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Insulating the Church: Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga and the Suppression of Public Law in the Construction of Religious Communities

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Insulating the Church: Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga and the Suppression of Public Law in the Construction of Religious Communities

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ABSTRACT/RÉSUMÉ:

[The English abstract follows the French.]

In Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga, the Supreme Court of Canada undertook to grapple with the question of whether, when, and to what extent courts should get involved in the internal decisions of religious groups where there are allegations of procedural unfairness. This paper approaches Aga with an interest in the issue of state regulation of religion through law. The paper (1) reviews and assesses the Court's judgment; (2) summarizes and analyzes the 12 intervener submissions, many of which were made by religious groups likely to be affected by the Court's eventual judgment; and (3) outlines some conclusions that interpret Aga in light of the intervener submissions and the Court's lead precedent on point, Wall. The paper argues that Wall's tenuous suppression of public law in the internal matters of religious organizations is affyrmed and advanced in Aga. For all the Court's insistence that the "private law" construction of religious associations does not completely insulate religious groups from judicial oversight, there appears to be no place for public and constitutional law in setting norms for how religious groups should treat their members, including whether and how they offer avenues for grievances and redress.

I. INTRODUCTION

1 In 2014, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses ("Committee") disfellowshipped Randy Wall.[1] Mr. Wall was effectively excommunicated from his religious community, losing a meaningful role and sacrificing rewarding relationships. Feeling that his removal was wrong, Wall sought readmission to the fellowship by pursuing a reversal of the Committee's decision. After unsuccessfully pursuing internal appeals within the Committee, Wall filed an application for judicial review in a court of "inherent jurisdiction."[2] Superior courts in Canada trace their authority back to the first courts in England, whose role overseeing the actions of public actors was rooted in *Magna Carta*. Proceedings in superior courts continue an adjudicative process that hearkens back to the begin- nings of the common law system.

2 Among other issues, Wall claimed the Committee violated principles of natural justice in the disfellowship process.[3] The Committee argued that religious organi- zations are insulated from review on public law standards; Wall was wrong to seek to apply public law duties on a private actor. The chambers judge, along with a majority of the Alberta Court of Appeal, disagreed with the Committee and concluded that courts do have some limited jurisdiction over the internal matters of religious organizations, such as where questions around procedural fairness arise.[4]

3 *Wall* went to the Supreme Court of Canada ("the Court") on the issue of judicial oversight of internal religious groups' affairs, and the top court unanimously reversed the lower courts' judgments, quashing the application for judicial review.[5] The rule from *Wall*, then, is that there must be a hook by which judicial review is invited in to the affairs of religious communities. Public law doctrine has begun to recognize religious groups, *qua* religious groups, as players in the public law arena.[6] However, this does not indicate public law's willingness to extend status to religious groups in ways that may disrupt other areas of private law. Instead, the judgment in *Wall* sought to slow the incursion driven from the lower courts and endeavoured to articulate a principled approach to expanding the reach of judicial oversight of religious groups.

4 The Court in *Wall* framed the central question as, "when, if ever, [do] courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness."[7] The decision turned on the definition of procedural fairness and of "religious organization." As understood by the Court, procedural fairness meant the protections afforded any participant engaged in an institutional practice such as those operated by religious organizations as the *de facto* institutions for members of religious communities to participate in intra-communal activity. That definition of procedural fairness was based on narrowly understanding "religious organizations" as voluntary formal associations of indi- viduals drawn from the broader, unorganized religious community. The Court suggested that the only identifiable legal personality in any religious community, beyond the individuals who comprise it, is that of the religious organization. As a creature of law, religious organizations are cognizable "persons" and can be recognized by legal institutions as such. They have standing in court; they can exercise rights and litigate. However, religious organizations also have tended to be resistant to state interference and wish to protect internal affairs from public scrutiny and especially from legal review. Yet, the stakes can be high for disgruntled members of religious organizations.

5 Three years after *Wall*, the question of religious dissidents' rights and judicial review jurisdiction came back to the Supreme Court. In *Ethiopian OrthodoxTewahedo Church of Canada St. Mary Cathedral v. Aga*,[8] the Court granted leave in order to grapple, again, with the question of whether, when, and to what extent courts should interfere with internal decisions of religious groups where there are allegations of procedural unfairness. This paper approaches *Aga* with an interest in the issue of state regulation of religion through law. The analysis will therefore: (1) offer a treatment of *Aga* that situates it in the context of *Wall*; (2) summarize and analyze the 12 intervener submissions brought to the Court, many of which were made by religious groups anticipating an impact as a result of the Court's eventual judgment; and (3) outline some conclusions that interpret *Aga* in light of the intervener submissions and the Court's treatment of *Wall*. The paper argues that *Wall*'s tenuous suppression of public law in the internal matters of religious organizations is affirmed and advanced in *Aga*. For all the Court's insistence that the "private law" construction of religious associations does not completely insulate groups from judicial oversight, there appears to be no place for public and constitutional law in setting norms for how religious groups should treat their members, including whether and how they offer avenues for grievances and redress.

II. THE CASE: *ETHIOPIAN ORTHODOX TEWAHEDO CHURCH OF CANADA ST. MARY CATHEDRAL V. AGA*

6 The respondents before the Court, Aga, Beyene, Goshu, Gezaw and Hebest ("claimants"), were expelled from the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral, following an internal dispute about a religious movement considered heretical by some within the Church.[9] The respondents sought to take legal action against the Church as well as a number of individual members of its senior leadership ("the Church").

7 The claimants pleaded that their expulsions violated the principles of natural justice and were in breach of the Church's internal procedures.[10] Among various relief, the claimants sought a declaration from the court that the decision to expel them from the Church is null and void; a declaration that the Church had violated the claimants' section 2(a) right to freedom of religion under the *Canadian Charter of Rights and Freedoms*;[11] and an order that the Church must announce the findings of the *ad hoc* committee who investigated the alleged heretical movement to the Church congregation.[12] In response to the claim, the Church brought a summary judgment motion to dismiss

the action on the basis that the court had no jurisdiction to either review or set aside the decision to expel the respondents. The Church further asserted there was no free- standing right to procedural fairness without an underlying legal right, which did not exist in this case.[13]

8 Ontario Superior Court Justice Sandra Nishikawa granted the summary judgment motion and dismissed the action, finding that this case fell directly under the *Wall* rule.[14] The judge held that to establish that the court had jurisdiction, the claimants had to allege or provide evidence of an underlying legal right. There had been no explicit allegation of breach of contract in their statement of claim. Rather, the pleading alleged that the Church failed to abide by its own constitution and its internal procedures and regulations.[15] In other words, the case had been plead as public law litigation (judicial review) as opposed to a private claim (breach of contract). In any event, the judge ruled that, had the claimants alleged breach of contract on the basis of the organization's constitution and bylaws, that would also have failed because such governance instruments are not "binding agreements" in the contractual sense and, as such, do not create legal rights.[16]

9 The claimants appealed to the Court of Appeal for Ontario, arguing the Church's constitution and bylaws were indeed contractually binding, thereby creating a justiciable issue.[17] In a unanimous judgment, the Court of Appeal agreed with the dissidents, reasoning that "[v] oluntary associations do not always have written constitutions and by-laws. But when they do exist, they constitute a contract setting out the rights and obligations of members and the organization."[18] The Court also set out other evidence indicating contractual relations and allowed the appeal accordingly.[19]

10 At the Supreme Court of Canada, the Church argued that its decisions pertaining to its members could not be reviewed by the Court because the Church was a voluntary religious association owing no specified legal duties to its members.[20] The Church asserted that the Court of Appeal erred in holding that membership in the organization created legal rights on account of having a written constitutions or bylaws, and this amounted to a deviation from the principles outlined in *Wall*. The Church made additional arguments, including that the claims and remedies sought by the dissident members were not justiciable due to their religious nature, and that the relief claimed would violate the Charter (for interfering with religion) among other things.[21] The claimants attempted to show that the existence of a written constitution and bylaws in this case differentiated it significantly from *Wall* (where there were no written instruments), and that the Court of Appeal correctly relied on this relevant distinction as part of its contractual analysis.[22]

11 The Supreme Court identified the sole issue before it as whether the Court of Appeal erred in finding an underlying contract, grounding a genuine issue for trial. It declined to consider the constitutional questions. Justice Rowe delivered the unanimous judgment that the Court of Appeal did indeed err.[23] The Supreme Court found insufficient evidence of objective intentionality on the part of the Church and its members to enter a legal relationship.[24] On that basis, the Court allowed the appeal and restored the motions judge's order granting summary judgment and dismissing the action altogether.[25]

12 As in *Wall*, the Supreme Court was careful to point out that courts may need to consider questions with religious dimensions when dealing with legal rights (as distinct from the non-justiciability of purely theological issues).[26] As identified in *Wall*, some of these legal rights include property, contract, tort, unjust enrichment and statutory causes of action.[27] On the question of contract in particular, the Court held that although a legal right may be grounded in contract, factors pointing to the existence of the contract must be abundantly clear. Contrary to the blanket finding of the Court of Appeal, therefore, the Supreme Court held that constitutions and bylaws (even where written) do not in and of themselves, or by necessary inference, create contractual relations between individuals or between individuals and an organization.[28] The necessary conditions of contract formation, including intent to create legal relations, must be patently present.[29]

13 Drawing on this principle, the Supreme Court reasoned that the lack of a necessary contractual element (intention to create legal relations) between the claimants and the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral undermined the existence of any contract in which to ground legal rights, rendering the issue

non-justiciable. It is also important to note the Court's posture on whether a question of procedural fairness could be a ground for jurisdiction in intra-religious disputes; the Court gave a qualified affirmative response by holding that, while procedural fairness was not a free-standing right, it could ground jurisdiction where an existing legal right was violated.[30] Therefore, the issue of an existing, underlying legal right becomes the critical jurisdictional hook.

14 In the result, while the Court found that courts must (and do) have jurisdiction to give effect to legal rights, including the legal rights of members of religious associations,[31] the Court also held that trial judges must exercise caution when characterizing religious commitments as legally binding.[32] Fairness review is at the top of a slippery slope that leads to improper interference in religious affairs, which are constructed in Canadian law as primarily private. Ultimately, therefore, *Aga* affirms the posture of judicial restraint and the preference for non-involvement when it comes to disputes within religious organizations. In neither *Wall* or *Aga* did the Court offer any sustained analysis of the convention of restraint or explanation for the rationale of non-involvement. The failure to justify a passive, hands-off posture falsely assumes that antiquated notions of judicial neutrality continue to command public confidence. On the contrary, it is safer to assume that today's public expects the judiciary to grapple with relevant matters of public interest that require resolution and are brought to the courts.

15 This does not resolve the real tension that is certain to persist. On the one hand, Canadian superior courts are not competent to interpret canon law, which has produced a judicial culture of restraint *vis-à-vis* legal claims rooted in religion. On the other hand, the pressure from individual religious dissidents or disgruntled church members, as seen in cases like *Wall* and *Aga*, suggest that the convention of judicial restraint may be unsatisfactory to the extent that it leaves citizens in a free and democratic society with no legal recourse to obtain a remedy for adverse actions or decisions that have significant impact on their lives and which, effectively, constrain their enjoyment of Charter rights.

16 The Court's construction of legal personality obscured the distinction between the legal interest of the religious organization and that of the religious community. This essentially erases religious dissidents from the (legal/constitutional) equation. In conflating the religious organization with the religious community, the Court tethered the definition of religious organization to legal personality in a *private law* sense. The consequence of *Wall* is that, notwithstanding the fact that there *are* significant public law, including constitutional law, considerations at play in the question of the legal rights of religious organizations and those of its members, the Court continues to limit the doctrinal frame to that of *private law*. To be sure, the private law-public law tension is not addressed explicitly in *Wall*, but its effect permeates the judgment. Perhaps despite, or due to, the Court's deafening silence on this issue, we arrive at the critical dimension to *Wall*'s legacy: its unmistakable (and, in our view, unreasoned) suppression of public law features in disputes concerning the internal affairs of religious organizations.

17 The Court in *Wall* did not ignore completely the question of public accountability of religious organizations. However, in considering that question, the Court defended the limited role for courts to engage in procedural fairness review of the decisions of religious civic organizations, even when issues of public accountability and the public interest are involved.[33] The Court gave three reasons for this conclusion. First, the Court declared that judicial review is limited to *public* bodies,[34] holding that religious organizations are, on the contrary, constituted as private legal entities. In the view of the Court, this private nature of religious organizations operates to generally preclude the courts' jurisdiction even where the community was incorporated and where the decision being contested is public in nature.[35] Secondly, the Court averred that there is no free-standing right of review on procedural fairness grounds.[36] According to the Court, procedural fairness attaches only to decisions involving a *legal* right.[37] The Court further ruled that most "rights" exercised within a civic organization that is comprised of members of a religious congregation are not *legal*, as such. Indeed, the Court evaluated what might have been the outcome of the case had it been brought as a standard action and concluded that membership in a religious group -- absent any civil or property rights -- remained free from court intervention.[38] It was based on this rationale that the Court rejected Mr. Wall's argument that a contract existed with the Congrega- tion, given the lack of intent to create legal relations.[39] With no legal rights, courts have no jurisdiction, and arguments based on natural justice cannot stand alone.[40]

18 Thirdly, the Court stated that even when there is jurisdiction to review decisions, the exercise of that jurisdiction is limited only to *justiciable* issues. Such issues, in the view of the Court, did not include ecclesiastical issues and matters of religious doctrine.[41] The Court was careful to point out the necessity of balancing different considerations when determining justiciability involving religious components.[42] On one hand, courts should not decide matters of religious dogma; indeed, the merits of religious tenets are not justiciable.[43] On the other hand, however, the Court pointed out that the mere presence of religious aspects to a decision does not render the entire issue non-justiciable.[44]

19 Despite this stated acknowledgment of the risk of insulating decisions with the potential for meaningful impact on members from review, the overall effect of *Wall* was to strengthen the private law framing of the internal affairs of religious organizations. *Wall* put matters such as membership disputes beyond the reach of courts unless a clear jurisdictional hook could be identified. When the Supreme Court granted leave to appeal to *Aga*-- which, like *Wall*, involved a Church versus member dispute -- the question was whether the Court would revise *Wall*'s strict framing and broaden the scope for judicial oversight of religious organizations.

III. INTERVENTIONS AT THE COURT

20 The *Aga* case attracted the attention of a myriad of organizations interested in the relationship of the state to religion. Twelve different interventions, some comprising multiple groups, were granted leave to intervene at the hearing. The interveners were: Egale Canada Human Rights Trust, the British Columbia Humanist Associa- tion, the Association for Reformed Political Action ("ARPA") Canada, the Canadian Center for Christian Charities, the Evangelical Fellowship of Canada, the Catholic Civil Rights League, the Seventh Day Adventist Church in Canada, the Christian Legal Fellowship, the Watch Tower Bible and Tract Society of Canada, the Canadian Muslim Lawyers Association, the National Council of Canadian Muslims, and the Canadian Civil Liberties Association.

21 The interveners can be organized into three broad categories in respect of their legal position on the appeal. The first category, the *Public Interest camp*, maintained that there must be robust protection of courts' jurisdiction over legal issues arising within religious communities. Any undermining of jurisdiction would imperil important legal (including, potentially, constitutional or quasi- constitutional) rights. The second category, the *Church Autonomy camp*, argued that the predominant interest is in protecting religious communities from state interference in the decisions taken by religious civic organizations. The principle of non-interference necessarily includes decisions affecting members' fundamental rights within the organization, including the revocation of membership status (*i.e.*, "excommunica- tion", *etc.*). The third position, the *Compromise camp*, argued that a balance should be sought between recognizing the independent legal personality that religious organizations have not only as legal entities but also as vehicles for manifesting shared religious identity, while at the same time acknowledging the reasonableness of expectations that such organizations will adhere to principles of natural justice and will respect, broadly-speaking, Charter values. It may be that this balance is impossible to achieve under existing approaches. This third category of interveners argued that effectively balancing these various interests will require new approaches or additional considerations by the courts. Expectedly, *Wall* featured prominently in the analytical framing for many of the intervener submissions.

1. **Public Interest Position: Court Jurisdiction Is Necessary to Protect Legal Rights** Egale Canada Human Rights Trust ("Egale") and the British Columbia Humanist

22 Association ("BCHA") advanced the position that finding court jurisdiction over religious organizational decision making is necessary to protect the legal rights of members. These two interveners offered the strongest assertion of dissidents' interests.

23 Egale submitted that legal issues involving religious associations can trigger competing constitutional rights, and the work of balancing those rights is appropri-ately handled by the courts. Egale argued that, while strictly spiritual issues are not justiciable, the religious character of a decision by a religious civic organization or Church should not prevent judicial scrutiny if there are legal rights present. Egale outlined an interpretation of *Wall* along

these lines, and surveyed other cases that tend, or could be construed, to support this approach.[45] Egale also highlighted that, where issues are justiciable (*i.e.*, not purely religious), courts have broad authority to grant legal remedies, including those with religious implications. The intervener highlighted that the Church's approach to justiciability and limits on judicial remedies would likely have disproportionate impacts on LGBTQI2S persons vulnerable to discrimination.

24 The BCHA adopted a similar position to Egale's and asserted that courts are as equipped to adjudicate religious legal issues as they are any other issue involving specialized fields of expertise unfamiliar to judges. The fact that a legal issue has a religious, or pluralist, tinge does not, in and of itself, cancel its legal character. The fact that not all legal dimensions in a particular matter may be justiciable does not make every aspect of it non-justiciable and beyond the jurisdiction of the courts.

25 The BCHA also sought to clarify two components of the *Wall* decision framing the *Aga* analysis. First, the intervener stated that *Wall* should not be understood as a basis for refusing to adjudicate a dispute *because of* the religious nature of a dispute -- legal issues may exist and remain justiciable. Religion does not, *qua* religion, alter the justiciability of an issue. Second, BCHA highlighted that membership in any incorporated voluntary organization is a legal relationship which can be properly adjudicated, even if the organization is religious. The BCHA highlighted the potential consequences of the inverse approach, including leaving leadership of voluntary organizations unchecked, or denying redress to members of organizations that ignore their own constitutions or bylaws.

2. **Church Autonomy Position: Court Jurisdiction as State Interference in Religious Autonomy**

26 A group of interveners, namely the Association for Reformed Political Action Canada ("ARPA"), Canadian Center for Christian Charities, the Evangelical Fellowship of Canada and the Catholic Civil Rights League jointly, the Seventh Day Adventist Church in Canada, the Christian Legal Fellowship, and the Watch Tower Bible and Tract Society of Canada, called for varying degrees of judicial restraint in the internal affairs of religious organizations.

27 ARPA submitted three main points. First, the intervener argued that strict limits should be upheld on courts' jurisdiction over internal affairs of religious bodies, even where legal relationships may be present -- the focus should remain on property and civil rights. The intervener highlighted an approach to religious bodies akin to federalism jurisprudence. Its factum surveyed leading precedent cases as well as historical information that supports maintaining a firm separation. Second, ARPA argued that generally considering constitutions and by-laws of religious associations as contracts ignores their religious nature. Terms such as "rights" and "obligations," or accountability to religious law and authority, carry different import in these contexts. ARPA also flagged potential consequences of this approach, such as the "ideological reduction of a church to a multilateral contract formed by the meeting of individual wills,"[46] or compulsion for leaders to engage in civil disobedience if they feel unable to fulfil their religious roles. Last, ARPA sought clarity from the Court as to what legal impact flows from the incorporation of a religious body.

28 Other interveners also raised alarm about the potential for churches to lose their autonomy. The Canadian Center for Christian Charities ("CCCC") focused on two main points. First, the intervener argued that donations or other contributions to a church cannot be construed as consideration for the purposes of a contract. To do so, CCCC argued, would be at odds with the common law understanding of a gift, as well as current provisions under the *Income Tax Act*[47] (and other regulatory schemes for Canadian registered charities). This, according to the intervener, also mischar- acterized membership as a benefit received in exchange for these contributions. Second, to construe gifts as consideration and the creation of a legal relationship is to overlook the religious character of the gifts, including the sense of moral duty or obligation, communal and/or collective religious practices, and other similar motivations that drive religious people to become members of and make donations to religious organizations. The CCCC argued, in sum, that the proper understanding of these contributions was that they constituted religious practices in and of themselves. As manifestations of religious beliefs, the CCCC submitted that any consequence of religious practice would be non- justiciable.

29 The Evangelical Fellowship of Canada and the Catholic Civil Rights League argued that the communal

dimensions of freedom of religion and freedom of association must be considered. The Church must be treated as akin to a self-governing authority. On this basis, the ecclesiastical decisions of religious communities (including membership) should not be reviewed or interfered with by the state. The interveners asserted that any direct or indirect interference with an essential religious practice amounts to religious interference of the individual rights of community members. Self-defining -- and excluding -- is integral to the community (and not exclusive to religious communities). Court inquiry or interfer- ence in those decisions would be inadequate (as a non-member of the community), inappropriate (as it would require judicial examination of religious doctrine motivating the decision) and violate the obligation of state neutrality.

30 The Seventh Day Adventist Church in Canada raised three main arguments in its factum. First, it argued that regardless of structure (*i.e.*, incorporation), any state interference in the internal affairs of voluntary religious associations would undermine their autonomy. The intervener argued that the judiciary lacks the required expertise on religious affairs and the subject matter falls outside the proper scope of its authority. Second, the intervener asserted that there is no bright line between religious doctrine and administration in the operation of a religious organization and therefore operational decisions should be equally protected from judicial oversight. Additionally, the Seventh Day Adventist Church in Canada argued that distinguishing procedural rules grounded in religious substance from those which are not requires significant inquiry into doctrinal and religious commitments, which would be beyond the capacity of the courts. Third, the intervener argued that a contractual approach is not appropriate for voluntary religious associations, as the parties lack the required intention to create contractual relations. The intervener also noted the potential consequences of a contractual approach, such as finding partial contracts, ineffective remedies, and resulting distinctions between different types of church organizations, among others.

31 The Christian Legal Fellowship ("CLF") submitted that the constitutional duty of state neutrality limits the court's jurisdiction to intervene in religious disputes, and issues which lack a clear legal component are properly characterized as religious disputes. Written rules concerning internal governance are not necessarily contracts which give rise to these legal issues. Further, the CLF highlighted persuasive international jurisprudence (such as from the European Court of Human Rights) on religious group autonomy manifesting individually and collectively, and how these principles align with the Charter. The individual and collective manifestation of religious autonomy impacts proper analysis of justiciability (including membership disputes) and identifies that group self-definition is a religious freedom.

32 The Watch Tower Bible and Tract Society of Canada ("Society"), the same organization that had been directly involved in the disfellowship of Randy Wall, made submissions discouraging the Court from using organizational governing documents (such as constitutions and by-laws) to interpret religious membership to give rise to enforceable contractual rights. The Society made four arguments. First, the web-of-contracts legal fiction does not apply to voluntary religious associations (and has also been rejected for some non-religious voluntary associations). Second, governing documents alone cannot ground a presumption of contract -- other requisite components such as evidence of mutual intentions and a relevant legal claim must also be present and compelling. Third, evaluating religious decisions according to principles of natural justice would likely violate freedom of religion under the Charter because, as argued by other interveners, there is no bright line between the operation of religious groups and their beliefs. Finally, membership in a religious group is a manifestation of constitutional religious freedom. Having laid out these arguments, the Society pointed out that it is not appropriate to analogize the status of religious associations to business associations. These are communities of people with individual and collective rights and interests. The way to ensure their best protection, the Society maintained that membership disputes are fundamentally religious disputes and are therefore not justiciable in secular courts.

3. **Compromise Position: Pragmatic Balancing of Interests Necessary**

33 The remaining three interveners -- the Canadian Muslim Lawyers Association ("CMLA"), the National Council of Canadian Muslims ("NCCM"), and the Canadian Civil Liberties Association ("CCLA") -- took positions that attempted to outline compromise approaches to balancing the tension between judicial non- intervention and interference in religion. The submissions of the CMLA addressed protections afforded to religious organizations; the

communal manifestations of religious practices; and the need for deference from the courts in respect of religious decisions. The intervener then highlighted several responsibilities of religious organizations, including contractual obligations, such as the duty of fair notice, and due inquiry.

34 The bulk of the CMLA submission focused on the impact of *Wall*, while surveying several lower court cases to explore situations where courts have, or could have, reviewed decisions of voluntary associations (including religious and non- religious organizations). Throughout, the intervener representing Canadian Muslim lawyers highlighted the impacts of written constitutions and bylaws, and the need for any interference by courts to be justified on the basis of preventing greater harms than of not interfering. This cautious, principled, proportionality-based framework for judicial oversight advanced by the CMLA was markedly different from the hard-line non-interventionist position advanced by most Christian legal groups.

35 Similarly, the intervention by a Muslim-identified civil liberties group, the NCCM, devoted a portion of its submission to identifying inconsistencies in the adjudication of legal issues related to voluntary associations (including religious voluntary associations) across different factual situations. These included the role of by-laws, rules or membership agreements constituting "contracts," and varying interpretative approaches taken to reading associations' rules. NCCM urged the Court to review its approach, providing it with a revised three-part framework to ensure consistent adjudication of the rights of members of religious communities *vis-à-vis* their voluntary civic organizations and churches. The test would require: (a) identifying any "cognizable contractual, civil and/or proprietary interests;" (b) determining whether the "essential character" of the dispute is religious; and if so, (c) conducting an accommodating and/or balancing analysis to consider if any portion of the dispute may be appropriately dealt with by the court. Like the CMLA, NCCM proposed an approach that would use proportionality to deal with the competing interests in the question being adjudicated. Proportionality is a tool that is typically used in public law adjudication to resolve competing interests and regulate the use of state power and the infringement of human rights and freedoms.[48]

36 The CCLA also highlighted the importance of proportionality in applying the *Wall* principle.[49] It drew the Court's attention to the fact that adjudicating a dispute regarding a voluntary religious association will "require a balance between meaningful protection of freedom of religion and the values of a secular state."[50] The CCLA submitted that organizational constitutions and by-laws alone are insufficient to ground a presumptive contractual claim that would provide a jurisdictional hook. The CCLA, however, stressed the importance of not ending the analysis there, arguing that courts must exercise case-by- case determinations to determine legal relationships. This would, according to the CCLA, involve assessing the written constitution and by-laws of the organization, and factors such as whether the association "is grounded in a public statute that might give rise to oppression remedies,"[51] the nature and history of the group's relationships with its members, and party intentions and knowledge of the relevant materials. Lastly, the Interveners submitted that even in cases where a legal right exists, courts are required to consider both justiciability and enforceability of remedies. As set out by the CCLA, the question of justiciability requires the court to analyze whether it could address the issue without becoming an arbiter of religious dogma.[52]

37 On the issue of enforceability, highlighted in that last example, the question is whether a religious organization can be obliged by the state to recognize the authority of civil law where compelling such recognition would infringe constitu- tionally protected rights, including religious freedom. An example of this might be where a person has sought and received a civil divorce and is seeking to have the religious organization recognize the divorce in a context where it might be controversial; perhaps divorce itself is not permitted under religious rules, or religious conditions of divorce are not satisfied by the civil legal regime. There could then be consequences within the voluntary civic association as a result of the lack of recognition, especially where marital status is a relevant factor in social relations in addition to status determination within the organization. Perhaps membership in the association itself is tied to marital status. A dispute about status that cannot be resolved could lead to all sorts of adverse outcomes, many of which would be unconscionable in a free and democratic society.

IV. **ANALYSIS AND CONCLUSIONS**

38 That *Aga* was the subject of intervention from such a wide array of interest groups is hardly surprising. As

intimated above, the stakes in cases like *Aga* and *Wall* are high. For individual members, the possibility of a tarnished reputation and loss of membership within a voluntary association that is the predominant community to which the individual ascribes can be personally devastating. The consequences of such decisions can last forever. In circumstances of this nature, voluntary religious associations hold a tremendous amount of power over their members. To the extent that "voluntary" means "unaccountable" in a public law sense, it is clear that the *Wall* framework, which conceives of religious associations as a collection of strictly private relationships, remains intact and affirmed.

39 Yet, for all the Court's framing of the facts and issues in *Aga* as strictly private, the case and the Court's ultimate decision have implications for public and constitutional law. With *Aga*, the *Wall* rule that courts ought to exercise restraint in interfering with internal affairs of religious organizations was reaffirmed. The internal affairs of a religious community are, by this construction, more akin to those between family members than between residents of a municipality. Members of families have no standing at law as such and family authorities are shielded from public law review of their decisions and conduct, subject only to criminal and quasi-criminal (*i.e.*, child protection) jurisdiction. Residents of a municipality, on the other hand, are legal subjects with public law rights with both substantive and procedural aspects in respect of those exercising a power of decision in relation to their interests. A citizen has far greater recourse to judicial review and remedies than does a "member". By maintaining a bright line between "public" and "private," the Court effectively blocked the searching lens of the public law to review the Church's decision to excommunicate Aga and his co-respondents. This conclusion has implications beyond the specific facts of this case; the ruling appears to extinguish completely the possibility of constitutional rights for religious dissidents *within* their communities.

40 The facts of *Aga* (and of *Wall*) ask a foundational question: What responsibility do religious organizations have to accommodate and include dissenters or unpopular minorities within their membership? Do members of religious organizations have status akin to citizenship? Do religious organizations have status akin to an independent state, including the authority to set different norms, even to legitimately operate under illiberal rules and practices?

41 These questions have gripped political theorists for several decades,[53] but do not appear to engage the attention of courts. Instead, courts have tended to assume that any doctrine of group "responsibility" in a legal sense must be clearly prescribed by law. By making that presumption, the Court refrains from engaging in the difficult questions related to identity and belonging, and the connections to individual dignity and other human rights interests that flow therefrom.

42 There have, however, been instances where the court has not begun its analysis of legal questions pertaining to the interests of religious communities and/or organizations from the presumption of non-involvement. The Court has begun to ask and answer questions, such as: What role should courts play in protecting minorities as well as minorities within minorities? How are competing human rights resolved in the public interest? Should courts interpret membership in a civic organization as giving rise to public accountability? These are versions of the questions at issue in cases like *Loyola High School v. Quebec (Attorney General)*[54] and *Trinity Western University v. Law Society of Upper Canada*.[55] The Court understood those cases, unlike *Aga*, as public law cases and therefore within the scope of judicial review. To do so, the Court identified and latched on to a public hook. In *Loyola*, that public hook was public education. In *TWU*, the public hook was less direct: a private educational institutional sought accreditation and recognition by statutory bodies -- law societies. The public law construction opened up the affairs of those religious communities to constitutional law considerations.

1. **Religion and the Public Interest**

43 *Loyola* and *TWU*, as well as *Wall* and *Aga,* raise a fundamental question -- where does the public interest in religion begin? Historically, the law exercised caution when entering into the realm of religion. Before the Charter, the courts enforced an unwritten principle of judicial "neutrality" with respect to religion, protecting believers from undue interference by the state.[56] To be sure, this did not translate into complete abstention from religious matters. Nevertheless, restraint appears to have been the general rule. With the advent of statutory human rights and the Charter and the consequent formalization of freedom of religion and religious equality, courts have been unable to

avoid engaging with religion when state action, or the actions of employers, landlords and service-providers, target religious beliefs or curb their manifestation. Beyond specifically regulated spheres, however, the Supreme Court has endeavoured to maintain a construction of religion that is primarily private and individual.[57]

44 Regardless of the Court's efforts, it has not always been easy to maintain a strict separation between the public and private dimensions of religion, as Ontario's controversial experiment with religious arbitration in the mid-2000s revealed. The *Arbitration Act, 1991*[58] was adopted to lessen the load on the judicial system by allowing for alternative dispute resolution ("ADR") in cases where both parties agree to be bound by rules and procedures of their own choosing. Through the 1990s, the system operated without much public attention. Consensual religious arbitration tribunals were used widely among Orthodox Jews and Ismaili Muslims, among others.

45 In 2003, however, when a group calling itself the Islamic Institute of Civil Justice announced a plan to launch a Muslim Court of Arbitration, the Darul Qada in Ontario, the announcement was greeted with public uproar. No doubt, much of the opposition was in whole or in part a function of Islamophobia. The timing was just two years after the September 11, 2001 attacks in the United States, Muslims were still a small but growing and mostly unknown minority community, and it is a fact that Islamophobia -- distrust, hate, bias and prejudice toward Muslims -- was high.[59] Opposition to the proposal mounted quickly. Objections cited the impact on women and concerns about how the "privatization" of adjudication would shield important decisions from Charter review. The government appointed former Attorney General, Marion Boyd, to look into the matter. In her December 2004 report, she recommended keeping the regime, but "striking a balance" by allowing religion- based arbitration to continue, but only if the process and the decisions are consistent with Ontario law.[60] This proposed model, which can be characterized as a form of pluralist dispute resolution, would have both accommodated the preference of some members of religious communities to have a "religious" authority to deal with private legal matters while also advancing the interest that some maintain that religious minorities should benefit from, and acculturate to, majoritarian norms. By incorporating informal religious dispute resolution into the formal system and including a softer form of judicial review, some believe that more "liberal" outcomes can be expected through this kind of pluralist integration.

46 While many scholars saw possibility in Ontario's experiment with religious pluralist dispute resolution, the political costs and frenzied media attention jolted the Liberal government of the time to hastily repeal the statutory scheme in September 2005. The Premier declared decisively that, "there would be no sharia law in Ontario."[61] A spokesperson for the Canadian Jewish Congress was quoted in the national media as being "disappointed" by "what we consider to be a knee-jerk reaction" by the government.[62] (Centuries of religious arbitration by Orthodox Jews would be disrupted, he complained.) Self-designated Muslim "moderates" rejoiced while the branded "fundamentalists" of the Institute for Islamic Civil Justice quietly exited the public stage. Ontario's sharia experience offers rich material for reflection and prescription. One thing it showed quite clearly is that private law can, and in fact does, raise public law interests. This may indeed explain the concerted effort at proportionality-based resolution brought to the case by the two Muslim-identified interveners, who may have gained insight from the Muslim community's experience with the shari'a debate and the intersecting private and public legal interests at stake.

47 In contrast, *Aga*, like *Wall*, presents a view that limits judicial review's activation of public law interest to the courts' finding of an underlying legal right. The fate of the internal religious minority or dissident, then, remains tethered to this technical requirement.

48 A significant focus in *Aga* (as in *Wall*) was identifying the presence of any underlying legal rights which would ground jurisdiction for court intervention in the dispute. These are often summarized as property, civil, or contractual rights -- the last being the focus of *Aga*. Where one of these rights is involved, the dissident is, according to *Wall* and later *Aga*, able to pursue judicial redress. As expressed in those decisions, the court would exercise jurisdiction over the issue due to the legal rights involved regardless of its religious components. This framing was key, for example, in *Bruker v. Marcovitz*,[63] where the religious components which were included in a recognized civil contract ("a voluntary exchange of commitments intended to have legally enforceable consequences") became enforceable as such. The purport of this jurisprudence is that where membership itself or other benefits enjoyed by

members can be characterized similarly, there is a greater likelihood for initial justiciability, and corresponding remedies to be present. In essence, where underlying legal rights are established, additional arguments concerning natural justice are more likely to be evaluated since they would not be stand-alone considerations. With the jurisdictional hurdle overcome and the consequent opening-up of the religious group's processes to challenge, courts can then legitimately examine the manner in which a religious community treats its dissidents.

49 The existence of an underlying legal right remains crucial in determining whether courts can examine the plight of dissidents and internal minorities. Yet, courts have not adopted an expansive construction of a legal right itself. Notably, the courts do not generally characterize membership as an underlying legal right.[64] This appears to run contrary to an early evaluation of membership as a legal right.[65] Further limiting the dissident's chances of success in securing judicial intervention is *Aga*'s exclusion of the web of contracts' approach for establishing such a legal right in relation to voluntary religious organizations (distinguished from non-religious organizations such as professional bodies). Given the impact of these two consid- erations in potentially limiting judicial aid to dissidents, both the Applicant Supreme Court of Canada Leave Materials in *Aga* and many intervener facta devoted attention to these considerations. The Court's ultimate emphasis on the presence a narrow notion of legal rights will continue to exclude many dissidents.

2. **Justiciability, Enforceability and Other Limitations**

50 Whether the religious dissident can successfully call upon courts to resolve a dispute within a religious community does not solely turn on the existence of a legal right. Other factors identified by the *Aga*-led jurisprudence are the justiciability of the issue or enforceability of the remedy (as indicated in the CCLA intervener factum in *Aga*). Where an issue is characterized as *essentially* religious, courts will not consider it justiciable. According to existing jurisprudence, essentially religious issues include those which require analysis of religious scriptures,[66] consideration of religious goods or benefits,[67] or the resolution of interpretive adherents, among other similar factors. In fact, court commentary on justiciability in the surveyed cases explicitly noted absence of any of these (or similar) factors in determining whether issues were essentially religious or legal issues involving religious components.[68] The absence of a justiciable issue is not cured by the explicit invocation of Charter arguments on freedom of religion as was deployed by the interveners, Egale Canada Human Rights Trust and the British Columbia Humanist Association, in *Aga*. In fact, such arguments have tended to invite court commentary on the inapplicability of freedom of religion to private organizations, culminating in dismissal or other responses.[69] The result is a lack of robust judicial commentary on the protection of human rights in religious spaces where the issue concerns the religious community's relationship with its member(s).

51 Beyond the question of justiciability, another question is that of enforceability. The jurisprudence also reveals that the type of remedy sought or the means by which court intervention is sought impacts the likelihood of success for the dissident. For example, where judicial review or other means are improperly sought, cases are often dismissed, as occurred in *Aga*. Similarly, courts comment on the nature of remedies available and appropriate to implement. Notably, courts insist that the determination of specific religious outcomes is neither available nor appropriate, contrasting this with by-law remedies. This question of enforceability was taken up by the CCLA factum in *Aga* although it, generally, appears less frequently in the cases surveyed.[70]

52 Important socio-theological considerations also come into play in determining a religious dissident's chances in appealing to the law. The fate of a religious dissident might be influenced by the membership of her religious community. It appears, for instance, that Christian organizations do not often incorporate or register under statutory regimes in the same manner that other faith groups such as Muslims, Sikhs and Hindus have done for their religious organizations. This reality may well be the outcome of greater societal familiarity with Christian governance and religious structures historically. Yet, the consequence today is that the governance structure, membership and, consequently, decisions of Christian organizations are more likely to be recognized as religious rather than corporate.[71]

V. **CONCLUSION**

53 The principle that *Aga* establishes is that religious dissidents can rely on courts to intervene in disputes about membership status and rights within a formal religious organization only where certain legal preconditions are met. There is no general jurisdiction over the internal matters of religious organizations. As analyzed in this paper, the Supreme Court's approach here has been more restrictive than expansive, with the Court adopting a narrow construction of legal rights as well as narrow conceptions of doctrines of justiciability and enforceability. Those indices are themselves products of the *Aga* court's broader implied presumption of the "private" nature of intra-communal dealings within religious communities. Rebutting that presumption is possible by transcending the legal preconditions set out above. At the same time, however, establishing jurisdiction will not come easily for many religious dissidents. The practical consequence for dissidents like Mr. Aga is that they will be pushed out of their communities, while the organizations that serve religious communities will remain impervious to the searchlight of judicial review. The private law construction of religious communities therefore has significant consequences on the legal rights of members of those communities. The status of religious minorities triggers public law protections in a variety of settings, but not when they are dissenters within religious communities. In essence, the public law automatically will protect them as dissenters in any institution of public importance within the broader society, but not within the institutions that serve to bind and advance religious communities within society.

54 Intra-group vulnerability is a marked feature of religious life. Criticism will continue to raise the likelihood of repression, and the value of living in a liberal-democratic society means little when enduring this kind of repression. Under such circumstances, the question of whether the law should aid the religious dissident will continue to carry immense significance. On the one hand, constitu- tional protections of religious liberty will be thin indeed without granting religious communities the authority needed to operate largely autonomous institutions necessary for communal civic life. On the other hand, however, members of religious communities steeped in Charter values and living in a liberal-democratic state cannot be expected to discard the Charter at the community's entrance gate. While constitutional law may not apply directly to churches, the relationship between Charter values and religious norms is more nuanced and interconnected than the Court's tepid recognition of the possible scope for judicial review acknowledges. Looking at the similarities between the facts of *Wall* and *Aga*, as well as the number of interveners in *Aga*, it is difficult to see this issue disappearing. As Canada's diversity increases and religious affiliation remains strong and with church/institutional membership high, disputes about fundamental issues, such as membership, status, rights, and fairness within community civic organizations that perform many of the roles of the states are likely to increase. Often, these issues will touch on the public interest and call for the application of constitutional law. The tension in the construction of religious community membership as a private matter, and of the sustained public interest in regulating aspects of religious life will therefore remain with us.

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1 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 1 (S.C.C.) [hereinafter "*Wall*"].

2 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 7 (S.C.C.).

3 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 7 (S.C.C.).

4 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 1 (S.C.C.).

5 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 40 (S.C.C.).

6 See, for example, *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613 (S.C.C.).

7 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 1 (S.C.C.).

8 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 (S.C.C.) [hereinafter "*Aga*"].

9 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 1 (S.C.C.).

10 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 12 (S.C.C.).

11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

12 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 12 (S.C.C.).

13 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 14 (S.C.C.).

14 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 15 (S.C.C.).

15 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 13 (S.C.C.).

16 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 15 (S.C.C.).

17 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 16 (S.C.C.).

18 *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, [2020] O.J. No. 68, 2020 ONCA 10 at para. 40 (Ont. C.A.), affd [2021] S.C.J. No. 22, 2021 SCC 22 at para. 16 (S.C.C.).

19 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 17 (S.C.C.).

20 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 18 (S.C.C.).

21 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 18 (S.C.C.).

22 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 19 (S.C.C.).

23 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 20 (S.C.C.).

24 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 3 (S.C.C.).

25 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 3 (S.C.C.).

26 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 28 (S.C.C.).

27 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 29 (S.C.C.).

28 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 23 (S.C.C.).

29 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 33 (S.C.C.).

30 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 30 (S.C.C.).

31 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 42 (S.C.C.).

32 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 42 (S.C.C.).

33 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 12 (S.C.C.).

34 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 12 (S.C.C.).

35 The Court clarified two categories of cases involving judicial review of voluntary associations. The first involved churches incorporated by a private Act (*Highwood Congre-gation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 18 (S.C.C.)). The Court noted that incorporation was not a statutory grant of authority, creating public accountability (para. 18). The second involved decisions made by unincorporated voluntary associations, where the decision seemed sufficiently public in nature (para. 19). The Court emphasized that a decision impacting the general public does not render it administratively public (para. 20). In both cases, judicial review remains unavailable (para. 20).

36 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 2 (S.C.C.).

37 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 12 (S.C.C.).

38 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 24 (S.C.C.).

39 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 28 (S.C.C.).

40 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 24 (S.C.C.).

41 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 2 (S.C.C.).

42 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 32 (S.C.C.).

43 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at paras. 36-37 (S.C.C.) (this extends, for example, to procedural rules involving interpretation of religious doctrines (at para. 38)).

44 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 2018 SCC 26 at para. 36 (S.C.C.).

45 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 (S.C.C.) (Factum of the Intervener Egale Canada Human Rights Trust at paras. 4 and 11).

46 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 (S.C.C.) (Factum of the Intervener Association for Reformed Political Action Canada at para. 25).

47 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

48 See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.). Largely as a result of the Supreme Court of Canada's guiding judgment in *R. v. Oakes*, proportionality has become not only a pillar of Canadian law, but an important legal principle in the constitutional jurisprudence of many countries.

49 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 (S.C.C.) (Factum of the Intervener Canadian Civil Liberties Association at para. 2).

50 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 10 (S.C.C.).

51 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 17 (S.C.C.).

52 Examples cited in the intervener brief are interpreting a religious text, wading into contested issues within the religious community, or deciding that a civil order is binding on religious authorities (*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedralv. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 at para. 1 (S.C.C.) (Factum of the Intervener Canadian Civil Liberties Association at para. 25)).

53 See, for example, Martha Minow, "The Constitution and the Subgroup Question" (1995-1996) 71 Ind. L.J. 1; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism and the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992) at 25; Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2002); Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, *et al.*, eds., *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999); Ayelet Shachar, *Multicultural Jurisdic-tions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002); Yasmeen Abu-Laban, "Liberalism, Multiculturalism and Essentialism" (2002) 6 Citizenship Studies 459; Sujit Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology" (2002) 10 J. Pol. Phil. 54; Gila Stopler, "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women" (2003) 12 Colum. J. Gender & L. 154; Avigail Eisenberg & Jeff Spinner-Halev, eds., *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005).

54 *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613 (S.C.C.) [hereinafter "*Loyola*"].

55 *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, [2018] 2 S.C.R. 453 (S.C.C.) [hereinafter "*TWU*"].

56 Faisal Bhabha, "From Saumur to L. (S.): Tracing the Theory and Concept of Religious Freedom under Canadian Law" (2012) 58 S.C.L.R. at 111.

57 Benjamin Berger, "Law's religion: Rendering culture" (2007) 45 Osgoode Hall L.J. 277.

58 *Arbitration Act, 1991*, S.O. 1991, c. 17. (

59 Sarah Wilkins-Laflamme, "Islamophobia in Canada: Measuring the Realities of Negative Attitudes Toward Muslims and Religious Discrimination" (2018) 55(1) The Canadian Rev. of Sociology.

60 Marion Boyd, "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith G. Banting, Thomas J. Courchene & F. Leslie Seidle, eds., *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: The Institute for Research on Public Policy, 2007).

61 Colin Freeze & Karen Howlett, "McGuinty government rules out use of sharia law" *The Globe and Mail* (September 12, 2005), online: https://www.theglobeandmail.com/news/national/mcguinty-government-rules-out-use-of-sharia-law/article18247682/.

62 Colin Freeze & Karen Howlett, "McGuinty government rules out use of sharia law" *The Globe and Mail* (September 12, 2005), online: https://www.theglobeandmail.com/news/national/mcguinty-government-rules-out-use-of-sharia-law/article18247682/.

63 *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607 (S.C.C.).

64 *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, *[2021] S.C.J. No. 22*, *2021 SCC 22* at para. 29 (S.C.C.).

65 See, for example, *Karahalios v. Conservative Party of Canada*, *[2020] O.J. No. 2270*, *2020 ONSC 3145* at para. 138 (Ont. S.C.J.).

66 See, for example, *Lutz v. Faith Lutheran Church of Kelowna*, *[2009] B.C.J. No. 86*, *2009 BCSC 59* (B.C.S.C.) (involving interpretation of religious scripture involved in governance). The Court in *Wall* also sought to correct the trajectory of "two lines" of cases which appeared to introduce judicial review for voluntary associations.

67 See, for example, the unsuccessful framing of spiritual paradise as part of contract in *Zebroski v. Jehovah's Witnesses*, *[1988] A.J. No. 551*, *1988 ABCA 256* (Alta. C.A.).

68 See, for example, *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, *[2015] A.J. No. 271*, *2015 ABCA 101* at paras. 23, 55 (Alta. C.A.).

69 See, for example, *Highwood Congregation of Jehovah's Witnesses (Judicial Committee)v. Wall*, *[2018] S.C.J. No. 26*, *2018 SCC 26* at para. 39 (S.C.C.).

70 See, for example, *Zebroski v. Jehovah's Witnesses*, *[1988] A.J. No. 551*, *1988 ABCA 256* at para. 24 (Alta. C.A.); and *Ukrainian Greek Orthodox Church of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, *[1940] S.C.J. No. 34*, *[1940] S.C.R. 586* (S.C.C.).

71 If the question of incorporation illuminates a key variation between religious organi-zations, other sociological factors might inform disparities in dissidents' access to judicial intervention even where the dissident meets the high threshold set by *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, *[2021] S.C.J. No. 22*, *2021 SCC 22* (S.C.C.). Already, general sociological literature on access to justice suggest that socially-pertinent indices of difference among them class, race, gender among others might culminate in disparities in access to justice of dissidents. For a classic account, see Marc Galanter, "Why the haves come out ahead: Speculations on the limits of legal change" (1974) 95 Law & Soc'y Rev. 9. See further, Rabiat Akande, "Centering the Black Muslimah: An Agenda for Interrogating Black, Gendered Islamophobia" in Anver Emon, ed., *Systemic Islamophobia* (Toronto: University of Toronto Press, *forthcoming*).

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