THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

ALOYSIAN LAW LUNCH 2019

‘THE PLACE OF RELIGIOUS LAW IN A PLURALIST SOCIETY’

FRIDAY 5 APRIL 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.

2. It is unfortunate that many have come to see the words of an acknowledgement of country as hollow and tokenistic. They should not be treated as mere idle sentiments. They say something important. They tell us about how our society relates to those which have gone before. They demand an understanding that our beliefs and ways of thinking do not travel alone and are caught in a web of traditions from the past from which we cannot remove ourselves.

3. It is these entangled traditions which form the threads from which our society is woven. The tradition which belongs to the heritage of the original inhabitants of this land and their descendants is one which is and must be prominent, but there are many others which are also significant. These traditions compete and conflict with each other as often as they align, and they will often encompass rules of conduct for individuals which are different from, and sometimes more demanding than, what the law requires. The challenge which confronts a pluralist society such as ours is to decide how to accommodate and respect these differing perspectives within the framework of its legal system.

4. I do not think that this is a question which is capable of being answered in the abstract. For starters, the idea of a "tradition" is somewhat nebulous, and, to those of you who know the topic of my remarks today, I could very well be accused of being deliberately coy in using it, since it might seem that I am merely using a politically-correct term for a "religion". Indeed, "tradition" is a word which would perhaps be more at home in a speech about anthropology than the law, and I do not doubt that, had any of you thought that I had taken up lecturing in anthropology, I would not be looking at the very full audience here today.

5. Nevertheless, in this case, I think that my choice of language is appropriate. There are difficulties with using the word "religion" in general terms, since, to many people, it tends to refer to institutional faiths having the hierarchical and universal doctrine of, for example, the Roman Catholic and Anglican churches. Both are somewhat unique in having had a close association with the institutions of the state throughout most of their history and have themselves acquired fairly strong institutions as a result.[1] Other faiths, by reason of their differing histories, have developed with a different and perhaps less centralised institutional structure, and thus may not have quite the same understanding of the nature of their faith as might be implied by describing it as a monolithic "religion".[2]

6. Take the concept of "religious law" as an example. Its archetype is the formal system of canon law which emerged in Western Christianity in the 11th century.[3] At least in England, canon law ultimately came to be

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1 For an introduction to the early development of the Christian church, see Henry Chadwick, *The Early Church* (Penguin, revised ed, 1993); R W Southern, *Western Society and the Church in the Middle Ages* (Penguin, 1970).

2 For a further exploration of the idea of "tradition", from which this address draws, see H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 4th ed, 2010) chs 1–2.

3 For the history of the development of the canon law, see R H Helmholz, *The Oxford History of the Laws of England Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press, 2004) 68–106. However, for an explanation of the difference between canon law and ecclesiastical law, see also N Doe, *The Legal Framework of the Church of England* (Clarendon Press, 1996) 12–16.

applied by an intricate system of religious tribunals in parallel to the common law courts.[4] Their judgments applied canon law as part of the law of the land and were enforceable on their own terms if given within jurisdiction. These developments are not surprising, given the legal milieu prevailing in Western Europe at the time.[5] This was well-explained by Umberto Eco in one of his novels, through the voice of a character from the 13th century Byzantine Empire. Speaking about the Western Europeans, he said that, "though they were barbarians, [they] were extremely complicated; hopeless when it came to fine points and subtleties if a theological question was at stake, but capable of splitting a hair four ways on matters of law".[6] I think that this comment is equally applicable to the Western legal tradition today, although perhaps with one minor modification; the High Court has been known to be capable of splitting a hair no fewer than seven ways on a point of law.

7. By contrast, other faiths have not necessarily developed in the same legal milieu, and their institutional structures have been, on the whole, less hierarchical and rigid than those in Western Christianity, leading to the existence of greater variation in traditional doctrine and opinion among believers on what their faith requires. In the absence of any enduring centralised authority, there would, of course, be less incentive to conclusively define orthodoxy for every member of the faith. As a result, while other faiths undoubtedly have their own strong norms of conduct, they will be more heterogeneous and less monolithic than the term "religious law" may perhaps imply.[7] It is important to bear this distinction in mind when considering how the legal system ought to respond to these different religious faiths.

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4 R H Helmholz, *The Oxford History of the Laws of England Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press, 2004) 206–34.

5 William Chester Jordan, *Europe in the High Middle Ages* (Penguin, 2001) ch 8.

6 Umberto Eco, *Baudolino*, tr William Weaver (Vintage Books, 2003) 33.

7 For a discussion of the nature of the Jewish and Islamic legal traditions, see H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 4th ed, 2010) chs 4, 6.

8. For this reason, I prefer to use the word "tradition" as a way of referring generally to different religious faiths and the obligations which they see themselves as imposing on an individual, no matter the extent to which they do or do not mirror a type of "religious law" with which we might be more familiar. The word clearly evokes the idea of a certain style or manner of belief or thought which has strong historical roots and cultural significance, and it is more comprehensible than some of the other terms of art used within the social sciences to describe the same phenomena. After all, if I were to start talking about "nomos", "reglementation", or "semi-autonomous social fields",[8] you might all think that I had gone mad, had been watching too much *Star Trek*, had taken up a career in academia, or quite possibly, all three at once.

9. Now, I have dealt with the definition of "tradition" at some length because I think that it illustrates just why it is difficult for a pluralist society to decide how to respond to and respect the perspectives of differing religious traditions within the framework of its legal system. Simply put, I believe that the heterogeneity in the religious traditions within our society is such that it is not feasible or desirable for the law to attempt to resolve conflicts with a religious tradition by invoking an abstract "right" to religious freedom. It is almost inevitable that different conflicts involving different religious traditions will involve different issues and require different solutions, and I do not think it would be wise to disguise this fact by a misguided appeal to uniformity.

10. Courts, in that context, have the duty when such issues are brought before them to resolve disputes by the application of the civil law, or more technically, the common law and statute. In circumstances where it becomes evident that courts cannot produce a satisfactory result, then it becomes a matter that calls for a political, rather than a legal, solution. This may involve the balancing of largely incommensurable

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[8] See, eg, Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719; Robert M Cover, '*Nomos* and Narrative' (1983) 97 *Harvard Law Review* 1.

considerations, such as, for example, the public interest, and the respect to be accorded to the precepts of a particular religious tradition. The existence of alternative opinion about how this balance might be achieved does not indicate that there is a fundamental problem in how the law responds to conflicts with religious traditions in general, or that the "right" to religious freedom is under threat, but rather, it indicates that a new decision might need to be made about how those considerations ought to be balanced, and if necessary, the law changed.

11. However, this approach does not always serve the purposes of those involved in the conflict. It will always be tempting for those on either side of the debate to frame their position in absolute terms so as to gain a rhetorical advantage. Those who favour a change in the law to protect their "right" to freedom of religion might claim that this "right" is inviolable and that the law should therefore accommodate them. Conversely, those who oppose such a change might claim that exemptions undermine the equality of each individual before the law and will not accept any derogation from uniformity. Intransigence begets further intransigence. In the end, the only outcome is the demise of any hope that there might have once been for a reasonable compromise.

12. I do not think that this is a desirable outcome for our society. This kind of public debate emphasises the few circumstances where there is conflict between the law and religious traditions and creates the impression that our legal system is rigid and intolerant when the opposite is in fact the case. Australia has always attracted migrants from diverse backgrounds and religious traditions because we have afforded considerable freedom to each individual to participate in whichever tradition they please. If it is not already too late, we must continue to maintain this freedom and avoid the religious polarisation which has so often sharpened prejudice throughout history.

13. It is for this reason that I have been referring to a "pluralist" society, rather than a "secular" society. I think that the term "secular" conceals more than it reveals. In some circles, it has begun to connote an indifference to religion or even an anti-religious sentiment. I do not think

that either is an accurate description of Australian society. Religious tradition is something which has special significance in the day-to-day lives of a significant proportion of the Australian population. I think that the word "pluralist" better acknowledges the diversity and significance of these religious traditions within Australian society. We protect and support a number of different religious traditions, and aim to show no preference to any one above the others in our laws.

14. In the remainder of this address, I would like to highlight some important, but often neglected, means by which our legal system operates to promote free participation in a religious tradition through the lens of two cases which I have sat on the past 12 months which raised issues about the relationship between the legal system and religious traditions. The first, *Ulman v Live Group Pty Ltd*,[9] concerned proceedings for contempt of court against four rabbis for attempting to impose religious sanctions on an observant Jew. The second, *Elkerton v Milecki*,[10] concerned the incorporation of Jewish law into a contract of employment between a rabbi and a synagogue.

15. Both cases were somewhat unusual. Each could be said to have rejected a claim based on religious tradition in favour of affirming the supremacy of the domestic legal system. However, I think that this is the wrong way to interpret these cases. As I see them, they are both very narrow decisions which do more to emphasise how, if the appropriate steps had been taken within the framework of the domestic legal system, a court would have been able to uphold the principal claim based on religious tradition in each proceeding. As it happened, those steps were not taken and the claim failed.

16. What matters is not that, in those circumstances, the legal system prevailed over the religious tradition. As I have said earlier, those kinds of conflicts are inevitable in a pluralist society with multiple religious

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9 [2018] NSWCA 338.

10 [2018] NSWCA 141.

traditions being accommodated within a single legal framework. If they give rise to difficulty, they should be resolved as a matter of reasonable public debate. What matters instead is that, in those circumstances, the legal system did offer a means by which effect could have been given to religious tradition if the appropriate steps were taken. I will seek to explain how this is the case.

17. I turn first to *Ulman v Live Group Pty Ltd*,[11] which presented more complex issues of law and fact but is perhaps more fundamental. The case concerned a commercial dispute between two companies, SalesPort and Live Group, about a social media marketing agreement. Mr Kuzecki, a Jewish director of SalesPort, sought to have this dispute adjudicated in the "Sydney Beth Din", which is a religious court composed of three rabbis administering Jewish law located in Sydney. The lead appellant who appears in the name of the case, Rabbi Ulman, was one of the members of the Beth Din.

18. After some correspondence with the members of the Beth Din about his claim, Mr Kuzecki commenced proceedings.[12] The Beth Din then issued a summons to Mr Barukh, a Jewish director of Live Group, and two of his relatives.[13] Since the agreement between SalesPort and Live Group was not effective to constitute the Beth Din the arbitral tribunal for the dispute,[14] its authority to issue the summons could only have been derived from religious law. I should note that the claim was not made against Live Group directly because it appeared that, as administered by the Beth Din, Jewish law "[did] not recognise the existence of a separate corporate legal identity".[15]

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11 [2018] NSWCA 338.

12 Ibid [15]–[21].

13 Ibid [22]–[23].

14 Ibid [161].

15 Ibid [7].

19. Mr Barukh responded to the summons by a letter, which expressed the view that it was not appropriate for Mr Kuzecki to have brought his claim in the Beth Din and that it should have been brought in the civil courts.[16] It therefore stated that Mr Barukh would not attend as required by the summons. The registrar of the Beth Din then entered into correspondence with Mr Barukh through his legal representatives. The registrar explained that "all members of the Jewish Faith [were] obliged to have their dispute heard in accordance with Jewish Law at a Beth Din" and that "they [were] not permitted to seek adjudication at a civil court without the express permission of a Beth Din".[17]

20. Mr Barukh continued to refuse to appear.[18] The registrar of the Beth Din then indicated that religious sanctions would be imposed on Mr Barukh if he failed to appear, and reiterated the obligation of a Jewish person to resolve disputes through a Beth Din rather than the civil courts.[19] The correspondence also warned Mr Barukh to not "underestimate the resolve of the Beth Din in ensuring Jewish Law is adhered to especially with those who profess to adhere to the tenets of Orthodoxy".[20] At this stage, it is important to note that this correspondence did not draw an express connection between the religious sanctions and the commencement of proceedings in a civil court by Mr Barukh or Live Group. It only linked the sanctions to Mr Barukh's failure to appear in response to the Beth Din summons. Indeed, at the time of that correspondence, there was no suggestion that Mr Barukh desired to commence any proceedings himself or through Live Group.[21]

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16 Ibid [24]–[27].

17 Ibid [28].

18 Ibid [30].

19 Ibid [31].

20 Ibid.

21 Ibid [24]–[26], [30].

21. After receiving the letter from the registrar of the Beth Din which threatened sanctions if he failed to appear, Mr Barukh responded by indicating that he and Live Group would commence proceedings in the Supreme Court for injunctive relief unless the Beth Din undertook to not take any of the further steps which they had threatened.[22] When the registrar responded, affirming that the Beth Din was still prepared to impose religious sanctions on Mr Barukh if he failed to respond to the summons, Mr Barukh and Live Group commenced proceedings in the Supreme Court as he had indicated.[23] A final letter was sent from the Beth Din to Mr Barukh after proceedings had commenced which continued to indicate that the sanctions would be imposed if he failed to attend in response to the summons.[24]

22. The principal issue for the Court to determine was whether the correspondence from the Beth Din threatening to impose religious sanctions on Mr Barukh amounted to a contempt of court. Although there was some debate about the nature of the contempts charged by Mr Barukh, the Court found that the case had been run on the basis that the contempts alleged arose from "interference with the administration of justice generally".[25] The charges alleged that the conduct of the Beth Din "interfere[d] with Mr Barukh's right to have a civil court determine the alleged commercial dispute" because the threat of religious sanctions amounted to "improper pressure" on him to not exercise this right.[26]

23. The trial judge found that there had been improper pressure, and therefore that the members of the Beth Din and its registrar were guilty

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22 Ibid [32]–[33].

23 Ibid [34]–[35].

24 Ibid [37].

25 Ibid [121], [243].

26 Ibid [121], [123].

of contempt.[27] They appealed from this finding. Before the Court of Appeal, a significant argument upon which the appellants relied was that the trial judge had "conflated" the threat to impose religious sanctions on Mr Barukh if he failed to attend the Beth Din in response to the summons on the one hand, with a threat to impose religious sanctions if he commenced proceedings in a civil court on the other.[28] The appellants drew attention to the fact that the correspondence from the Beth Din did not expressly indicate that the sanctions would be imposed if Mr Barukh or Live Group commenced proceedings in a civil court, as I have noted earlier.[29]

24. Justice Beazley and I commenced our consideration of this issue by noting that, were this submission correct, then we would have been of the opinion that the statements made by the Beth Din in its correspondence would not have amounted to an interference with the administration of justice.[30] However, after reviewing the terms of the correspondence, we did not accept this characterisation. Instead, we found that the meaning of the correspondence from the Beth Din to Mr Barukh threatening the imposition of sanctions could not be construed as making the fine distinction alleged by the appellants.[31]

25. We found that, when that correspondence was read in light of the correspondence between the Beth Din and Mr Barukh as a whole, the sanctions were threatened to be imposed for something more than simply the failure to attend in response to the summons. Given the statements in the correspondence that "members of the Jewish Faith [were] obliged to have their disputes heard in accordance with Jewish

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27 See *Live Group Pty Ltd v Ulman* [2017] NSWSC 1759, [299] (Sackar J). A separate decision recorded the reasons of the trial judge on the question of the penalties to be imposed: see *Live Group Pty Ltd v Ulman* [2018] NSWSC 393.

28 *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, [125]–[139].

29 Ibid [127].

30 Ibid [157].

31 Ibid [157]–[159].

Law at a Beth Din", and that Mr Barukh should not "underestimate the resolve of the Beth Din in ensuring Jewish Law is adhered to", we found that, in context, the statements in the correspondence amounted to an "unambiguous threat that sanctions would be imposed if Mr Barukh persisted in asserting that the alleged commercial dispute be resolved in a civil court".[32]

26. Justice Beazley and I then went on to consider whether the pressure brought about by that threat was "improper".[33] A number of considerations had been raised by the submissions of both parties on this question, and reference should be made to the relevant part of the judgment for a full understanding of how we reached our conclusion on this issue. However, in summary, we found that the pressure was "improper" because there was no prior agreement which required Mr Barukh to submit to the jurisdiction of the Beth Din and we accepted the evidence of Mr Barukh that the sanctions would have a "serious personal impact" on him and a "significant" impact on a "business and social level".[34] Further, the sanctions would also have affected Live Group, which was a separate legal entity to Mr Barukh for the purposes of Australian law, whether or not this might have been the position under Jewish law.[35] We therefore upheld the findings of contempt made by the trial judge, although the penalties imposed were reduced.[36]

27. Now, I think that it should be clear that our conclusion in this case was ultimately one which we reached as a matter of fact. The difference between the view reached by Justice Beazley and myself on the one hand and Justice McColl on the other turned on the construction of the relevant correspondence between the Beth Din and Mr Barukh. As I

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32 Ibid [159].

33 Ibid [160]ff.

34 Ibid [161]–[165].

35 Ibid [167]–[168].

36 Ibid [196]–[203].

read her reasons, Justice McColl viewed the threat to impose religious sanctions more narrowly than Justice Beazley and myself.[37] Her Honour interpreted the threat as relating only to Mr Barukh's compliance with the Beth Din summons, particularly since, at the relevant time, Mr Barukh had not expressed any desire to commence proceedings against SalesPort through Live Group.[38] While Justice Beazley and I did not come to the same conclusion as her Honour, this difference of opinion does illustrate that the decision turned on a matter of fact on which reasonable minds may differ.

28. I would therefore hesitate to describe *Ulman* as a "significant" decision on the relationship between the legal system and religious tradition. Its circumstances are unlikely to reoccur, at least with respect to the Jewish religious tradition. The decision turned solely on the ground that some of the statements in the correspondence of the Beth Din could only be interpreted as a threat to impose sanctions if Mr Barukh were to exercise his right to commence proceedings in a civil court. It may be that the position of the members of the Beth Din and its registrar throughout the proceedings at trial and on appeal was that they never subjectively intended to interfere with Mr Barukh's right to commence proceedings, since they believed that the Beth Din also had an obligation to "comply with and respect the law of the land".[39] But, if that is the case, then it should not be difficult for the members of the Beth Din to ensure that this intention is clear in future correspondence.

29. As Justice Beazley and I made clear, although the matter was "finely balanced", there would have been no interference with the administration of justice generally if it had been apparent that the sanctions only related to the failure to comply with the original summons, and did not extend to any right which Mr Barukh or Live Group may have

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37 Ibid [262]–[266].

38 Ibid [262].

39 Ibid [130].

had to pursue a claim in the civil courts.[40] The threat was a contempt of court not just because it was a sanction, but because, on its proper interpretation, it interfered with the right of Mr Barukh and Live Group to pursue their claim in a civil court. We did not decide that the imposition of any religious sanction for a breach of Jewish law would amount to a contempt of court, but only those which had the effect of interfering with this important right.

30. This could be regarded as an example of a conflict between the legal system and the religious tradition concerned. As a simple matter of logic, this may well be correct. The law does not permit the imposition of certain sanctions which a religious tradition requires to be imposed. However, to frame the matter in this way is too simplistic. It ignores the important public interest considerations which the law has recognised when there is an interference with the administration of justice, not just in the case of proceedings which have already been commenced, but also generally.[41] They encompass the "need to protect the courts and the whole administration of justice from conduct which seeks to undermine the authority of courts and their capacity to function".[42] This requires that sanctions which would improperly pressure an individual to not approach the courts if they wish to make a claim be prohibited.

31. In my opinion, it is entirely appropriate for the law to take this position in a pluralist society. Each individual must always have the ability to approach the courts to obtain an independent adjudication of their legal rights if they desire. It would undermine this freedom if the courts were to permit the members of a religious tradition, or indeed, any other group, to improperly coerce an individual not to exercise it. While far removed from the circumstances of this case, I do not think it stretches credulity to imagine that a closed and reclusive group might wish to

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40 Ibid [157].

41 Ibid [77].

42 *Prothonotary v Collins* (1985) 2 NSWLR 549, 567 (McHugh JA).

threaten sanctions to keep its members from bringing notice of its injustices to an independent tribunal for adjudication. We protect the right to approach the courts for this reason. As a society, we have judged that the value of this protection is worth its cost.

32. This concession which the law requires the members of a religious tradition to make must be seen in the wider context of the freedom which the law affords them to conduct their affairs. An association of individuals who are members of a particular religious tradition are regarded in law as being bound to each other only in conscience, ever since it was determined that no religious tradition had ever been "established" by law in Australia.[43] The connection between each of the members of the religious tradition has been described as a "consensual compact", but I think that language is apt to confuse.[44] Far from implying that there has been some kind of assent sufficient in law to constitute a common law contract, the language is intended to suggest the idea that, while the members share agreement on what their tradition requires, it is not intended to create a legal relationship between them.

33. This type of analysis is now often associated with the unfairly maligned decision of the High Court of Australia in *Cameron v Hogan*,[45] although it should be noted that it can in fact be traced back to a number of significant mid-19th century English cases which concerned disputes between the members of unestablished religious traditions.[46] Indeed, the majority judgment of Justices Rich, Dixon, Evatt and McTiernan appeared to elevate this principle to the status of a presumption. Their Honours said that voluntary associations, including ones which are

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43 *Ex parte King* (1861) 2 Legge 1307, 1314 (Dickinson ACJ), 1324 (Wise J); *Long v Bishop of Cape Town* (1863) 1 Moo NS 411, 461–2; 15 ER 756, 774 (Lord Kingsdown). Cf *Wylde v Attorney-General (NSW)* (1948) 78 CLR 224, 284–6 (Dixon J).

44 *Scandrett v Dowling* (1992) 27 NSWLR 483, 554 (Priestly JA).

45 (1934) 51 CLR 358.

46 *Long v Bishop of Cape Town* (1863) 1 Moo NS 411; 15 ER 756; *Bishop of Natal v Gladstone* (1866) LR 3 Eq 1; *Forbes v Eden* (1867) LR 1 Sc & Div 568.

religious in character, "are established on a consensual basis, but unless there be some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract".[47]

34. While presumptions are no longer the starting point for analysing whether an intention to create legal relations exists, it seems to me that it is still the case that the "general character"[48] of a community of members of a religious tradition will mean that relationships between members will not usually be intended to be enforceable. I do not think that anything said by the High Court in *Ermogenous*[49] or what I said in *Ashton v Pratt*[50] is inconsistent with this proposition. While this may be the "general character" of such arrangements, it does not mean that this will always be true in every case. Close attention to the surrounding circumstances is required to determine the relationship, and, like in *Ermogenous*, it may be found that, in those circumstances, the relationship was intended to be enforceable.[51]

35. The effect of each of these doctrines is to place control over the nature of the relationship between the members of a religious tradition firmly in their hands. They may dispute about what their tradition requires with each other, and have this resolved by their own religious tribunal, and even impose religious sanctions if an individual fails to comply, so long as it does not interfere with any right they may have to commence proceedings in the civil courts. Otherwise, unless there is some question of title to property or enforceable agreement concerning a

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47 (1934) 51 CLR 358, 371.

48 (1931) 51 CLR 358, 370 (Rich, Dixon, Evatt and McTiernan JJ).

49 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 106 [26]–[27] (Gaudron, McHugh, Hayne and Callinan JJ).

50 *Ashton v Pratt* (2015) 88 NSWLR 281, 295–6 [73].

51 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 111–12 [40]–[45] (Gaudron, McHugh, Hayne and Callinan JJ).

dispute, there would be little reason for the courts to intervene. It seems that, in practice, such cases alleging contempt along the lines of *Ulman* have been rare.[52]

36. However, I think that the freedom for the members of a religious tradition to organise their affairs can be something of a poisoned chalice. Sometimes, the problems about which complaint is made seem not to be too little religious freedom, but too much. The fact that the relationship between members of a religious tradition will not generally be enforceable does mean that the members are free to provide for their own means of resolving disputes. But, by its very nature, this also means that there will be inevitable difficulty in effectively enforcing the requirements of a tradition except through voluntary compliance by members. This poses difficulties for those who claim authority within the tradition, who might prefer that the law was available to assist them to assert this authority over others within the tradition.

37. It seems to me that this is the real problem which faced the members of the Beth Din in *Ulman*. They claimed authority to adjudicate a dispute involving Mr Barukh since he was an observant Jew.[53] However, despite their view of what Jewish law required, Mr Barukh disagreed. He did not accept that the Beth Din had authority to adjudicate the dispute between SalesPort and Live Group.[54] According to the Beth Din, this view of what Jewish law required was wrong and was not a reason for the Beth Din to decline to entertain the dispute. It thus felt that it was required by Jewish law to impose religious sanctions as a response to Mr Barukh's failure to comply with its view of Jewish law.

38. Now, it might be accepted that the members of the Beth Din held a genuine belief, based on their training and experience, that all observant Jews were required to adjudicate commercial disputes before a Beth

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52 Cf *Hillfinch Properties Ltd v Newark Investments Ltd* [1981] The Times 9 (1 July 1981); *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775.

53 *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, [6].

54 Ibid [45]–[46].

Din. But I cannot see why this means that they would have authority to impose this view on any person who happened to themselves identify as an observant Jew. There was no independent evidence about the organisation of the Jewish community in Australia which would have enabled the court to draw any such conclusion. There was not even any independent evidence that Mr Barukh and the Beth Din were members of the same denomination of the Jewish religious tradition.[55] Thus, the court was left with an unresolved dispute between the evidence of the members of the Beth Din and the evidence of Mr Barukh.

39. It has sometimes been said that the "decisions of the governing body of the church should be accepted on issues of practice and procedure of ecclesiastical government, as well as issues of doctrine".[56] It is possible that such an approach might be warranted in relation to highly centralised religious traditions with a hierarchical structure which determines clear standards of orthodoxy, although, even then, there can be disputes as to the particular doctrines of a tradition. This is all the more so when different institutions claim authority to determine what is in fact orthodox doctrine. These observations have particular force in a case like *Ulman*. There was no evidence to establish that the Beth Din was anything like a "governing body" relative to Mr Barukh and his congregation, or that the Jewish religious tradition as understood by his congregation even contemplated such a body's existence.

40. In these circumstances, I think that it would be absolutely inimical to religious freedom to proceed on the basis that the Beth Din's view of what Jewish law required was somehow binding on Mr Barukh. It must be remembered that I do not say that, even if this were an available reading of the evidence, this would have altered how I viewed the sanctions imposed on Mr Barukh. It would not have done. I merely raise it as another illustration of how religious freedom has limited

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55 Cf ibid [47].

56 *Attorney-General (NSW) v Grant* (1976) 135 CLR 587, 613–14 (Murphy J), quoted in *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, [248] (McColl JA).

usefulness as a slogan in a pluralist society. It may permit the members of a religious tradition to conduct their affairs without the interference of the courts, but it also means that they must accept that there can be legitimate differences of opinion within that tradition which it is not the duty of the courts to police.

41. Of course, there are many ways in which the members of a religious tradition can, if they wish, structure their affairs so that they are capable of being adjudicated by a court. They may subject property which they hold to the terms of a trust for the purposes of their tradition. A court may then be called upon to decide whether the property has been or is being used in accordance with the terms of the trust, and may grant relief if it is not. If the terms of the trust refer to matters of doctrine belonging to the religious tradition, then the court may, in effect, have been asked to resolve a dispute about what the doctrine of the religious tradition means or requires, although courts have imposed limitations on the extent to which these questions will be relevant.[57]

42. The examples of these types of dispute which have come before the courts are widely known. The effect of the union between the Free Church of Scotland and the United Presbyterian Church was determined by the House of Lords in *General Assembly of Free Church of Scotland v Lord Overtoun*,[58] and the High Court of Australia resolved a dispute about the propriety of certain liturgical rites according to Anglican doctrine in *Wylde v Attorney-General (NSW)*.[59] But, perhaps the most notorious dispute in recent times is that between the members of the Macedonian Orthodox Church about the right to appoint a priest to a community church in Rockdale.

43. The litigation, most commonly referred to by the name of its lead plaintiff, His Eminence Petar, the Diocesan Bishop of the Macedonian

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[57] See *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 668 [155]–[159] (Young CJ in Eq), referring to *Scandrett v Dowling* (1992) 27 NSWLR 483,

[58] [1904] AC 515.

[59] (1948) 78 CLR 224.

Orthodox Diocese of Australia and New Zealand, was heard at trial by three experienced judges in the Supreme Court of New South Wales over the course of some 15 years,[60] generating many attempts to appeal to the Court of Appeal[61] and one successful appeal to the High Court, who, I must say, seemed, in this instance, to overturn the Court of Appeal with apparent relish.[62] In the end, his Eminence was ultimately successful, but the case is more a demonstration of the many pitfalls which can arise when religious disputes come before the courts for adjudication than a success story for the Macedonian Orthodox Church.

44. The principles upon which courts adjudicate in these trusts disputes are well-known, no doubt in large part to the quantity of litigation which has continued to come before the courts.[63] However, these principles concerning trusts will generally be of little assistance where there is no question as to who has the right to assert control over an item of property. The alternative, in these circumstances, is to resort to the principles of contract law, and more particularly, arbitration agreements. While the members of the Beth Din in *Ulman* were unsuccessful in relying on such an agreement,[64] this was not a result of any inadequacy in the law. Rather, it resulted from a failure to advert to what was necessary for the law to be able to give effect to such an arrangement.

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60 The principal judgments are: *Metropolitan Petar v Mitreski* [2003] NSWSC 262 (Hamilton J); *Metropolitan Petar v Mitreski* [2009] NSWSC 106 (Young CJ in Eq); *Metropolitan Petar v Mitreski* [2012] NSWSC 16 (Brereton J); *Metropolitan Petar v Mitreski* [2012] NSWSC 167 (Brereton J).

61 Many applications for leave to appeal were refused prior to the resolution of all the principal questions at trial. After the conclusion of the principal questions, an appeal was brought, which varied the conclusions reached at trial in some respects: *Macedonia Orthodox Community Church St Petka Inc v Metropolitan Petar* [2013] NSWCA 223.

62 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australian and New Zealand* (2008) 237 CLR 66. This appeal arose out of satellite litigation concerning the giving of judicial advice to defendant trustee about funding the principal litigation.

63 See, eg, *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic* (2017) 94 NSWLR 340.

64 *Ulman v Live Group Pty Ltd* [2018] NSWCA 338, [161].

45. To illustrate how the law of contract could be an important tool in enabling members of a religious tradition to structure their affairs with the desired degree of oversight from the courts, I turn now to the second of the cases which I mentioned earlier in this address, *Elkerton v Milecki*.[65] The case concerned the affairs of the South Head & District Synagogue in the Eastern Suburbs of Sydney, which was operated through a public company limited by guarantee whose members and board of management were the members of the congregation of the Synagogue. The company had engaged Rabbi Milecki as the Chief Rabbi for the Synagogue pursuant to the terms of a written contract of employment.[66]

46. After many years of declining revenue, a decision was made by the board of management to appoint administrators for the company, one of whom was Mr Elkerton.[67] The administrators formed the view that there were "insufficient funds to make ongoing payments due to the Rabbi under the terms of his employment", and purported to terminate it by letter, but Rabbi Milecki denied that the termination was effective under the terms of the contract.[68] However, it was accepted that, in any event, the contract was brought to an end shortly after by the subsequent winding up of the company. Rabbi Milecki then sought to press a claim for damages resulting from his alleged wrongful dismissal in the winding up.[69]

47. The claim depended upon Rabbi Milecki being able to establish that his employment contract provided for its termination upon something other than reasonable notice.[70] He asserted that, while there was no express

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65 [2018] NSWCA 141.

66 Ibid [4].

67 Ibid [5].

68 Ibid.

69 Ibid [10].

70 Ibid [14].

term in the contract dealing with termination, it had nevertheless incorporated a principle of Jewish law known as "hazakah",[71] which provided that a Rabbi appointed by a congregation had life tenure and could not be removed "except by agreement, or pursuant to a decision of a properly constituted Din Torah" on a ground relating to a fundamental failure by the Rabbi to perform their duties.[72]

48. This principle was said to have been incorporated by a clause in the contract which provided that the "relationship between the Rabbi and the congregation shall be defined in accordance with [Jewish law]".[73] However, Justice Meagher, with whom Justice Macfarlan and myself agreed, found that, based on a consideration of the terms and effect of the contract read as a whole, this clause was merely a recital of the position which the Rabbi would occupy in relation to the congregation, and was not intended to give rise to legal obligations.[74] There was thus no means by which the principle of "hazakah" could be incorporated as a term of the contract.[75]

49. Justice Meagher nevertheless went on to consider whether, if that clause had been intended to give rise to legal obligations, it would have been effective to incorporate "hazakah". His Honour drew attention to the requirement that the subject matter of an incorporation by reference must be "sufficiently clear and certain", referring to some of the well-known authorities in this area.[76] His Honour then expressed doubts, again, with which Justice Macfarlan and myself agreed, that a reference to the body of Jewish law as a whole was sufficiently certain to

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71 Ibid [15].

72 Ibid [22].

73 Ibid [12].

74 Ibid [34]–[36].

75 There were other methods upon which reliance was placed to incorporate the principle of "hazakah" but the Court found that these were not made out: see ibid [38]–[47].

76 Ibid [50]

incorporate only those aspects of that law which regulated the relationship between the Rabbi and their congregation.[77] It was accepted that such principles could be incorporated into the contract in theory, but that there might have been difficulties applying the particular clause in question to have that effect.

50. I think that *Elkerton* neatly illustrates that it is necessary for members of a religious tradition to give careful consideration to how they formulate contractual relationships intended to give effect to the rules or principles of a religious tradition. There was no suggestion at trial or on appeal that a court would have hesitated to enforce a term providing for the principle of "hazakah" had it been effectively incorporated into the employment contract. The difficulty was a matter of the language used. If the clause had been drafted to be more specific about which terms of Jewish law were intended to be incorporated, Rabbi Milecki might have had a better chance at success.

51. This is the same problem which faced the members of the Beth Din in attempting to assert jurisdiction under the arbitration agreement between SalesPort and Live Group in *Ulman*. The agreement simply failed to identify the Sydney Beth Din as the relevant arbitral tribunal. Instead, it identified an individual Rabbi as the arbitrator. While the Rabbi was in fact a member of the Beth Din, this was not sufficient to amount to a nomination of the Beth Din as the arbitral tribunal. Had the agreement been clearer and explicitly named the Beth Din as the appropriate tribunal, any court would have been bound to accept the jurisdiction of the Beth Din to determine any dispute covered by the arbitration agreement arising between SalesPort and Live Group under the *International Arbitration Act 1974* (Cth).[78]

52. I think that, if *Elkerton* and *Ulman* can teach us anything, it is that the desired results in those cases could have been achieved with minor

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77 Ibid [51].

78 See, eg, *International Arbitration Act 1974* (Cth) s 7. A stay might also have been sought under the provisions of the Model Law: see sch 1 art 8(1).

modifications to the drafting of the relevant contractual documents, which, unsurprisingly, is no less true here than it is in any other area of law. It would have been possible, of course, to say that what ultimately appeared in the document did not reflect the actual common intention of the parties at the time of the contract. If that were the case, then the well-established remedy of rectification would have been available. But, in the absence of any such claim, a court is required to construe the objective meaning of the language used as best it can so that it does justice to both parties to the dispute. For my part, in these circumstances, I would find it very difficult to view there being any kind of interference with religious freedom when there was a legal means available which would have achieved the desired result, but which, ultimately, was not taken.

53. Now, I have been referring to cases which have involved the Jewish religious tradition primarily because those cases have been the ones to have come before the Court of Appeal recently. Similar issues do occur with attempts by members of other religious traditions to incorporate rules and doctrines of their tradition into their contractual relationships. For example, the English Court of Appeal has had to consider the effect of a clause which read "Subject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England".[79] It was found that the clause was ineffective to incorporate Islamic law either generally or in respect of those rules relevant to the particular contract, on the same basis that the similar clause was found ineffective in *Elkerton*.

54. I do not think it is going too far to say that these decisions draw attention both to the importance of recognising how different religious traditions treat the concept of "religious law" and to the possibility that it therefore may not be possible to simply incorporate these bodies of rules by reference generally. In these cases, it is better to craft clear contractual terms which themselves reflect the requirements of the relevant religious

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[79] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784.

tradition. A good example comes from the regulation of finance by Islamic law. Rather than seek to regulate their agreements generally by references to Islamic law, Islamic financial institutions, internationally and domestically, take the approach of developing their own bespoke financial products which seek to comply with the requirements of Islamic law on their own terms.[80]

55. It seems to me that such an approach is much more sensible than simply relying on a general incorporation by reference. However, it must always be remembered that, despite the latitude which the law of contract may give to the members of a religious tradition to arrange their affairs, there are limits. Courts will not enforce contractual terms which are illegal or contrary to public policy. Similarly, other legal instruments, such as wills or pre-nuptial agreements, must also give way to the overriding requirements of statute law, such as those prevailing under the *Family Provision Act 1984* (NSW) or the *Family Law Act 1975* (Cth).

56. As I have stressed throughout this address, these exceptions have been introduced by the legislature in the public interest to achieve certain policy objectives to which religious freedom must give way. If these laws are sought to be changed to increase the freedom for the members of a religious tradition, then the case must be put to the legislature in a manner which recognises and grapples with these public interest considerations, rather than simply relying on the slogan of religious freedom. As I have said, it is inevitable that some restrictions on this freedom will be necessary in a pluralist society given the sheer diversity of the different religious traditions which form part of it, and it is important to recognise that this should not be seen as detracting from the otherwise wide freedom given to members of a religious tradition to organise their affairs.

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80 Apart from the problem with the ineffective clause discussed above, the agreements in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784 are good examples. For further information on Islamic finance, see Salim Farrar, 'Accommodating Islamic Banking and Finance in Australia' (2011) 34 *UNSW Law Journal* 413.

57. In this address, I hope that I have done my best to give a brief survey of how I think the legal system supports and enables members of a religious tradition to do this, although some might hesitate to describe an address which is nearly an hour long as “brief”. I have necessarily had to be selective in what I have covered. A survey which purported to be comprehensive in such a complex and difficult area of law would probably have required our hosts to cater for a dinner as well as a lunch. But, at the very least, I hope that I have highlighted some of the problems inherent in an approach to religious freedom which focuses too much on the alleged restrictions on its exercise, and too little on the alternative legal options available by which its goals could be achieved.

58. Developing the rules by which the legal system of a pluralist society should operate is a challenge in a country of diverse religious traditions. It requires sober consideration of the different interests which are at stake, and a public discourse which recognises and respects how the beliefs of the members of various religious traditions may differ. It is not a task which we can leave to emotion or flights of rhetorical fancy. I hope that, in the future, we will be able to conduct these kinds of debates with the civility and respect which is required.

59. Thank you for your time.