not satisfied by these reasons. The Italian courts do not appear to have attached importance to the fact that the applicant had not had the possibility of examining the evidence produced by her ex-husband and by the "so-called witnesses." However, the Court reiterates in that connection that the right to adversarial proceedings, which is one of the elements of a fair hearing within the meaning of Article 6 § 1, means that each party to a trial, be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.

[45] It is irrelevant that, in the Government's opinion, as the nullity of the marriage derived from an objective and undisputed fact the applicant would not in any event have been able to challenge it. It is for the parties to a dispute alone to decide whether a document produced by the other party or by witnesses calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file.

[46] The position is no different with regard to the assistance of a lawyer. Since such assistance was possible, according to the Court of

Cassation, even in the context of the summary procedure before the Ecclesiastical Court, the applicant should have been put in a position enabling her to secure the assistance of a lawyer if she wished. The Court is not satisfied by the Court of Cassation's argument that the applicant should have been familiar with the case-law on the subject: the ecclesiastical courts could have presumed that the applicant, who was not assisted by a lawyer, was unaware of that case-law. In the Court's opinion, given that the applicant had been summoned to appear before the Ecclesiastical Court without knowing what the case was about, that court had a duty to inform her that she could seek the assistance of a lawyer before she attended for questioning.

[47] In these circumstances the Court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law.

[48] There has therefore been a violation of Article 6 § 1 of the Convention.

Metropolitan Church of Bessarabia v. Moldova
European Court of Human Rights
App. No. 45701/99 (2001)

[*Editor's note: In* Metropolitan Church of Bessarabia v. Moldova, *Moldovan authorities had refused to recognize the Metropolitan Church of Bessarabia, an Orthodox Christian church that existed in parallel with the officially recognized Metropolitan Church of Moldova. This refusal was upheld in 1997 by a final judgment of the Supreme Court of Justice of Moldavia, which held that official recognition could be determined only by the Metropolitan church of Moldova and that any intervention in the conflict by Moldovan authorities would be improper. The Court noted that adherents of the Metropolitan Church of Bessarabia could freely practice their religion within the Metropolitan Church of Moldova. It was argued to the ECtHR that denial of official recognition violated Article 9 of the Convention.*[*]]

[*] Article 9 of the Convention provides:

> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or

[114] The Court refers to its settled case-law to the effect that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

[115] The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

[116] However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.

[117] The Court further observes that in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership. Similarly, where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation,

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in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9.

[118] Moreover, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention,[*] which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.

In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.

[119] According to its settled case-law, the Court leaves to States party to the Convention a certain margin of appreciation in deciding whether and to what extent interference is necessary, but that goes hand in hand with European supervision of both the relevant legislation and the decisions applying it. The Court's task is to ascertain whether the measures taken at national level are justified in principle and proportionate. In order to determine the scope of the margin of appreciation in the present case the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society. Similarly, a good deal of weight must be given to that need when

[*] Editor's Note: Article 11 of the Convention provides:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
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> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

determining, as paragraph 2 of Article 9 requires, whether the interference corresponds to a "pressing social need" and is "proportionate to the legitimate aim pursued." In exercising its supervision, the Court must consider the interference complained of on the basis of the file as a whole . . . .

[123] In any event, the Court observes that the State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group. In the present case, the Court considers that by taking the view that the applicant Church was not a new denomination and by making its recognition depend on the will of an ecclesiastical authority that had been recognised—the Metropolitan Church of Moldova—the State failed to discharge its duty of neutrality and impartiality. . . .

[129] The Court notes that in the absence of recognition the applicant Church may neither organise itself nor operate. Lacking legal personality, it cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations. . . .

As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned. . . .

[130] In conclusion, the Court considers that the refusal to recognise the applicant Church has such consequences for the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society, and that there has been a violation of Article 9 of the Convention.

Serif v. Greece
European Court of Human Rights
App. No. 38178/97 (1999)

[*Editor's Note:* Serif v. Greece *involved the criminal conviction of a minister of a breakaway branch of Islam for "having usurped the function of a minister of a 'known religion.'" The applicant, Ibraim Serif, was a Greek national, born in 1951 and living in Komotini (Greece). Although Greek law provided for the election of the Muslim religious leaders (muftis) by the members of the minority in Thrace, when the Mufti of Rodopi died, the President of the Republic, following standard practice, appointed a replacement without any election. Two independent Muslim Members of Parliament requested the State to organize elections, as it was in their view obliged to do under a 1913 Treaty. In response the law was changed to provide for the appointment of muftis by the President of the Republic. In December 1990 a number of Muslims attending Friday prayers proclaimed the applicant as the Mufti of Rodopi. The applicant was subsequently convicted under Articles 175 and 176 of the Criminal Code for usurping the functions of a minister of a "known religion" and of publicly wearing the robes of such a minister without being entitled to do so. His conviction was upheld by the Greek Court of Appeal and Supreme Court. The applicant before the ECtHR argued that his right to freedom of religion guaranteed under Article 9 of the European Convention on Human Rights had been violated.*]

[50] The Court recalls that the applicant was convicted under Articles 175 and 176 of the Criminal Code, which render criminal offences certain acts against ministers of "known religions." The Court notes in this connection that, although Article 9 of the Convention does not require States to give legal effect to religious weddings and religious courts' decisions, under Greek law weddings celebrated by ministers of "known religions" are assimilated to civil ones and the muftis have competence to adjudicate on certain family and inheritance disputes between Muslims. In such circumstances, it could be argued that it is in the public interest for the State to take special measures to protect from deceit those whose legal relationships can be affected by the acts of religious ministers. However, the Court does not consider it necessary to decide this issue, which does not arise in the applicant's case.

[51] The Court notes in this connection that, despite a vague assertion that the applicant had officiated at wedding ceremonies and engaged in administrative activities, the domestic courts that convicted him

did not mention in their decisions any specific acts by the applicant with a view to producing legal effects. The domestic courts convicted the applicant on the following established facts: issuing a message about the religious significance of a feast, delivering a speech at a religious gathering, issuing another message on the occasion of a religious holiday and appearing in public in the dress of a religious leader. Moreover, it has not been disputed that the applicant had the support of at least part of the Muslim community in Rodopi. However, in the Court's view, punishing a person for merely acting as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society.

[52] The Court is not oblivious of the fact that in Rodopi there existed, in addition to the applicant, an officially appointed mufti. Moreover, the Government argued that the applicant's conviction was necessary in a democratic society because his actions undermined the system put in place by the State for the organisation of the religious life of the Muslim community in the region. However, the Court recalls that there is no indication that the applicant attempted at any time to exercise the judicial and administrative functions for which the legislation on the muftis and other ministers of "known religions" makes provision. As for the rest, the Court does not consider that, in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership.

[53] It is true that the Government argued that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among the Muslims in Rodopi and between the Muslims and the Christians of the area as well as Greece and Turkey. Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. . . . In this connection, the Court notes that, apart from a general reference to the creation of tension, the Government did not make any allusion to disturbances among the Muslims in Rodopi that had actually been or could have been caused by the existence of two religious leaders. Moreover, the Court considers that nothing was adduced that could warrant qualifying the risk of tension between the Muslims and Christians or between Greece and Turkey as anything more than a very remote possibility.

[54] In the light of all the above, the Court considers that it has not been shown that the applicant's conviction was justified in the circumstances of the case by "a pressing social need." As a result, the interference with the applicant's right, in community with others and in public, to manifest his religion in worship and teaching was not "necessary in a democratic society . . . for the protection of public order" under Article 9 § 2 of the Convention. There has, therefore, been a violation of Article 9 of the Convention.