
THE NEW WALL OF SEPARATION: PERMITTING DIVERSITY, RESTRICTING COMPETITION

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INTRODUCTION

Constitutionalism, as Sanford Levinson once eloquently put it, has evolved in America into a kind of “civil religion.”¹ It has its own rituals, symbols, interpretative discourses, sources of authority, even a rank of “high priests”: namely, the Justices of the Supreme Court. Like divine religions at their zenith, this civil religion enjoys a near-sacred position. One astute observer notes:

For the past two hundred years, the Constitution has been as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that ‘all wisdom is enfolded’ within the pages of the Bible, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document.²

Alas, constitutionalism as the civil religion of individual-rights-based legalism and human-based (as opposed to deity-ordained) social ordering has never been the sole player on the charged terrain of engendering identity, authority, and demands of loyalty.³ In recent years, the specter of litigants turning to religious or customary sources of law as authoritative guides to regulate their behavior, alongside or in

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¹ See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988). The phrase “civil religion” was coined by Jean-Jacques Rousseau in *THE SOCIAL CONTRACT*. In the United States, the tenets of civil religion have been studied extensively by sociologists and political scientists. See, e.g., Robert N. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1 (1967).

² See Daniel Lazare, *America the Undemocratic*, 232 *NEW LEFT REV.* 3, 21 (1998).

³ For a comprehensive discussion of this theme, see generally RAN HIRSCHL, *SACRED JUDGMENTS: THE CHALLENGE OF CONSTITUTIONAL THEOCRACY* (forthcoming).

lieu of secular norms, has once again risen to the forefront of politics in many countries worldwide.⁴ In the legal arena, the reemergence of piety religion raises profound challenges for the civil religion, as evidenced by the spike of jurisprudence addressing these issues in literally every region of the globe. In this essay, we draw upon citizenship theory and real-life jurisprudence from the world of comparative constitutionalism to identify, with broad brush strokes, two different categories of response by the high priests of constitutionalism to religious-based claims for recognition, accommodation, and exemption: Those claims that can reasonably be construed as demanding *inclusion* in the public sphere, which we shall refer to, for the purposes of simplicity and analytical clarity, as “diversity as inclusion”; compared with claims for *insulation*, if not outright immunization, from the purview of the state’s secular ordering and its centrifugal force, claims which are based on adherence to sacred or customary sources of authority and identity. This latter pattern we label “non-state law as competition.”⁵

The inquiry reveals, in a nutshell, that as long as legal claims for accommodation are not seen as directly or indirectly challenging the lexical superiority of the constitutional religion itself (“diversity as inclusion”), they stand a fair chance of success. Contrast that with the unyielding reluctance of legislatures and judiciaries to accept as binding or even cognizable any potentially competing legal order that originates in sacred or customary sources of identity and authority. This pattern of clamping down and refusing to accept any alternative (here, religious or customary) sources of regulation becomes particularly visible where the legal challenge at issue is interpreted as raising doubts regarding *which* set of norms and institutions, or *what* set of high priests, should have the final word in authoritatively resolving legal disputes within a given society (“non-state law as competition”). This is a challenge that no secular legal order, no matter how tolerant and otherwise open to providing exemptions and accommodations to religious believers, can accept with indifference.⁶

The reason is as simple as it is powerful; what is perceived to be at

⁴ See generally *id.*; Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEO. INQ. L. 573 (2008).

⁵ We use the term non-state law or legal order to indicate “norms and institutions that tend to draw moral authority more from contemporary or traditional cultural, or customary or religious beliefs, ideas and practices, and less from the political authority of the state. They are ‘law’ to the extent that people who are subject to them, voluntarily or otherwise, consider them to have the authority of law.” See INTERNATIONAL COUNCIL ON HUMAN RIGHTS, PLURAL LEGAL ORDERS AND HUMAN RIGHTS, para. 118 (May 2009 draft).

⁶ Countries that incorporate aspects of religious (personal) law through their national (territorial) law are beyond the scope of our analysis here. For such a discussion, see Ran Hirschl, *Constitutional Theocracy*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY (Stephen Macedo & Jeffrey Tulis eds., forthcoming).

stake here is nothing less than the very authority and source of legitimacy of the accepted civil religion. When faced with the *non-state law as competition* type of claims, courts and legislatures may loudly manifest their commitment to respecting tolerance, balancing rights, protecting the vulnerable, ensuring proportionality, and other important values. However, they may nevertheless interpret the situation as reflecting a more foundational power struggle between competing systems of knowledge and interpretation: the earthly, human-enacted constitution and the claim to speak in a vernacular of a revealed or divine authority. When faced with this kind of a challenge, even the most generous and even-handed officials of the state are structurally not in a position to rule from a “point of view from nowhere.”⁷ Instead, as stakeholders in the civil religion, they may feel obligated to reaffirm the superiority of its sources of legitimacy, procedures of engagement, methods of interpretation, and style of reasoning that are state-driven and entrenched in the secular constitution precisely when the very foundations of the legal and social order they protect and adhere to are (or are perceived to be) at stake.

In order to substantiate these claims, we trace in the following pages the rise of a fortified wall of separation, erected in response to the non-state-law-as-competition set of claims, even in accommodating societies that are otherwise strongly committed to the diversity-as-inclusion path of response. We demonstrate these claims by focusing on recent jurisprudence from Canada and South Africa, two polities that are widely recognized in the comparative constitutional literature as progressive jurisdictions demonstrating an expansive approach to recognizing religious and cultural diversity. Both countries are committed to the core idea of multicultural or “differentiated” citizenship: namely, that public recognition of cultural identities and religious practices offers a valuable path to belonging and equal citizenship for once-excluded and marginalized minorities.⁸ They therefore represent the most difficult cases for our argument;⁹ if there is any place we would expect to find recognition by secular countries of religious or customary sources of law and authority, it would be in these diverse societies that have made an explicit constitutional commitment to promote their citizens’ freedom to preserve and enhance their multitude of backgrounds and distinctive cultural, linguistic, religious,

⁷ This is a narrower claim than stating that *any* type of engagement between law and religion is inevitably “tainted” by the cultural dominance of liberalism and secularism, given that, in many parts of the world, religion has a strong claim for governance and might be officially recognized by the state. See generally HIRSCHL, *supra* note 3.

⁸ For a now-classic defense of differentiated citizenship, see Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250 (1989).

⁹ See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 144-46 (2005).

ethnic, and racial heritages as part of their “mosaic” (Canada) or “rainbow nation” (South Africa) conceptions of citizenship.¹⁰ Although both countries have made significant progress in their attempts to advance a comprehensive reading of the diversity-as-inclusion mandate, policymakers in both countries have in recent years vigorously clamped down on any competing, non-statist sources of regulation.

In identifying and categorizing these jurisprudential patterns—*diversity as inclusion* is about creating a shared space for manifesting group-based identities and practices, whereas *non-state law as competition* is about contracting out of the secular regime’s regulatory reach as part of a demand to establish “islands of jurisdictions” that lie outside the governance of the state and its official agents—our goal is not to justify or defend them.¹¹ Rather, we employ illustrative and interpretative methods to ascertain the emergence of the new wall of separation between state and religion within otherwise accommodating societies. We are further interested in articulating precisely where and according to what regulatory logic the high priests of the civil religion are in effect drawing a line of resistance in their (re)engagement with some of the most ancient, yet still highly credible, alternative sources of authority and legitimacy to that of the modern state: namely, those grounded in a religious order or customary tradition.¹² Through such documentation we reveal the intricate ways in which governments committed to pluralism and multiculturalism nevertheless seek to mold and govern a diverse population, especially where non-state orders are

¹⁰ This commitment is officially expressed in Canada’s constitutional and federal policy. See section 27 of the Canadian Charter of Rights and Freedoms, which states, “[The *Charter*] shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” R.S.C. 1985, App.II, No. 44, Sched. B, Pt. I, sec. 27. These policy goals are also enacted through the Canadian Multiculturalism Act of 1985. Canada’s vision of multiculturalism generally places a premium on culture rather than religion. See WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* (1998). On the potential slippage and at times calculated choices of litigants as to whether to advance the claims of culture or those of religion, see Sanford Levinson and Rachel Levinson, “*Culture, “Religion,” and the Law, in WRESTLING WITH DIVERSITY* 278-317 (2003); see also the collection of essays in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* (Richard A. Shweder et. al. eds., 2004). In South Africa, the commitment to diversity runs through the Interim and Final constitution. *Id.* at 86-87.

¹¹ Our task here is to provide a sound assessment of what states are already doing, rather than what they *ought* to do. As a normative and institutional design matter, one of us has argued precisely against the invocation of such “either/or” responses, favoring instead a more coordinated, joint-governance approach that is grounded in the principles of multicultural feminism. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (2001); Shachar, *supra* note 4; Ayelet Shachar, *What We Owe to Women: The View from Multicultural Feminism, in TOWARD A HUMANIST JUSTICE: THE WORK OF SUSAN MOLLER OKIN* 143 (Debra Satz & Rob Reich eds., 2009).

¹² Obviously, there may be significant differences and rivalries among and between claimants and authorities that purport to speak in the name of the divine. However, the intricacy and richness of such debates are intentionally placed beyond the scope of this discussion given its focus on decisions taken by secular courts and legislatures.

seen as potentially encroaching upon the reign of secular constitutionalism.

This inquiry is urgent; all over the world, the challenges of defining the scope and limits of legal pluralism and the boundaries of accommodation have become pressing, leading states to rethink their policies as to how much toleration is due to cultural, religious, or other recognition-based claims.¹³ Many countries are now reassessing the value of diversity as inclusion—the more moderate claim for accommodation of the two identified here—adopting more restrictive interpretations regarding what freedom of religion requires, or permits, in the public sphere. Take, for example, the veil (*hijab*) debates in France and beyond, where the expression of religious dress or symbols in public schools has been characterized, as famously stated by former President Jacques Chirac, as leading schools “to breaking down along ethnic lines.”¹⁴ This resistance to diversity as inclusion has led, in France’s case, to national legislation that uncompromisingly bans the display in public schools of any “conspicuous religious symbols” (including the Islamic headscarf).¹⁵ As if the diversity-as-inclusion dilemma did not present enough of a hurdle for judges and legislatures, pressing at the edges is another, already emerging challenge of non-state-law-as-competition: seeking to place certain civil actions and disputes outside the official realm of state regulation, locating them instead under the purview of non-state religious or customary vernaculars and institutions of decision-making. Against this background, and especially given the shift in sentiment in many European countries *against* recognizing diversity in the public sphere and towards putting greater emphasis on communality among the citizenry, it is helpful to disentangle the strikingly different legal responses to claims for inclusion versus those of competition, which are often mingled together in popular and policy debates.¹⁶ The former, diversity-as-inclusion, does not challenge the ultimate authority of the civil religion. Indeed, the power vested in judges to recognize (or suppress) non-statist identities can be seen as further entrenching the dominance of the secular religion, allowing its priests to incorporate “difference” into the state and maintain their privileged standing as

¹³ This trend is evident in the imposition of various language tests and “shared values” contracts for newcomers, especially immigrants from non-western countries. See Sue Wright, *Citizenship Tests in Europe*, 10 INT’L J. ON MULTICULTURAL SOCIETIES 1 (2008); BRIAN BARRY, *CULTURE AND EQUALITY* (2001) (criticizing multiculturalism from a liberal egalitarian perspective). See also Geoffrey Brahm Levey, *What is Living and What is Dead in Multiculturalism*, 9 ETHNICITIES 75 (2009) (offering an illuminating and balanced assessment of the current state of multiculturalism).

¹⁴ See Jacques Chirac, President, Republic of France, Statement on France/Secularism (Jan. 28, 2004) (transcript on file with authors).

¹⁵ See Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

ultimate arbiters of all disputes.¹⁷ The latter challenge, non-state-law-as-competition, is not amenable to this resolution, thus raising the menace of a showdown that challenges the accepted constitutional supremacy of the civil religion. In order to clamp down on this destabilizing, existential-type threat, the new wall of separation is placed upright and barricaded. For what is perceived at stake is nothing less than the constitutional order's near-sacred standing as the supreme law of the land. This is a test that even the most accommodating secular societies, here exemplified by South Africa and Canada, resist and respond to firmly by resurrecting the lexical priority of the civil religion over and above any competing narrative of law and authority.

PERMITTING DIVERSITY, RESTRICTING COMPETITION

In exploring the emergence of a new wall of separation between state and religion in accommodation-styled societies, it is worth recalling that any polity bent on acting as a legitimate and representative body of its members must establish a minimal level of "ties that bind" a diverse citizenry, often through inculcating in them the basic values (however defined) that are seen as necessary for a sufficient level of communication and participation in an open, democratic polity. Even the most accommodating of constitutional systems, those that are committed to a version of "differentiated" citizenship within the boundaries of reasonable or permissible accommodation of collective identities, are not keen on autonomous, rival adjudicative systems that derive their authority and morality from sources external and prior to, and in some cases insulated from, secular law. The writings of Max Weber, James Scott, or Pierre Bourdieu all point to different aspects of this almost organic antagonism of the modern state and its laws toward alternative schemas of meaning and authority.

In societies committed to a multicultural or differentiated conception of citizenship, accommodating religious difference under the umbrella of the rule of law and the overarching monitoring of the courts established by it—the diversity-as-inclusion category—may be acceptable, or even desirable, as a public measure of facilitating equal citizenship. It permits religious and other minorities, if they so wish, to "express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society."¹⁸ The non-state-law-as-competition family of claims, by

¹⁷ See Beverely McLachlin, *Freedom of Religion and the Rule of Law: A Canadian Perspective*, in *RECOGNIZING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY* 16 (Douglas Farrow ed., 2004).

¹⁸ See Bruce Ryder, *The Canadian Conception of Equal Religious Citizenship*, in *LAW AND*

contrast, is not merely about a desire not to erase previous identities or particular religious or cultural heritages, nor is it designed to ensure greater inclusion in the dominant society's institutions. Instead, religious or customary leaders relying on sacred texts or oral traditions are offering an *alternative* to these institutions. It is in response to this pattern of demand that we find a statist reaction that is often hostile and imposing, especially in regard to faith-based or customary orders of rules, norms, and enforcement systems that are perceived as challenging or defying the state law's ultimate authority over a given territory and its citizenry.¹⁹ Following from this, we can assume that the reluctance expressed by priests of the civil religion to grant support to alternative interpretation systems is driven, at least in part, by their interest in retaining the secular court as the primary and commanding legitimate interpreter of laws, as well as the ultimate arbiter in a legal system. Although the legal system may face difficulty digesting or "translating" calls for accommodation that fall even within the scope of diversity-as-inclusion claims (especially those that require a great degree of visibility for non-mainstream practices and beliefs in the public sphere), it is equipped with the tools to address such claims and, at times, to recognize and accept them.²⁰ But when a Martin Luther King Jr.'s "change from within" approach is replaced by a Malcolm X-like "by all means necessary" threat, the legal system resists with all its force. "Surrender and comply or risk elimination" is often its answer to (real or manufactured) non-state-law-as-competition challenges.

SAMPLE EVIDENCE FROM SOUTH AFRICA

South Africa poses a most difficult test to the jurisprudential pattern described in this essay. It is one of the most accommodating jurisdictions in the world when it comes to cultural diversity. So, if there is any jurisdiction in the liberal-democratic universe that would accept alternative narratives of law and interpretation, it would be South Africa, but here we must think again. Whereas the South African Constitutional Court has been more sympathetic to the claims of difference than most of its counterparts worldwide, even such a generous accommodation regime reaches its limits of toleration when it

RELIGIOUS PLURALISM IN CANADA 87 (Richard Moon ed., 2008); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 31 (1995) (emphasis added). Kymlicka here refers to the category of "ethnic groups" rather than "national minorities." The tribunal's advocates would fit under the former rather than the latter definition in Kymlicka's typology.

¹⁹ Our use of the term "citizenry" refers to all those residing permanently within the boundaries of the territorial state, irrespective of their formal membership status.

²⁰ See McLachlin, *supra* note 17.

encounters a challenge to its overarching reign over law's empire.

Consider, for example, the uneasy relationship between the civil religion of constitutionalism and customary sources of law in South Africa. The challenge of customary law has haunted the new South Africa for years. Described as the "rainbow nation," it prides itself on being multiracial, diverse, and open-minded, and, in many respects, this is true. It features one of the most progressive bodies of constitutional jurisprudence in the world in the areas of gay and lesbian rights (even involving non-South African spouses), workers' rights, and socioeconomic rights. But even here, in this haven, or even *heaven* of (formal) constitutional inclusiveness, the boundaries of accommodation are firmly drawn and enforced when it comes to customary law. The South African Constitutional Court has consistently limited the scope and application of this once-unrecognized system of legal meaning-creation. In a series of key rulings over the last decade, it has emphasized that individual rights, including the right to gender equality, effectively trump African customary law under the constitution. This is not a foregone conclusion. The South African Constitution requires courts to respect cultural and religious communities and, where relevant, to apply customary law, although such law is only applicable to the degree that it is consistent with the constitution itself.²¹ This delicate balancing act has been reserved primarily for the high priests of the civil religion in Johannesburg, although the chiefs and headmen of various customary and tribal groups, especially those in rural areas, see themselves as the authoritative voices in determining (or "revealing") the content of customary rules and practices. This combination of legal recognition of customary law and the competition over who has the final word to interpret it has provided the very crucible in which tensions can brew. Add to this the fact that many of South Africa's customary traditions impose severe encumbrances on women's rights, and the rumbles of legal disputes over the limits of toleration and accommodation were soon to be heard. Several recent landmark rulings of the South African Constitutional Court provide a viable illustration.

In a country where roughly half of the black population resides in rural areas, African customary rules and practices maintain a significant degree of multiplicity and diversity.²² They vary among the traditional groups and the different regions of the country. Despite these important distinctions, it is impossible not to notice that many customary rules and traditions are infused with gender inequality and, as such, potentially

²¹ See S. AFR. CONST. 1996 §§ 15, 30, 31 (addressing religion, culture, and cultural, religious or linguistic communities, respectively). Sections 39(3) and 211(3) hold that courts are required to apply customary law "subject to the Constitution and any legislation that specifically deals with customary law."

²² See Statistics South Africa, Census 2001 Key Results, <http://www.statssa.gov.za>.

stand in tension with the equality guarantees encoded in the Bill of Rights. As the Constitutional Court predicted in its landmark 1996 decision, *In re Certification of the Constitution of the Republic of South Africa*, these tensions were bound to emerge. As the Court put it, “[P]atriarchal principles which underlie much of indigenous law would be outlawed by the Bill of Rights, thereby undermining the core of indigenous law.”²³ This is particularly true in the realms of marriage, property succession, and access to political power. Women are frequently prohibited from owning or inheriting property, and they are barred from holding traditional leadership positions. The South African Constitution, as part of its commitment to overcoming past racial hierarchies, specifically requires courts to enforce customary law wherever applicable. At the same time, the Constitution enshrines individual rights and principles of equality (including gender equality) and dignity, and it declares, more generally, in its founding provisions that “the Republic of South Africa is one, sovereign, democratic state founded on the . . . values [of] non-racialism and non-sexism.”²⁴ How to reconcile these commitments is an obvious and inevitable challenge. A woman’s right to inherit property and to own jointly accumulated property during and upon the breakdown of marriage are two major issues where these frictions have manifested themselves.

In 1998, soon after the transition to democracy, a genuine attempt was made to employ deliberative processes of law reform to generate an agreed-upon compromise between promoting gender equality and recognizing, for the first time in South African’s history, customary marriages as binding and “legible” in the eyes of the state.²⁵ This effort culminated with the passage of the Recognition of Customary Marriages Act by Parliament. Based on a model developed by the South African Law Commission, the Act provides legal recognition to customary marriages that were never before recognized as lawful and attributes to them certain binding obligations. In this respect, the Recognition of Customary Marriages Act pays a major tribute to traditional and tribal sources of regulating the family. At the same time, the Act heavily regulates the content and structure of the recognized customary marriages, injecting “the state bureaucracy into the regulation of customary marriages, first by requiring that all marriages be registered with a government agency and second by permitting divorce only when it is granted by a family court judge.”²⁶ The Act also changed

²³ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at 200 (S. Afr.).

²⁴ S. AFR. CONST. 1996, § 1; *see also id.* §§ 9-10.

²⁵ *See* S. AFRICAN LAW COMM’N, DISCUSSION PAPER 74, THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: CUSTOMARY MARRIAGES (1997); Monique Deveaux, *A Deliberative Approach to Conflicts of Culture*, 31 POL. THEORY 780 (2003).

²⁶ *See* David L. Chambers, *Civilizing the Natives: Marriage in Post-Apartheid South Africa*,

significantly the balance of power between the spouses in a customary marriage. For instance, the Act declares women and men to be formal equals within the marriage relationship, allowing women in customary marriages the power to acquire and dispose of assets, to enter into contracts, and to litigate in their own name; these are powers and rights that they did not possess under traditional customary family rules. The recognition of customary marriages has thus involved not only acceptance of customary marriages but also a major transformation of these institutions and the traditions they reflect. It replaced, as one scholar concisely notes, “a patriarchal view of marriage with a partnership view.”²⁷ While celebrated by many urban dwellers and women’s rights advocates, not everyone was pleased with this legislative reform. Some saw it as suppressing minority cultures precisely by bringing them into the fold of formal state-centered legalism, in the process taking away the most precious currency that traditional leaders held under the old order: their authority as lawgivers.

The recognition of customary marriage was part of a larger reform that was envisioned by the South African Law Commission, an advisory body associated with the mandarins of the civil religion.²⁸ The traditional leaders initially had more success, however, in protecting their turf on another front: a bill proposed in 1998 to reform the customary laws of succession by allowing women to inherit property on the same terms as men.²⁹ This legal reform would have radically changed the economic, social, and gendered status quo in relation to property-holding, particularly in light of the fact that most succession customary laws in South Africa entailed a system of primogeniture that prohibited females from inheriting. The traditional leaders mobilized against the bill, arguing that such a bill would amount to the westernizing of African customary laws, that laws of succession were critical to the integrity of customary traditions, and that they were “fundamentally opposed to the Eurocentric approach which is prevalent in [our] country.”³⁰ Legislators acquiesced, deciding not to introduce “drastic changes to the customary system” without considering whether

129 DAEDALUS 101, 113 (2000).

²⁷ *Id.* at 114; see also Penelope E. Andrews, ‘Big Love’? *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV 1485, 1486 (2007).

²⁸ The Commission’s members are appointed by the President and are assigned the task of making recommendations for the “renewal and improvement of the law of South Africa on a continuous basis.” See SOUTH AFRICA LAW REFORM COMMISSION: OBJECTS AND CONSTITUTION, http://www.doj.gov.za/salrc/docs_gen/objects.htm.

²⁹ See S. AFRICAN LAW COMM’N, DISCUSSION PAPER 93: CUSTOMARY LAW OF SUCCESSION (2000); S. AFRICAN LAW COMM’N, DISCUSSION PAPER 95: CUSTOMARY LAW: ADMINISTRATION OF ESTATES (2001).

³⁰ See S. AFRICAN LAW COMM’N, DISCUSSION PAPER 93, *supra* note 29, ¶ 1.2.2; see also Nelson Tebbe, *Inheritance and Disinheritance: African Customary Law and Constitutional Rights*, 88 J. RELIGION 466, 467 (2008).

a more gradual approach might be preferable.”³¹ With this compromise, the tensions encapsulated in these succession laws—between the grand constitutional commitments to respecting customary rules while at the same time promoting gender equality—did not wither away. Rather, they were merely postponed.

From 1997 to 2000, the *Mthembu v. Letsela* trilogy of decisions rocked the country. These early cases played out the drama surrounding customary succession laws and women’s (and children’s) rights.³² The legal dispute was based on an inheritance claim made by Mthembu on behalf of her daughter, Tembi, against the estate of the deceased, Letsela. In the first *Mthembu* case, the court did not directly rule on the question of whether the customary rule of primogeniture was valid, instead referring the case for a ruling on whether there was a valid marriage between Mthembu and the deceased, as illegitimate children are barred from inheriting under customary law. The subsequent judgment, which was upheld in the end by the Supreme Court of Appeal, found that Mthembu’s case had to fail on the grounds of illegitimacy, with a judgment from the Supreme Court of Appeal calling the question of the validity of the rule of primogeniture “academic.”³³ In its ruling, the Supreme Court of Appeal notes that “in terms of this system of succession, whether or not Tembi is the deceased’s legitimate child, being female, she does not qualify as heir to the deceased’s estate. Women generally do not inherit in customary law.”³⁴ The Supreme Court of Appeal expressed reluctance, however, to change or reform customary law, saying that this is a task best left to the legislature.

In the face of the *Mthembu* decisions, the South African Law Commission revisited the issue. The result of their investigation was a discussion paper, issued in 2000, outlining the concern that primogeniture discriminated against women and children born out of wedlock and making recommendations for amending the Intestate Succession Act that governed civil law marriages to extend its coverage to customary marriages as well.³⁵ Out-of-wedlock children would also be recognized as legitimate heirs. These changes would have the advantage of complying with the requirements of the constitution and of being administratively convenient, though they did not directly confront the constitutionality of the practice of primogeniture. That issue was not fully settled until roughly a decade later, when the Constitutional

³¹ See Tebbe, *supra* note 30, at 468.

³² *Mthembu v Letsela* 1997 (2) SA 936 (TPD) (S. Afr.); *Mthembu v. Letsela & Another* 1998 (2) SA 675 (T) (S. Afr.); *Mthembu v. Letsela & Another* 2000 (3) SA 867 (SCA) (S. Afr.).

³³ *Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA), at ¶ 33.

³⁴ *Id.* ¶ 8.

³⁵ The history of the Law Commission’s involvement and its recommendations are spelled out in summary fashion in “Background to the Investigation” and “Summary of Recommendations” in S. AFRICAN LAW COMM’N, *supra* note 29, at ix-xxi.

Court weighed in on these charged matters.

Other branches of government did not sit idle, however. Parliament enacted in 2000 the Promotion of Equality and Prevention of Unfair Discrimination Act. This Act unequivocally prohibits gender discrimination in line with the Constitution and South Africa's international obligations, such as CEDAW. As several commentators noted at the time, it is hard to understand this legislative intervention without accounting for the apparent ineffectiveness of court officials in "reigning in" or bringing customary succession in line with the equality provisions of the Bill of Rights, as was evident in the consideration of the issue in the *Mthembu* decisions. Seen from this angle, the Act is a victory for the side of secular constitutionalism in its battle against a rigid and discriminatory customary law. Others have tried to challenge the very terms of this debate, and their theoretical interventions are important in understanding how this drama unfolded. Instead of conceptualizing customary succession and gender equality in terms of a zero sum clash representing traditional versus Western values, authors such as Gardiol van Niekerk held that the reliance on traditional narratives in *Mthembu* and in customary law litigation in general was itself projecting a partial view of customary traditions: it disregarded traditionally marginalized voices within these communities and imposed an artificial certainty on fluid understandings of customary rules. Thus, the view from academia was that written and rule-centered customary law is itself already "Westernized."³⁶ Following from this approach, the tension between customary laws and the rights of women and children could be overcome, or at least be significantly mitigated, if the stories and perspectives of women and children were actually heard. This attempt to broaden the scope of what should be considered "customary law" proved significant in the eventual jurisprudence of the South African Constitutional Court in its persistent attempt to "domesticate" the potential competition and disruption that customary sources of law and identity might otherwise raise in a country committed to both diversity and equality.

More specifically, scholars draw a distinction between two sources of customary law. The first is comprised of sources such as texts, legislation, and case law, and it is referred to as official customary law. The second is found through the stories and examples of how people actually live and is referred to as living customary law.³⁷ Advocates of the living tradition argue that official customary law is not, and may

³⁶ See Gardiol van Niekerk, *Indigenous Law and Narrative: Rethinking Methodology*, 32 COMP. INT'L L.J. S. AFR. 208, 211, 218-26 (1999).

³⁷ See Chuma Himonga & Craig Bosch, *The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just the Beginning?*, 117 S. AFR. L.J. 306, 319-36 (2000).

never have been, truly representative of the actual workings of the community. Some further argue that these interpretative debates themselves reflect intracultural struggles, as suggested in the South African context by Victoria Bronstein. While she does not look directly at the issue of succession, Bronstein suggests that clashes between customary laws and women's rights ought not to be characterized as traditional versus Western cultural disputes but should instead be interpreted as intracultural struggles of women confronting traditionally male-dominated power structures within their own cultures and communities.³⁸ The appeal of this approach is that, in a struggle against paternalism in customary law, it denies the paternalism implicit in "Westernizing" solutions. Moreover, the intracultural-conflict approach characterizes customary law as living and, thus, makes room for adaptation to the values enshrined in the new South African constitution.³⁹ This permits response to the non-state-law-as-competition claim by effectively disarming its alternative claim for authority and authenticity, bringing it instead within the diversity-as-inclusion fold.

With this background in mind, let us now consider the position taken by the country's apex court. In *Bhe*, the South African Supreme Court heard a constitutional challenge to the rule of male primogeniture as it applies in the customary law of succession.⁴⁰ The two minor daughters of Ms. Nontupheko Bhe and her deceased partner argued that the customary law rule of male primogeniture unfairly discriminated against them in that it prevented the children from inheriting the estate of their late father. Not mincing words, Deputy Chief Justice Langa, writing the majority decision, held that the African customary law rule of male primogeniture discriminated unfairly against women and illegitimate children and was, therefore, unconstitutional and invalid. While ordinarily it would be desirable for courts to develop new rules of African customary succession to reflect the living customary law (as opposed to ossified, official customary law) and bring customary law in line with the Constitution, that remedy was not seen as feasible in this matter, given that the rule of male primogeniture is fundamental to customary law and ostensibly irreplaceable on a case-by-case basis. The South African Constitutional Court in *Bhe*, therefore, issued a call for Parliament to reconcile through legislation the role of customary law

³⁸ See Victoria Bronstein, *Reconceptualizing the Customary Law Debate in South Africa*, 14 S. AFR. J. HUM. RTS. 388 (1998). For a detailed analysis of intragroup gender dynamics and their connection to intercultural relations, see SHACHAR, *supra* note 11, at 5-44.

³⁹ Bronstein, *supra* note 38, at 403.

⁴⁰ *Bhe & Others v. Magistrate, Khayelitsha, & Others* 2005 (1) SA 580 (CC) (S. Afr.). In the earlier case of *Moseneke & Others v. Master of the High Court*, 2001 (2) SA 18 (CC) (S. Afr.), the Court ordered the government to expedite its harmonization efforts and granted it two years to accomplish that goal.

under the new Constitution, with its emphasis on fairness, justice, dignity, and equity. The fate of the “competitor” worldview, namely, customary law (as interpreted by traditional leaders), was now placed squarely in the hands of the different branches of the civil religion. This time around, the legislature acted swiftly, passing a law that unified the administration of estates.⁴¹

This development did not conclude the saga of forcefully responding to the non-state-law-as-competition challenge; it only set the stage for the next battle, which erupted in the sphere of succession to traditional offices, most prominently chieftainship. In 2008, the Constitutional Court dealt another blow to official customary law by declaring the patrilineal custom of chieftainship unjustifiably discriminatory and therefore unconstitutional.⁴² This fascinating case concerned a dispute between Ms. Shilubana and Mr. Nwamitwa over the right to succeed Mr. Nwamitwa’s father, Richard Nwamitwa, as Hosi (Chief) of the Valoyi traditional community in Limpopo. In 1968, Ms. Shilubana’s father, Hosi Fofeza Nwamitwa, died without a male heir. Because customary law at the time did not permit a woman to become Hosi, Ms. Shilubana did not succeed him as Hosi although she was his eldest child. Hosi Fofeza was instead succeeded by his brother, Richard Nwamitwa. During 1996 and 1997, the traditional authorities of the Valoyi community passed resolutions deciding that Ms. Shilubana would succeed Hosi Richard, since, in the new constitutional era, women were equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr. Nwamitwa interdicted Ms. Shilubana’s installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard’s eldest son, was entitled to succeed his father. Two lower court instances supported his claim before the case ultimately reached the Constitutional Court.

Justice Van der Westhuizen, writing for a unanimous Court, held that the High Court and the Supreme Court of Appeal failed to acknowledge the power of the traditional authorities to develop and reform customary law, here drawing on the living customary law approach. Although courts must consider the past practice of the community, they are also required to respect the right of traditional communities to develop their own law. Courts must also balance the need for flexibility and the imperative to facilitate development against the value of legal certainty and respect for vested rights. As the Constitutional Court stated, “[p]ast practice will . . . not be decisive

⁴¹ See Repeal of the Black Administration Act of 2005; see also S. AFRICAN LAW COMM’N, DISCUSSION PAPER 93, *supra* note 29; SOUTH AFRICAN LAW COMMISSION, DISCUSSION PAPER 95, *supra* note 29.

⁴² *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) (S. Afr.).

where the *Constitution* requires the development of the customary law in line with constitutional values.”⁴³ Relevant factors for this balancing test include the nature of the law in question, in particular the implications of the change on constitutional and other legal rights, the process by which the alleged change occurred or is occurring, and the vulnerability of parties affected by the law. Applying this test, the Court found that succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture. However, the traditional authorities had the authority to develop customary law, and they had done so in furtherance of the constitutional right to equality. The value of recognizing the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty.

On balance, a living customary law approach (here understood as customary law that agrees to comply with the Constitution) trumps the patrilineal succession custom, and such a “change from within” of customary law is, from the civil religion’s perspective, to be applauded.⁴⁴ So, 40 years after Ms. Shilubana’s father died without a male heir, his daughter was declared eligible to succeed him as Hosi. In reaching this decision, the high priests of the civil religion were clearly aided by the fact that change had already occurred within and by the relevant community (or part thereof). This led the Court to pronounce that:

[C]ustomary law is living and will in the future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions . . . and of course, the demands of the *Constitution* as the supreme law.⁴⁵

With this vision of partnership in interpretation, the specter of non-state-law-as-competition as challenging the authority of the civil religion was mitigated if not altogether eliminated. It should come as no surprise that not all were equally satisfied with this result. In response to the press applauding the Court’s decision, members of Parliament supporting the “official” interpretation of customary law declared that African political leaders were protecting their “own traditions and customs and [were] opposed to their suppression by westernized norms such as equality.”⁴⁶ Either way, having provided endorsement of those interpretations of customary law that incorporate

⁴³ *Id.* ¶ 56.

⁴⁴ Advocates of democratic deliberative processes also support such changes, as do multicultural feminists. See generally SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (2002); Deveaux, *supra* note 25; SHACHAR, *supra* note 11.

⁴⁵ *Id.* ¶ 81.

⁴⁶ See Tebbe, *supra* note 30, at 469 (citing Chritelle Terreblanche, *Woman’s Battle To Be Chief Pits Traditional Leaders Against Their Past*, SUNDAY INDEP. (S. Afr.), May 6, 2007).

general principles of constitutional law with respect to succession of property and succession of tribal leadership, the Court swiftly moved on to tackle a third head of customary law: the division of property jointly accumulated during marriage upon its dissolution.

Elizabeth Gumede entered into a customary marriage in 1968. The marriage broke down irretrievably, and, in January 2003, her husband instituted formal divorce proceedings. Mrs. Gumede was not employed during the marriage, instead maintaining the family household as well as the four children. The family acquired two pieces of immovable property during the course of the marriage. The Customary Marriage Recognition Act provides that a customary marriage concluded after the commencement of that Act (in 2000) is automatically viewed as splitting any jointly acquired property between spouses. The Act does not, however, provide for this property regime in respect of customary marriages concluded before the commencement of the Act, and those marriages are consequently governed by customary law. Customary law in KwaZulu Natal has been codified in the KwaZulu Act and the Natal Code, both of which provide that the husband is the family head and owner of all family property. The result of the KwaZulu Act, the Natal Code, and the lack of provision in the Recognition Act is therefore that a wife to a customary marriage concluded before the commencement of the Act will, in effect, be entitled to nothing upon dissolution of the marriage. Ms. Gumede challenged the constitutionality of these arrangements in *Gumede v. President of the Republic of South Africa*.⁴⁷

Deputy Chief Justice Moseneke, writing for a unanimous Court, found these impugned provisions to be self-evidently discriminatory on at least one listed ground—that of gender.⁴⁸ Only women in a customary marriage are subject to these unequal proprietary consequences. Because this is discrimination on a listed ground, it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women engaged in pre-Act marriages concluded under customary law. Moseneke found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that a section of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. That section, the Court argued, does not cure the discrimination that a spouse

⁴⁷ *Gumede v. Pres. of the Rep. of S. Afr. & Others* 2009 (3) BCLR 243 (CC) (S. Afr.).

⁴⁸ In the United States, the doctrinal sex equality standard is “intermediate scrutiny” whereas in South Africa gender classification is treated, in American constitutional law terminology, as “suspect category,” thus inviting strict scrutiny.

in a customary marriage has to endure during the course of the marriage. The patrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, “patently limits the equality dictates of our Constitution and of the Recognition Act.”⁴⁹

The unanimous Court thus confirmed the order of constitutional invalidity issued by the High Court and held that all discriminatory federal and provincial laws that maintain unequal ownership of property between married spouses, during or upon termination of marriage, must be struck down, regardless of whether the couple entered customary marriage before or after the adoption of the Recognition Act. With that decision, the whole concept of “family head” was put to rest. In the clash here between customary law as male-privileging and the equality rights of women and children, the Court has clearly sided with the latter. The triumph of general state law, most notably constitutional law, over the legacy of customary law as a competing normative order with values that stand in tension with those encoded in the civil religion, has been completed. The result is not that customary law no longer exists, or is derecognized; rather, it has been made palatable to the statist order, transformed, as it were, into a more moderate “diversity-as-inclusion” mechanism of governing difference by disarming both a potential challenge to the supremacy of the secular legal authority and the clout held by the high priests of constitutionalism.

CANADA: EMERGING BOUNDARIES OF RELIGIOUS ACCOMMODATION

A few words are warranted about equivalent developments in Canada, considered one of the most accommodating national jurisdictions on earth when it comes to religion and, indeed, cultural diversity more broadly. Unlike the French understanding of secular citizenship (*laïcité*) or the United States’ “melting pot” approach, Canada adheres to a multicultural or differentiated citizenship model (or the “mosaic” metaphor), whereby ethnic, religious, or linguistic differences are, in principle, not seen as a threat to citizenship or nationhood. This is reflected in Canadian public discourse, in Canada’s official policy of multiculturalism, as well as in the *Charter of Rights and Freedoms*, adopted in 1982.⁵⁰ Section 2 of the *Charter* protects freedom of religion, sections 16 to 23 protect language and minority language education rights, and section 27 states that the *Charter* “shall

⁴⁹ *Gumede*, 2009 (3) BCLR 243.

⁵⁰ Canada’s official multiculturalism policy was introduced in 1971, predating the *Charter*. Today, it finds statutory expression at the federal level as well as in several provincial acts. See, e.g., Canadian Multiculturalism Act, R.S.C. ch. 24 (4th Supp. 1985).

be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”.⁵¹

Over the years, the Supreme Court of Canada has developed a rich jurisprudence in support of state-endorsed multiculturalism and generous accommodation of cultural and religious difference in the public sphere.⁵² In two rulings over the last few years, for example, the Court went out of its way to generously address faith-based claims falling squarely within the parameters of multicultural citizenship as advancing a vision of “diversity as inclusion.” In *Amselem*—a case involving Orthodox Montreal Jews who erected *sukkahs* on their balconies in a residential condominium partly in contravention of a boilerplate tenancy contract—the majority advocated tolerating a practice where the individual sincerely feels it is connected to religion, regardless of whether the practice is required by a religious authority.⁵³ In *Multani*, the Court drew upon a section 1 analysis to overturn a Quebec school board decision not to allow a Sikh student to carry the *kirpan* (a ceremonial dagger) due to potential safety hazards and an apparent conflict with the school’s prohibition on weapons and dangerous objects.⁵⁴ Indeed, the very categorization of the *kirpan*—as either a prohibited weapon in a schoolyard (as the school board claimed) or as an important religious symbol (the position of the student, his parents, and the interveners on behalf of the Sikh community)—was at the heart of this legal dispute. A decision to universally ban the *kirpan*, the Court ruled, was not the least drastic means to address the rather limited harm potential, especially when weighing the sincerity of the student’s religious beliefs and the fact that the interference (the ban on the *kirpan*) was not trivial. The Court thus held in favor of Gurjap Singh Multani, providing a resounding statement of the “diversity-as-inclusion” theme of differentiated citizenship:

The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into

⁵¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, 1982, ch. 11, § 27 (U.K.).

⁵² For a concise overview, see generally Ryder, *supra* note 18, at 87-109 (defending Canada’s expansive conception of equal religious citizenship); Benjamin L. Berger, *Law’s Religion: Rendering Culture*, 45 OSGOODE HALL L. J. 277 (2007) (offering a critical analysis of constitutional law’s engagement with religious accommodation claims in Canada).

⁵³ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (Can).

⁵⁴ *Multani v. Marguerite-Bourgeois (Comm’n scolaire)*, [2006] 1 S.C.R. 256 (Can).

account Canadian values based on multiculturalism.⁵⁵

But even Canada's multicultural policy, arguably the most accommodating constitutional regime presently offered, has been obliged to set its boundaries. When it comes to clashes of religion and culture, arguments that move beyond requests for accommodation (or specific exemption from general laws) to attempts to advance alternative, extrajudicial moral or adjudicative orders appear to fall beyond the limits of tolerance. This is the dividing line where "diversity as inclusion" ends and "non-state law as competition" emerges, the latter often bringing with it the wrath of the state. Unlike the many diversity-as-inclusion cases requesting reasonable accommodation under the rule of law (as these terms are interpreted by the courts or legislatures of the secular state), arguments that pursue the claim that faith-based sources of authority and obligation are, or ought to be, completely unregulated and parallel or superior to the general rule of law are typically answered with ironclad resistance.

Early in the Charter era, the Supreme Court ruled in *R. v. Jones* that an Alberta pastor in a fundamentalist church could not educate his three children in a church's basement without having any accreditation or approved home-schooling curriculum as required by the relevant secular legislation.⁵⁶ In this case, the Alberta Schools Act required all parents to send their children to a public school unless the parent could show that the children are going to an accredited private school or the government has approved the home-school curriculum. Jones was charged with truancy under the Schools Act. In response, he challenged the very authority of general law over the matter, arguing that the rule requiring government approval to educate his children involves "his acknowledging that the government, rather than God, has the final authority over the education of his children" and so contravenes his right to freedom of religion under section 2(a) and his right to have control over how his children are educated, which is protected under section 7 ("life, liberty and security of the person"). Writing for the majority, Justice La Forest dismissed the religion-based challenge to state authority and held that there was a compelling state interest in requiring accreditation. The certification procedure was in no way manifestly unfair or contrary to any principles of fundamental justice. While the province must reasonably accommodate religious belief in accordance with *Charter* principles, no extraconstitutional source of authority of the kind Jones argued for existed (in the eyes of the state). The Court therefore bluntly rejected Jones' assertion that that he should not be forced to apply for exemption or certification from the

⁵⁵ *Id.* ¶ 71.

⁵⁶ *R. v. Jones*, [1986] 2 S.C.R. 284 (Can.).

government because, as he saw it, the authority to attend to his children's education comes from God, making it sinful for him to request the state's permission to do God's will. And, so, the jurisprudential tone was set at the outset of the *Charter* era to accept claims for accommodation that fit the diversity-as-inclusion mold but reject claims for alternative authority or inapplicability of the constitutional law or state regulatory powers, or those falling in the non-state-law-as-competition category.⁵⁷

With this background in mind, consider the acrimonious controversy that erupted in 2003 in Ontario following a proposal emanating from some members of the province's large and diverse Muslim community to draw upon the provincial Arbitration Act of 1991 to establish Shari'a-based arbitration tribunals in personal status matters.⁵⁸ This proposal did not come to the fore in the usual legislative process nor did it originate from a governmental initiative or 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 a "[P]rivate Islamic Court of Justice," or Shari'a tribunal, as this proposal came to be known in the ensuing debate.⁵⁹ The envisioned tribunal, according to its proponents, would have permitted consenting parties to rely on the (then existing) Arbitration Act 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 the resolution of family disputes, according to the "laws (*fiqh*) of any [Islamic] school, e.g. Shiah or

⁵⁷ Courts in Canada have accepted jurisdiction over religious disputes in which property rights or civil rights are implicated. See ALVIN J. EASU, *THE COURTS AND THE COLONIES: THE LITIGATION OF HUTTERITE CHURCH DISPUTES* (2004). In the American constitutional jurisprudence, *Wisconsin v. Yoder* stands out as a landmark case of expansive accommodation that exempted members of the Old Amish community who reached the age of fourteen from two additional years of schooling that would have otherwise been mandated by the state's compulsory education law. As Austin Sarat and Peter Berkowitz observe, the Burger Court's pro-accommodation ruling in this case can be partly explained by the fact that the Amish were not perceived as "disorderly" or threatening the social order. If anything, the Court evokes a nostalgic vision of an agrarian, self-sufficient community that preserves American values of the early Republic that have long since been lost in mainstream society. See Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 *YALE J. L. & HUM.* 285 (1994). In this Article's terminology, the Court stretched the diversity-as-inclusion category to fit the facts of this case, thus rescuing it from the non-state-law-as-competition framework.

⁵⁸ Briefly, the 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. See Arbitration Act, S.O., ch. 17 (1991) (Ont.) ("allow[ing] the parties to choose the law applicable to their disputes. . . . It does so by allowing the parties to vary or opt out of the applicability and choice of law sections."), see also John D. Gregory, Anne Marie Predeko & Juliet Nicolet, *FAITH-BASED ARBITRATION 1* (2005).

⁵⁹ Syed Mumtaz Ali, *Establishing an Institute of Islamic Justice (Darul Qada)*, *CAN. SOC'Y MUSLIMS NEWS BULL.*, Oct. 2002, <http://muslim-canada.org/news02.html>.

Sunni (Hanafi, Shafi'i, Hambali, or Maliki)."⁶⁰ The tribunal's advocates further argued that once the possibility to turn to binding Shari'a arbitration becomes readily available, it should represent a clear choice for Muslim Canadians: governance of oneself by the personal law of religion or governance by secular Canadian family law.⁶¹ This construction of the proposal had the effect of presenting it as a frontal "non-state-law-as-competition" challenge, which even tolerant, multicultural Ontario (the largest Canadian province and arguably the country's most influential common-law jurisdiction) could not accept with indifference.

A major controversy soon erupted. Opponents argued that a religious tribunal of this kind would set a dangerous precedent by allowing different communities to "carve out" certain aspects of the law and to insulate themselves from the purview of *Charter* provisions and other basic norms of statutory and administrative law. Establishing such enclaves of unregulated "islands of privatized jurisdiction" would be detrimental to the universality of the rule of law in Canada. Feminist activists and grassroots organizations, such as the Canadian Council of Muslim Women, further emphasized that such tribunals would put undue burden on Muslim women who, for fear of being ostracized or otherwise sanctioned, would be coerced by the community to consent to such Shari'a-based arbitration processes.⁶² Others expressed the concern that these tribunals would fall prey to intracommunity politics or would be dominated by community "big-men." As tensions mounted, the debate over the proposed faith-based tribunal became highly politicized and polarized. It was in this climate that Ontario Premier Dalton McGuinty decided to terminate the debate by publicly announcing that no religious or faith-based arbitration in Ontario may be based on the province's Arbitration Act. The concept of alternative dispute resolution (ADR) may be effective in reducing the burden on the court system. However, it is not meant to carve out enclaves of religious jurisdiction operating outside of the purview of the general rule of law.

The clearest statement of this governmental position was expressed

⁶⁰ *Id.*

⁶¹ Interview by Rabia Mills with Syed Mumtaz Ali, President, Can. Soc'y Muslims (Aug. 1995), available at <http://muslim-canada.org/pfl.htm> (last visited May 10, 2009); see also *Darul-Qada: Beginnings of Muslim Civil Justice System in Canada*, CAN. SOC'Y MUSLIMS NEWS BULL., Apr. 2003, <http://muslim-canada.org/news03.html>; Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board*, LAW TIMES, Nov. 24, 2003, at 11; Syed Mumtaz Ali & Rabia Mills, *Darul Qada (The Beginnings of a Muslim Civil Justice System in Canada)*, CAN. SOC'Y MUSLIMS NEWS BULL., <http://muslim-canada.org/DARLQADAform2andhalf.html> (last visited Apr. 19, 2009).

⁶² See, e.g., CANADIAN COUNCIL OF MUSLIM WOMEN, POSITION STATEMENT ON THE PROPOSED IMPLEMENTATION OF SECTION OF MUSLIM LAW [SHARIA] IN CANADA (2004), available at http://www.ccmw.com/activities/act_arb_muslimlaw_sharia.html.

by the Attorney General, the highest civil official in Ontario authorized with developing and enforcing the tenets of the civil religion. Upon revealing the proposed legislation that amended the Arbitration Act, the Attorney General stated that “[a]ll family law arbitrations [in Ontario will be] conducted under *Canadian* law.”⁶³ The answer to the non-state-law-as-competition challenge, then, was to declare officially and accordingly legislate that “resolutions based on other laws and principles—including religious principles—would have no legal effect and would amount to advice only.”⁶⁴ This change took effect in 2006 and was further elaborated with regulations published in 2007. Bringing the point home, the Attorney General reaffirmed that only those charged with securing the implementation of the civil religion have a claim to speak authoritatively on behalf of the governed, stating forcefully that “[t]here is one family law for all Ontarians and that is Canadian law.”⁶⁵ Any other sources of normativity and authority, including religious principles, are relegated to the realm of “unofficial,” “unrecognized” and, indeed, “non-law” status.

Arguably, the very debate provoked by the tribunal proposal was whether this ought to remain the status quo or whether alternative, non-statist (in this example, religious) principles, should gain a degree of authority in regulating certain aspects of family law disputes among voluntarily consenting adults. Without a doubt, concerns about potential coercion and duress, as well as deeply engrained gendered power inequities, were well considered in this context.⁶⁶ However, it is difficult to explain the austere and unequivocal response of the government to the Shari’a tribunal proposal solely in terms of a commitment to promoting women’s rights, especially given that Canadian (federal and provincial) family laws still permit a great degree of flexibility to spouses that wish to opt out of the statutory default rules of equitable division, leaving women with far less than equitable division.⁶⁷ The spectre of witnessing the unravelling of a reality in which not all law is state law nor is it administered exclusively by its

⁶³ MINISTRY OF THE ATT’Y GEN., THE FAMILY STATUTE LAW AMENDMENT ACT, 2005: BACKGROUND, Nov. 15, 2005, available at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration-bg.asp> (emphasis added). These changes were implemented with the passage of the Arbitration Act, S.O. ch. 1, § 1(2) (2006) (incorporated into section 2.2. of the 1991 Arbitration Act) and 2007 regulations pursuant to this legislation. See Family Arbitration, O. Reg. 134/2007.

⁶⁴ MINISTRY OF THE ATT’Y GEN., *supra* note 63.

⁶⁵ *Id.*

⁶⁶ See Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L. J. 49, 61-77 (2005); Shachar, *supra* note 4.

⁶⁷ See *Hartshorne v. Hartshorne* [2004] 1 S.C.R. 550, ¶ 36 (Can.) (confirming and reinstating the legal validity of a “domestic contract” that was defined by legal counsel as an “unfair agreement” to the wife, allowing the parties to stray away from statutory equitable default rules found in governing family-law statutes).

approved members of the civil religious order seemed to have played a major role, too, in this clamp down.

The government, in short, decided to respond to the Shari'a tribunal challenge by ultimately 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 draws a high and formidable wall of separation between state and religion. It also reasserts in unambiguous terms the lexical priority of the former over the latter.

Another example of the renewed emphasis on enforcing secular provisions against expressions of pious resistance to the ground rules established by the civil religion is found in the landmark decision of *Bruker v. Marcovitz*, in which the high priests of constitutionalism rejected the idea that noncompliance with a contractual obligation becomes immune to judicial review or intervention merely by virtue of claiming religious freedom as the motivation for such noncompliance.⁶⁸ In the *Marcovitz* case, a Jewish husband made a contractual commitment to remove barriers to religious remarriage in a negotiated settlement reached with the consent of the parties and after consultation with independent legal counsels. That agreement was incorporated into the final divorce decree between the parties (*decree nisi*); indeed, its provisions became part of the terms that enabled the civil divorce to be finalized by the relevant state authority.⁶⁹ Once the husband had the secular divorce in hand, however, he failed to honor the agreement, claiming that he had undertaken a moral rather than legal obligation. The Supreme Court of Canada, unlike its counterpart in South Africa in the *Gumede* case, refused to enter the fray of exploring competing interpretations of the religious obligation at issue. What remained undisputed between the parties was that, unless the husband granted a Jewish divorce decree ("*get*") to his wife, she could not be released from that religious marriage because the secular divorce does not terminate or affect that relationship. Mr. Marcovitz's refusal to remove the religious barriers to remarriage thus left Ms. Bruker in the situation

⁶⁸ *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can.).

⁶⁹ Canada's Divorce Act requires parties to remove religious barriers to remarriage. See Divorce Act, R.S.C. 1985, ch. 3, § 21.1 (2nd Supp. 1985). For an illuminating analysis of the Divorce Act's effects on Canada's Jewish women, see Lisa Fishbayn, *Gender, Multiculturalism, and Dialogue: The Case of Jewish Divorce*, 21 CAN. J. L. & JURISPRUDENCE 1 (2008).

known as the *agunah* or “chained wife”; despite being civilly divorced, the woman is unable to remarry or have children that are recognized as members of the faith community.⁷⁰ The Supreme Court recognized the gendered harms caused to Ms. Baker by Mr. Marcovitz’s refusal to deliver the *get*, but it was not in a position to order specific performance (directing the husband to turn to a Jewish beth din). Instead, the judgment imposed monetary damages on the husband for the breach of the contractual promise in ways that harmed the wife personally and affected the public interest generally. This decision was made despite the ex-husband’s claims that no secular authority has the power or right to enforce damages for the breach of contract in this context because his promise to remove the religious barriers was moral, not legal, and, as such, was a protected religious freedom. The Court, in a majority opinion penned by Madam Justice Rosalie Abella, rejected this claim. It held, instead, that it was fully within the Court’s jurisdiction to “[r]ecognize the enforceability by *civil* courts of agreements to discourage *religious* barriers to remarriage, addressing the gender discrimination those barriers may represent and alleviate the effects they may have on extracting unfair concessions in a civil divorce.”⁷¹ The key to understanding this decision is found, we believe, in its opening paragraphs, which conform squarely with the distinction between accepting diversity as inclusion and treating non-state law as competition as a potential threat that must be curtailed, contained, and regulated. As Justice Abella wrote:

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.⁷²

This is a classic manifestation of Canada’s now-canonical policy favoring diversity as inclusion. Immediately following this declaration, in the subsequent paragraph, the Court quickly set limits to its

⁷⁰ The literature on the *agunah* problem is too vast to cite. Representative publications include: Bernard J. Meislin, *Pursuit of the Wife’s Right to a ‘Get’ in United States and Canadian Courts*, 4 JEWISH L. ANN. 250 (1981); Mark Washofsky, *The Recalcitrant Husband: The Problem of Definition*, 4 JEWISH L. ANN. 144 (1981); J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984); Fishbayn, *supra* note 69; SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 11; AVIAD HACHOHEN, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNAH PROBLEM, BACKGROUND AND HALAKHIC SOURCES (2004).

⁷¹ *Marcovitz*, 3 S.C.R. 607, ¶ 92 (emphasis added).

⁷² *Id.* ¶ 1 (emphasis added).

celebrated commitment to tolerance. These restrictions were erected precisely in response to challenges in which differences are seen as failing to accept or submit to the overarching authority of the secular state and the core values enshrined in its civil religion:

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.⁷³

The final decision, then, on how to articulate this "delicate necessity" is not reserved for those claiming exemption or immunity from general laws through raising the non-state-law-as-competition challenge. Instead, the state's high priests retain the crucial designation as the ultimate arbiters in conflicts between the tenets of the civil religion and its competitors. And, "[i]n this manner, the issue was decided," as Raymond Carver piercingly observed in the closing line of *Popular Mechanics*, referring there to a more blatantly violent confrontation.⁷⁴

CONCLUSION

In this essay, we identified two different interpretations of what tolerance and accommodation require in grappling with the challenges of diversity: diversity as inclusion and non-state law as competition. The focus has been on courts and legislatures in accommodation-friendly societies that now find themselves embroiled in the search for responses to the post-secularist spread of alternative (here, religious and customary) sources of law and meaning. While accepting the mantra of diversity as inclusion, the high priests of the civil religion appear to vehemently oppose the non-state-law-as-competition narrative, at least in part because it challenges the very authority and superiority they hold on account of the secular order. Although operating in different contexts, the South African Constitutional Court and the Supreme Court of Canada seem to have made every effort to subject traditional legal regimes to general principles of constitutional law. By so doing, they have erected a new wall of separation that places noncompliance with

⁷³ *Id.* ¶ 2.

⁷⁴ Raymond Carver, *Popular Mechanics*, in RAYMOND CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE: STORIES 123 (Vintage 1989) (1981).

the values of the civil religion beyond the pale of accepted accommodation, offering to those who espouse them the potential to either bring these alternative legal domains under the general rule of constitutional law or encounter the wrath of state fiat.

The bottom line is this. Although the law is not necessarily as “jurispathic” as Robert Cover had assumed many year ago⁷⁵—for we have seen throughout this Article that courts and legislatures prefer to extend olive branches of various kinds to non-state, alternate and potentially competing systems of orthodoxy—the high priests of constitutionalism have not hesitated, when encountering what they perceived as unruly challenges to their own standing as supreme and ultimate lawgivers, to expel their competitors to the no-man’s land of legal exile. Those who do not comply with the civil religion’s meta-narrative come to encounter the outer limits of law’s accommodation—and it is a cold place to reside on this side of the new wall of separation.

⁷⁵ Robert M. Cover, *The Supreme Court 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).