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Multicultural Jurisdictions at the National and International Levels

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BOOK REVIEW

MULTICULTURAL JURISDICTIONS AT THE NATIONAL AND INTERNATIONAL LEVELS

AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES
AND WOMEN'S RIGHTS*. Cambridge: Cambridge University Press, 2001. xiv + 193.

*Reviewed by Christina L. Brandt-Young**

INTRODUCTION	241
I. ICCPR ARTICLE 27: THE RIGHT OF MEMBERS OF MINORITIES TO ENJOY THEIR CULTURES, LANGUAGES, AND RELIGIONS.....	247
A. <i>The Lovelace Case</i>	248
B. <i>The Kitok Case</i>	253
II. ICCPR ARTICLE 14: TRIAL BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL.....	257
A. A " <i>Suit at Law</i> "	258
B. <i>Santa Clara Pueblo v. Martinez and Group Court Review</i>	261
III. GOVERNMENT REVIEW OF GROUP ADJUDICATION: THE SULLIVAN FRAMEWORK.....	263
CONCLUSION.....	269

INTRODUCTION

One of the most common criticisms of international human rights law, especially among lawyers, is that it is hortatory and unenforceable, and indeed anyone who has tried to encourage or implement their State's commitment to "ensure the equal right of men and women to the enjoyment of all civil and political rights"¹ knows how little concrete guidance exists in the treaties themselves for meeting this goal. One of the other major criticisms is that human rights law describes a string of sometimes conflicting ideals that States must respect, without providing any parameters as to how rights are to be prioritized and reconciled.² Ayelet

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1. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 3, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

2. See, e.g., Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 816 (1992).

Shachar's book *Multicultural Jurisdictions*,³ published as part of Cambridge University Press's Contemporary Political Theory series and winner of the 2002 First Book Award of the Foundations of Political Theory section of the American Political Science Association, offers institutional and theoretical insight into the particularly thorny problem of respecting minority cultures at the national and local levels while protecting the individual equality rights of the women who live as members of those minority groups. This Review will assess the extent to which Shachar's political and theoretical solutions are compatible with certain requirements of the international human rights regime.

The problem Shachar tackles can be understood as a subset of several major recent theoretical disputes in law and political science: the distinction between liberalism and communitarianism,⁴ the question of how to implement multiculturalism,⁵ and the disputed universality of human rights.⁶ At the international level, these debates manifest, for instance, in the claim that human rights as described in United Nations treaties are too individualistic and Western in outlook and do not reflect the more communitarian philosophies of Asian and Islamic cultures, and therefore should not be applied in non-Western nations.⁷ At the national level, when cultural diversity is relatively limited, the claim is made that local feminists agitating for reform of unjust family laws have absorbed too much Western influence and that their ideas will lead to the decay of national values and identity.⁸ Shachar's particular area of interest is the claim, made by minority groups in more culturally diverse polities, that such groups should be shielded from laws that, in their view, interfere with the practice and enjoyment of their culture.

Women's rights activists around the world are familiar with arguments that rights are a concept incompatible with local traditions and that local cultures are so good at meeting the needs of their members that "our women don't need rights." Such activists will therefore be pleased to hear that Shachar proposes a strategy of creating institutions and

3. AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

4. See, e.g., ELIZABETH FRAZER & NICOLA LACEY, *THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE* (1993).

5. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

6. See, e.g., Christine Chinkin, *Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women*, in *HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT* 64 (J.P. Gardner ed., 1997).

7. See, e.g., Mark Clayton, *Rights Controversy Clouds U.N. Conference*, *CHRISTIAN SCI. MONITOR*, June 10, 1993, at 7.

8. See, e.g., Lama Abu-Odeh, *The Fateful Triangle: Islam, the West, and Patriarchy*, Address at the University of Michigan Law School (Mar. 4, 2002) (accompanying paper on file with author).

agreements between groups and the State that seeks to break through this supposed impasse. Because so many women's activists rely heavily on international human rights law as a political and legal basis for action, this Review will address some aspects of how international law interacts with a strategy that focuses very carefully on a certain type of local or national legal-political problem.

Although any group might ask the State to craft special legislation better able to meet its goals ("covenant marriage" in Louisiana,⁹ for instance, comes to mind), Shachar focuses on groups that are particularly disaffected from the State and in a situation she calls "reactive culturalism."¹⁰ She notes that while minority groups generally assimilate to majority or outside cultures to some degree, certain voices within some groups respond to their minority position by attempting to wall the group off from the outside, demanding "a strict adherence to a group's traditional laws, norms, and practices as part of [the] identity group's active resistance to external sources of change, such as secularism or modernity."¹¹ Such strict adherence can take the forms of idealizing the image and culture-transmitting role of women in the family—especially where the group's image and culture are thought to differ from those of the majority—and of interpreting departures from traditional hierarchy, textual readings, or behavioral norms as evidence of the group's decay.¹² Such situations can lead to a deadening of formerly flexible traditions,¹³ making traditional law and social sanctions less effective and less just when transposed to a changing social context.¹⁴ Women often bear the brunt of such restrictions since their treatment under traditional group norms becomes the major symbolic contested issue; group members with alternate readings of traditional practices become open to accusations of cultural betrayal, and "[e]normous pressure is . . . put on women insiders to relinquish their individual citizenship rights and to demonstrate group loyalty by accepting the standard interpretation of group doctrine as the only correct reading of their group's tradition."¹⁵ Women are trapped,

9. LA. REV. STAT. ANN. §§ 9:272–9:275.1 (West 2000).

10. The phenomena at stake here are complex, and not easily summarized; for a fuller explanation in addition to SHACHAR, *supra* note 3, see also especially Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285 (1998) [hereinafter Shachar, *Perils*]; Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385 (2000); Ayelet Shachar, *Reshaping the Cultural Model: Group Accommodation and Individual Rights*, 8 WINDSOR REV. LEGAL & SOC. ISSUES 83 (1998).

11. SHACHAR, *supra* note 3, at 35.

12. *Id.* at 35–36.

13. *Id.* at 39–40.

14. *See id.* at 60.

15. *Id.* at 39.

unable to improve their situation from inside the group, unable to go to outsiders for help, and usually financially, emotionally, and skills-wise unable to leave, even if they would want to desert their primary cultural context.

Of all the nondominant cultural groups in a given situation, those in a state of "reactive culturalism" are of greatest interest to Shachar because of the question of how government involvement is likely to affect their female members.¹⁶ On the one hand, these are the groups that are most likely to ask for explicit rights and exemptions from State law so as to preserve their own traditional law, yet on the other hand these exemptions may very well preserve the systematic maltreatment of certain members (for Shachar's purposes, women) of the group.¹⁷ Thus, by attempting to protect the rights of the minority as a group by granting the group more legal autonomy, the State leaves those certain members even more legally and socially vulnerable than they were before. Shachar calls this the "paradox of multicultural vulnerability."¹⁸ Michael Walzer called it the "motive . . . not to free oneself from minority status . . . but to acquire (and then mistreat) minorities of one's own."¹⁹

In order to prevent the government, the group, or both from forcing women to make emotionally wrenching and often pragmatically impossible "your culture or your rights"²⁰ choices, Shachar suggests that the government and the group negotiate a solution in which they share jurisdiction over a given area of law of interest to the group. The goal is to get the government and the group to compete for the allegiance of vulnerable group members so that the parties "identify and defend only those [S]tate accommodations which can be coherently combined with the improvement of the position of traditionally subordinated classes of

16. Although policies directed at women may stem from government involvement with family law, it is worth noting that involvement by any nontraditional group, such as development projects for women led by local nongovernmental organizations (NGOs), can in some circumstances leave women subject to physical threats and ostracism. *See, e.g.,* MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 82 (1999).

17. SHACHAR, *supra* note 3, at 2.

18. *Id.* at 3.

19. Michael Walzer, *The New Tribalism*, 39 *DISSENT* 164, 169 (1992).

20. *See* SHACHAR, *supra* note 3, at 63–71. This phrase describes the no-win situation in which female members of religious groups find themselves when policy analysts, government officials, and/or group members assume that cultural laws are immutable and that a woman cannot seek relief from such rules while remaining a loyal member of the group. She must choose either to remain an undissenting member of her culture or to opt out of the group in order to assert her (government-granted) rights. Such a paradox ignores the malleability of culture and identity, and the common existence of multiple interpretations of group rules. It also potentially minimizes the practical and personal difficulties women would experience if they attempted or were forced to abandon their primary cultural contexts. *See generally id.* at 63–87.

individuals within minority group cultures.”²¹ In turn, vulnerable group members will experience increased bargaining power within their communities, and hopefully group members will interpret cultural law in a more egalitarian way.²²

This feat of political science is called “transformative accommodation,” and Shachar describes three preconditions for making it work. The first principle is that all areas of law are divisible into “submatters” that must be addressed together in order for a problem to be solved (e.g., contract interpretation and damages; or substantive law, criminal procedure, and sentencing); the hope is that the group and the State may be most interested in utterly different submatters.²³ Next is the “no monopoly” rule: The group and the State each take jurisdiction over different submatters, so that neither has complete control over the legal area at issue;²⁴ power, precedent, and values are more likely to “circulat[e]”²⁵ between the government and the group when neither has a legal stronghold. Finally, and perhaps most importantly for lawyers and advocates on the ground, both government and group must provide multiple opportunities in the life cycle of the law for group members to choose one side’s legal options over the other’s. Such opportunities need not be offered frequently, but they “cannot be taken lightly.”²⁶ The goal here is to allow group members to opt out of aspects of group law, when that law is untenable, without having to leave the group entirely, which is often neither desirable nor practically feasible.²⁷

Most of *Multicultural Jurisdictions* focuses on transformative accommodation in the context of family law,²⁸ since family law describes who falls within and without the boundaries of the group’s influence, and thus groups “increasingly demand *legal* recognition of family law traditions as necessary to preserve the group’s identity.”²⁹ Family law is, of course, also the means by which traditional roles and rights for

21. *Id.* at 118.

22. *Id.* at 138–40.

23. *Id.* at 119–20.

24. *Id.* at 120–22.

25. *Id.* at 119.

26. *Id.* at 123; *see id.* at 122–26.

27. *Id.* at 125 n.18.

28. An appendix describes briefly how the principles of transformative accommodation might operate in the spheres of immigration, education, and criminal law. *Id.* at 151–65.

29. *Id.* at 46. Another interpretation of the common minority group emphasis on family law is that those who find it necessary to compromise culturally with outsiders during the day in the public realm compensate at home by protecting and glorifying to new heights the wives and mothers who stay in the private realm away from such influences. This, in turn, feeds back into the “women as symbol” problem. *See TOVE STANG DAHL, THE MUSLIM FAMILY: A STUDY OF WOMEN’S RIGHTS IN ISLAM* 62–63 (Ronald Walford trans., 1997); *supra* notes 10–15 and accompanying text.

women can become concretized.³⁰ Shachar identifies two submatters of family law. The first is its “demarcating” element, which defines how one is included or excluded from the group through marriage or descent, with emphasis on the “racial, ethnic, biological and territorial” as opposed to the “cultural and spiritual.”³¹ The second submatter is the “distributive” component of family law, primarily involving property division at divorce and death, “which shapes and allocates rights, duties, and ultimately powers between men and women within the group.”³² She suggests that the government and the group can negotiate as to which each prefers to control, while providing opt-out provisions at strategic points along the way.

The principles presented in Shachar’s book are innovative and carefully developed, although they require that groups and governments muster up considerable trust and political will to cooperate fully. *Multicultural Jurisdictions* is thus likely to be of great interest to minority and women’s rights activists, as well as those interested in merging traditional or religious law with the civil law of the modern State. Although many important issues relating to women’s rights in the family have been addressed by international human rights bodies and would make fine complements to Shachar’s book, this Review will explore several institutional questions about how transformative accommodation relates to international human rights law, in keeping with the institutional focus of *Multicultural Jurisdictions*. The first of these questions is whether a scheme that grants minority groups limited autonomy for autonomy’s sake is justifiable under international human rights law, and whether such devolution of authority effectively insulates the actions of such groups from international review. I will argue that transformative accommodation is designed with a worst-case human rights scenario in mind, such that some stretching may be necessary of the concepts through which the International Covenant on Civil and Political Rights (ICCPR) protects cultural rights, and that international review of actions taken in such groups is permissible under the jurisprudence of the ICCPR Human Rights Committee. The second major question is whether granting minority groups limited power to decide disputes related to family law status or property rights activates the State’s responsibility to ensure that such decisions occur in independent and impartial tribunals with equality before the law. The short answer here is yes, and States can comply either through direct supervision of group

30. SHACHAR, *supra* note 3, at 50.

31. *Id.* at 51 (quoting Hedva Ben-Israel, *Nationalism in Historical Perspective*, 45 J. INT’L AFF. 367, 393 (1992)).

32. *Id.* at 50–51.

courts or by providing review of group decisions in national courts. The third section of this paper begins to address the question of how national courts can review such decisions in a way likely to respect the gender equality and cultural rights involved.

Shachar has produced a highly thought-provoking book that seeks to inspire solutions to a frustrating and all-too-common problem; it is worthwhile reading for any lawyer or activist in the field, whether reactive culturalism is her particular albatross or not.

I. ICCPR ARTICLE 27: THE RIGHT OF MEMBERS OF MINORITIES TO ENJOY THEIR CULTURES, LANGUAGES, AND RELIGIONS

Although Shachar's book is, broadly described, about the rights of female members of minorities, significant portions are dedicated to discussing family law since it is the area in which groups most commonly demand accommodation. The implication is that groups will probably be most interested in its demarcating function: "Family law's peculiar power lies not so much in its delineation of 'blood' membership as in its value as a political expression of the group's power to determine its (non-territorial) membership boundaries, i.e. a self-defined legal procedure for autonomously demarcating who falls inside and outside the collective."³³ Yet the most widely ratified human rights treaty addressing that issue, the ICCPR, article 27, does not protect the nuts and bolts of minority family law per se, the "racial, ethnic, biological and territorial," but instead protects the "cultural and spiritual":³⁴ Persons "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."³⁵

33. *Id.* at 54 (citation omitted). Although Shachar does not suggest that cultural groups enjoy an absolute right to define their own membership, this claim has been made at the international level on behalf of indigenous groups, although not for merely minority groups. For indigenous groups: While the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 1(a), 72 I.L.O. Official Bull. 59, does not specify a full right for self-determined personal status laws, the Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Hum. Rts. Comm., Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), recognizes a "collective right to determine their own citizenship in accordance with their customs and traditions" (art. 32), as well as a right of indigenous peoples to retain their traditional legal systems (art. 4). For minority groups, see the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Annex, Supp. No. 49, at 210, U.N. Doc. A/47/49 (1993) (no explicit right of minorities to determine own membership).

34. Ben-Israel, *supra* note 31.

35. ICCPR, *supra* note 1, art. 27, 999 U.N.T.S. at 179, 6 I.L.M. at 375-76.

This Part will discuss the overriding interest of article 27 of the ICCPR, which is also the underlying interest of transformative accommodation: protecting the ability of minority members to identify themselves as part of the minority group (without unacceptably high costs to the individual). The division of jurisdiction along submatter lines does not result in the abdication of the State's duties toward group members under international law. However, the transformative accommodation strategy is conceived only in terms of the local and national; the various group, State, and nongovernmental players of international law will have to consider carefully how international human rights reporting and adjudication will fit into the mix.

A. *The Lovelace Case*

*Lovelace v. Canada*³⁶ was the first major ICCPR article 27 decision of the ICCPR Human Rights Committee under the Optional Protocol to the ICCPR.³⁷ It is notable for two things: its emphasis on what will be called here the "relational" benefits of minority culture (rather than the culture's legal traditions), and its holding that restrictions on group membership must comply with the rest of the ICCPR. The ICCPR seeks to defend individuals directly and to protect minorities' ways of living, not to protect the abilities of groups to protect themselves. In contrast, Shachar's suggestion is to give groups significant powers of self-government in order to prove that cultural lockdown is unnecessary for group preservation, a process that is at odds with the orientation toward individual equality found in the ICCPR. This is therefore the aspect of Shachar's work that is most likely to raise objections from international human rights advocates. It is also possible, however, to argue that reactive culturalism represents the exceptional situation where the values of the human rights regime will have to be vindicated through long-term strategies rather than fruitless and divisive, albeit direct, struggle. *Lovelace* is a useful case for examining the validity of this argument.

Sandra Lovelace was registered as a member of the Maliseet Indian tribe at her birth, but lost her tribal membership when she married a non-Indian pursuant to section 12(1)(b) of Canada's former Indian Act, a provision which applied to women and not to men. The Indian Act sought to emulate a patrilineal structure supposedly found in all of

36. *Lovelace v. Canada*, Communication No. 24/1977, U.N. Hum. Rts. Comm., 13th Sess., in *Selected Decisions Under the Optional Protocol*, at 83, U.N. Doc. CCPR/C/OP/1 (1985).

37. Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 302.

Canada's Native American groups, and was not specific to the Maliseet.³⁸ After Lovelace's divorce she wished to return to the reserve where she had grown up and where her parents still lived, but she was denied the legal right to do so because she no longer had Indian status. Therefore, under the Indian Act she was no longer permitted to reside upon, own, possess, inherit, or be buried on the lands of her former tribe; to receive federal loans, farming instruction, medical care, or due-free timber available only to Indians; or to exercise any traditional hunting or fishing rights she may once have had.³⁹

However, the primary denial of a benefit of Maliseet membership that concerned the Committee, and Lovelace's primary complaint, was that "a person ceasing to be an Indian [loses] the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity."⁴⁰ The Committee also specified the loss of "access to her native culture and language."⁴¹ The Committee decided that most of the distributive aspects of tribal membership granted by the federal government listed above were beyond its review because their content fell outside the scope of the Covenant.⁴² Nevertheless, the Committee insisted on protecting Lovelace's rights to culture, language, and identity. It did so by inferring her right to live on her community's reserve; because article 27 specifies that minority members shall enjoy language, culture, and religion "in community with other members of the group," and because "there is no place outside the Tobique Reserve where such a community exists,"⁴³ Lovelace must be allowed to live on the reserve, even if this meant changing the Indian Act's demarcational rules. This was not a finding of a violation of the right to freedom of movement and choice of residence⁴⁴ per se,⁴⁵ but instead a practical recognition of the peculiar nature of article 27: While the right to participate in one's culture inheres in individuals, one cannot speak one's language or tell one's stories alone.⁴⁶

38. KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 362 (2002).

39. Lovelace v. Canada, *supra* note 36, ¶ 9.9.

40. *Id.* ¶ 13.1.

41. *Id.* ¶ 15.

42. *Id.* ¶¶ 14, 15.

43. *Id.* ¶ 15.

44. ICCPR, *supra* note 1, arts. 12(1)–(3), 999 U.N.T.S. at 176, 6 I.L.M. at 372.

45. See Lovelace v. Canada, *supra* note 36, ¶¶ 16, 18.

46. See Rhoda E. Howard-Hassmann, (Dis)Embedded Women, 24 MICH. J. INT'L L. 227 (2002). Whether article 27 ought to protect the rights of individuals or groups is sometimes disputed. See, e.g., William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 559 n.34 (2000) (stating that the Committee's article 27 jurisprudence is "confused" because sometimes groups are allowed the power

Rather than protecting the right of the community to have its cultural law enshrined in national or local public law, to determine what such law should be, or Lovelace's right to challenge such law, the Committee can be said to have required Canada to amend the Indian Act in order to protect Lovelace's one-way "relational" right: to relate to others as a Maliseet Indian. The Committee saw Lovelace's Indian status as inherent in her person and subject only to her wish to express it: "Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain those ties must normally be considered as belonging to that minority within the meaning of the Covenant."⁴⁷ The Committee did not directly delve into the Maliseet's demarcational law, the Canadian government's interpretation thereof, nor the distributional law that followed; in fact, it sidestepped the colonial issue altogether and superficially accepted that the government might want to define group members for the purpose of protecting resources and group identity,⁴⁸ an

to expel their members, but sometimes not, and that "[some] Indian feminists stress[] . . . that the power of the tribe to determine its membership [is] a primary constituent of sovereignty"). However, the drafters of article 27 described the right as inhering in individuals because of a historical belief that rights inhered in individuals and not groups; because with the exception of article 1 on self-determination, the ICCPR creates a structure that protects only individual rights; and most importantly, because they wished to preserve for individuals the ability to choose to what degree they might assimilate with the majority. FRANCESCO CAPOTORTI, SPECIAL RAPPORTEUR OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES ¶¶ 206–10 (1979). "[T]he rights provided are based on the interests of a collectivity, and consequently it is the individual as a member of a minority group, and not just any individual, who is destined to benefit from the protection granted by article 27." *Id.* ¶ 210.

47. Lovelace v. Canada, *supra* note 36, ¶ 14.

48. *Id.* ¶ 15. The tension between ethnicity, colonialism, and the State action issue inherent in the Indian Act; equality rights between men and women; and the subjective and objective components of group identity are hinted at but not fully developed in the Committee's ruling in *Lovelace*. The Committee first noted that article 27 only protects members of minorities, and that pursuant to the Indian Act Sandra Lovelace was no longer a member of the Maliseet. The Committee therefore ruled that group membership for the purpose of applying article 27 had to be distinguished from membership for the purpose of the Indian Act. It did so by implying that the Indian Act served primarily to describe those distributional benefits flowing from Indian tribal membership as a result of tribal relations with the State, apparently a matter very different from determining Lovelace's Indian status for the purpose of determining whether she was being denied the opportunity to participate in her culture more generally. The Committee then applied its own unspecified criteria for determining personal group identity, summed up as a combination of her ostensibly objective ethnicity and her subjectively experienced short separation from the tribe, to determine that Lovelace was a member of the group for the purpose of article 27. *Id.* ¶ 14. For further discussion of the colonialism problem and these objective and subjective elements, see KNOP, *supra* note 38, at 358–72. For an argument that the *Lovelace* case was really about gender rights and that the article 27 discussion is a means of evading the fact that the ICCPR was not in effect in Canada when Lovelace was ejected from the Maliseet as a result of her marriage,

argument to which it would later return when defining the limited circumstances under which protecting the group's identity might mean denying the relational rights of otherwise worthy individuals.⁴⁹

This leads to an important difference between the technique of the ICCPR and Shachar's concept of transformative accommodation: While the goals of each are very similar, their means of achieving those goals can be seen as the inverse of each other. The ICCPR seeks, at its broadest, to achieve "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want,"⁵⁰ and article 27 itself is "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned."⁵¹ In other words, the ICCPR pursues the end of cultural freedom by protecting linguistic, cultural, and religious displays directly, rather than protecting the group's right to protect itself.⁵² Along these lines, Shachar cites various aspects of the multicultural literature to show that the goal of multiculturalism is to spread the benefits of a seemingly neutral government, which usually reflects the image of the majority, to members of nondominant groups who might otherwise be insecure in their government's ability and will to respond to their needs and views.⁵³ As Robert Howse and Karen Knop put it,

the protection of cultural identity and affiliation may plausibly be conceived of as vital to the autonomous flourishing of the individual, to the individual's free and equal participation in the common public culture. Deprived of her own language and cultural community as a living context for political, social, and artistic discourse, the individual senses herself neither particularly free nor equal as a citizen of the greater community where another language and/or culture predominates.⁵⁴

While Shachar's goal of protecting minority rights thus appears to be quite similar to that of the ICCPR, Shachar does not protect cultural displays or relationships directly but instead gives the group itself almost

see Anne F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CANADIAN Y.B. INT'L L. 244 (1982).

49. See *infra* notes 62–67 and accompanying text.

50. ICCPR, *supra* note 1, pmbl., 999 U.N.T.S. at 173, 6 I.L.M. at 368.

51. General Comment No. 23, U.N. Hum. Rts. Comm., 50th Sess., ¶ 9, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 38, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

52. See *supra* note 46.

53. SHACHAR, *supra* note 3, at 22–25.

54. Robert Howse & Karen Knop, *Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective*, 1 NEW EUR. L. REV. 269, 278–79 (1992) (citation omitted).

unlimited license to determine its own demarcational or distributive law, without democratic safeguards, in exchange for State control over the other half of family law plus limited opt-out provisions for group members too overburdened to continue under the group's system.

Should this qualitatively different approach be a problem for international rights activists? Shachar's institutional solution, while designed to avoid devolving too much power to the group, might stir political momentum toward undue future accommodations more difficult to control. Moreover, it is easy to question why activists should throw their weight behind a series of minority rights that are not clearly supported in international human rights law. In response, Shachar's protection of minority rights seems to flow directly from her assessment of "reactive culturalism" as a political crisis; the group gets limited group autonomy only as a trade-off for protecting women's financial and relational autonomy and, one suspects, only where no other solution is forthcoming. Activists can certainly identify with such a concern, because the cultural difference argument is one that often wins out in local contexts.

International human rights advocates who are concerned about Shachar's suggestion that group rights be recognized in their own right are thus likely to point to the other major result of *Lovelace*, which is that the Committee, having determined that residence on the Tobique Reserve was necessary to preserve Lovelace's right to participate in her cultural and linguistic community, formulated the following test to determine that Canada's demarcational and distributive rules under the Indian Act were improper: "[S]tatutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole."⁵⁵ "[C]onsistent with the other provisions of the Covenant" would seem to suggest that States Parties to the ICCPR have a responsibility to refrain from validating customary law where contradictions between the two are prominent, for instance where only one gender is allowed to initiate a divorce or where children can be married irrevocably at a very young age. Shachar does seem to support some baseline requirements for recognition of a demarcational scheme, for instance, where children's rights and minimum ages for marriage are concerned.⁵⁶ In the short term, under transformative accommodation's limited opt-out provisions, women should theoretically not have to suffer the imposition of discriminatory

55. *Lovelace v. Canada*, *supra* note 36, ¶ 16. It was duly declared that denial of residence on the reserve was not "reasonable, or necessary to preserve the identity of the tribe," and therefore that "to prevent her recognition as belonging to the band [was] an unjustifiable denial of her rights." *Id.* ¶ 17.

56. See, e.g., SHACHAR, *supra* note 3, at 47 n.10, 109.

law by the group unless they refuse to exercise that opt-out power. However, the primary long-term strategy of transformative accommodation attempts to give women within minority groups enough power to cause groups to reinterpret discriminatory law from within, rather than having the State impose reform from without on an unwilling group—a plan which most activists will recognize as a likely political disaster in a reactive culturalist situation.

So is Shachar's system consistent with the Human Rights Committee's attitude toward cultural rights? Both are primarily concerned with allowing minority group members access to their relational rights in the short term; the difference is in the long-term strategy for achieving compliance with the ICCPR. While a commitment to the international human rights regime is attractive in part precisely because it aims to empower the less powerful directly and immediately, there can be no denial that sometimes situations do develop where this is politically impracticable. Whether a given situation is likely to benefit from Shachar's transformative accommodation approach is ultimately a very local judgment to make.

B. *The Kitok Case*

Aside from the question of whether defending individual cultural rights by increasing group autonomy is legally defensible based on international human rights law, another question that international human rights activists may have about Shachar's system is whether devolving half of family law (i.e., demarcational or distributional law) to the power of potentially "private" groups would insulate it from review under the ICCPR Optional Protocol for a lack of State action. If the State refuses to interfere with a group's legal system, are individuals in the group cut off from international review of their cases, and can the State avoid answering questions about the group's practices when it makes its report to the Human Rights Committee?⁵⁷ Based on the case of Ivan Kitok,⁵⁸ it would appear not, but it does not follow that State measures that devolve power in order to protect a minority are easily assailable. Where land or other economic rights are directly at issue, the Committee seems likely

57. This question is made all the more tantalizing by the relatively recent coming into force of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, Annex, U.N. GAOR, 55th Sess., Supp. No. 49, at 5, U.N. Doc. A/54/49 (vol. 1) (2000), under which the Committee on the Elimination of All Forms of Discrimination Against Women will hear individual complaints from women under the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

58. *Kitok v. Sweden*, Communication No. 197/1985, U.N. Hum. Rts. Comm., 33d Sess., in Report of the Human Rights Committee, at 221, U.N. Doc. A/43/40 (1988).

to accept restrictions on access to groups, whether implemented primarily by the State or the group itself.

Ivan Kitok brought his case to the Human Rights Committee after Swedish courts refused to overturn the decision of a Sami ethnic community board that pursuant to section 12, paragraph 2 of the Reindeer Husbandry Act, he was no longer eligible to herd reindeer in the community after failing to do so for three years. The law had been enacted in order to limit the number of herders grazing reindeer on community lands, so that traditional reindeer husbandry could be made profitable enough to allow some ethnic Sami to earn a decent living entirely through traditional ways of life, and the Swedish administrative adjudicators were allowed to overturn a decision of a community board not to grant reentry to a Sami member only in unspecified "special circumstances."⁵⁹ Kitok protested his exclusion as a violation of his rights under article 27; the Swedish government alleged that this was a private dispute among the Sami and that any denial of Kitok's rights had not been perpetrated by Sweden. The Committee responded that the passage of the Reindeer Husbandry Act itself was sufficient to engage Sweden's responsibility.⁶⁰ In other words, the marshalling of distributive rules by the State activated State responsibility for the group's demarcational decisions.⁶¹

Nonetheless, the Committee accepted Kitok's exclusion from the formal rolls of Sami village members "for economic and ecological reasons and to secure the preservation and well-being of the Sami minority."⁶² The Committee indicated that the case was a difficult and close one, given the "objective ethnic criteria," Kitok's continuing links with the community, and his efforts to return to reindeer farming as soon as he was able to do so⁶³—all factors very similar to Lovelace's case—not to mention the distressing distinction between first-class and second-class Sami inherent in the existence of differentiated Sami rights. The Committee seems to have been won over by the distinctive reindeer husbandry problem, however, as well as the fact that Kitok was informally permitted to hunt, fish, and reside on Sami lands, and decided that the

59. *Id.* ¶¶ 2.2, 4.2.

60. *Id.* ¶ 9.4.

61. The private-public acts distinction was further discredited as an acceptable defense to article 27 complaints in the Committee's General Comment No. 23, *supra* note 51, ¶ 6.1: "Positive measures of protection [of the rights granted in article 27] are . . . required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party." It would have been helpful if the Committee had specified that this included challenges from members acting within the minority group at issue, but this must be assumed from the text.

62. *Kitok v. Sweden*, *supra* note 58, ¶ 9.5.

63. *Id.* ¶ 9.7.

restriction at hand was “necessary for the continued viability and welfare of the minority as a whole.”⁶⁴

It is difficult to explain the difference in results between *Lovelace* and *Kitok*⁶⁵ without emphasizing the economic aspects of the distinctive way of life at stake in the latter case. Although in either of the cases the influx of large numbers of new members onto group land could have been economically and ecologically challenging for the minorities at stake, the colonialist and gender-discriminatory Canadian Indian Act apparently had less sentimental appeal than the protection of disappearing Sami reindeer herders. Since *Kitok*, the Committee’s interest in protecting distinctive ways of life seems only to have increased, to the extent that article 27 might now be said to protect language, religion, culture, and agricultural/ecological systems.⁶⁶ This is unsurprising; distinctive ways of life like reindeer herding fit neatly into the relational rights concept protected under article 27, and when the Committee protects them it can be viewed as clearly promoting minority cultures, not merely minority autonomy claims.

While protection of distinctive ways of life is thus consistent with the history and purpose of article 27, it does illustrate how economic pressures can affect the success of a given minority-protection project. When only potentially inexpensive relational rights such as language are the focus of cultural rights preservation, the group’s future survival can always be said to be promoted through the use of demarcational rules that maximize the number of members of the group; more language speakers equals more security in identity. This can be said to be good for women; more security in identity equals less social pressure to behave in ways thought to promote the group’s uniqueness. However, *Kitok* shows that when group membership requires use of finite group resources—when more members means less grazing space per reindeer—restrictions on behavior increase in order to protect those resources. Where there is significant competition for communal economic resources, then demarcational policy (defining the group’s members) and distributive policy

64. *Id.* ¶ 9.8.

65. See KNOP, *supra* note 38, at 370–71 & n.58. Knop points out that both *Kitok* and *Lovelace* were permitted but not statutorily entitled to live on their groups’ respective lands, yet *Kitok* had a community board declaration allowing him to do so, *Kitok v. Sweden*, *supra* note 58, ¶ 4.2, whereas *Lovelace* did not have full community support and “dissident members of the tribe who support[ed] her cause [had] threatened to resort to physical violence in her defence should the authorities attempt to remove her,” *Lovelace v. Canada*, *supra* note 36, ¶ 9.7. Also, the violation of *Lovelace*’s right to gender equality as guaranteed by article 3 of the ICCPR, *supra* note 1, 999 U.N.T.S. 171, 6 I.L.M. 368, must have weighed heavily on the Committee even though it insisted that such a claim was barred as arising before the ICCPR came into force in Canada. *Lovelace v. Canada*, *supra* note 36, ¶ 10.

66. See, e.g., General Comment No. 23, *supra* note 51, ¶¶ 3.2, 7.

(determining the access each group member has to resources, including power) must be fairly tightly coordinated.⁶⁷ Although this in no way invalidates Shachar's system, it does suggest that transformative accommodation will be easier to apply to, for instance, recent urban immigrant populations seeking accommodation in basic areas of family law as opposed to indigenous groups with complex economic relations with the State. Even more political will and good faith are required in negotiations between the group, activists, and the State. Women's rights activists may also question how much effort government negotiators can put into protecting the position of women when land, water, mineral, and wildlife concerns are also on the bargaining table; or, to put it another way, much more may ultimately be involved in family law than personal status and property rights.

International human rights activists need not fear that a transformative accommodation system will necessarily insulate intragroup restrictions from international review. However, if restrictions can be tied to the availability of distinctive resources or practices *and* are not otherwise wildly violative of the ICCPR, they have a decent chance of being upheld before the Committee. If access to resources is a significant part of the reactive-culturalist group's set of concerns, international review may be less helpful to women than would otherwise be the case.

If we accept, then, that transformative accommodation and the ICCPR both ultimately seek to achieve short-term relational rights protection and long-term gender equality, these two systems can be used together. An interim cause for concern is that where efforts are being made to implement a transformative accommodation system, international human rights advocates may face pressure to avoid bringing cases to the attention of the Human Rights Committee so as to maintain political good will. Also, governments may feel compelled to defend group actions more strenuously than they otherwise would, in order to protect the arrangement. These are issues that require both advance negotiation and good on-the-spot policymaking, as well as careful vigilance by nongovernmental organizations. In other words, while transformative accommodation can be compatible with improving human rights situations via international human rights law, it probably will not make the process any simpler.

67. See, e.g., *R.L. v. Canada*, Communication No. 358/1989, Hum. Rts. Comm., 43d Sess., U.N. Doc. CCPR/C/43/D/358/1989 (1991). In this case, the Whispering Pines Indian Band, a cattle-raising subset of the Shuswap Nation of only twenty-six members, claimed to be reeling from the amendments to the Indian Act that Canada made in light of the result in *Lovelace*, which would have dramatically raised its number of middle-aged members while disqualifying many of the members' children from membership. The communication was declared inadmissible for failure to exhaust domestic remedies. *Id.*

II. ICCPR ARTICLE 14: TRIAL BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

While the cultural rights aspect of the ICCPR is the most obvious one to discuss when assessing a book about minority rights from the perspective of international human rights law, a question that is just as important is whether granting jurisdiction to a nongovernmental group to control certain aspects of legal status like family law will lead to group courts and, if so, whether there will be deviations from international standards for adjudication. Shachar does not discuss regulation of the sort of private group courts which might determine demarcational or distributive family law rights in *Multicultural Jurisdictions*,⁶⁸ but it is fair to assume that some groups, especially those with complex family law traditions and some historical tradition of dispute resolution bodies, will want to designate someone within the group to decide disputes when they arise. This Part will analyze the question of whether such decision making is likely to be subject to international human rights law, and whether institutions can be devised which will successfully adhere to both the transformative accommodation and international human rights frameworks.

Article 14(1) of the ICCPR regulates civil adjudication as follows: "All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."⁶⁹ In courts created or endorsed within a transformative accommodation situation, this raises the initial question of how to determine whether a tribunal is competent, independent, and impartial without stepping on the toes of someone in the group, since the Committee requires reporting on "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative."⁷⁰ The initial questions, however, are whether family law questions are covered by article 14(1) and what kind of regulation is required for group-based institutions.

This Part will show that most issues of family demarcational and distributive law are of the type that the ICCPR requires to be adjudicated in a court compliant with article 14(1). Shachar's system divides jurisdiction along submatter lines in order to give groups control over certain

68. Shachar has discussed this possibility in works that predate *Multicultural Jurisdictions*, especially Shachar, *Perils*, *supra* note 10. See *infra* text accompanying notes 93–95.

69. ICCPR, *supra* note 1, art. 14(1), 999 U.N.T.S. at 176, 6 I.L.M. at 372.

70. General Comment No. 13, U.N. Hum. Rts. Comm., 21st Sess. ¶ 3, in *Compilation of General Comments*, *supra* note 51, at 14.

aspects of their law, but it is a government's responsibility to ensure that all courts within the State comply with the ICCPR. Whether this creates a conflict may be a situation-specific issue, but if conflicts arise they can only be resolved through careful negotiation and compromise. One answer may be direct government review of a court's personnel, but not of its decisions. In *Santa Clara Pueblo v. Martinez*,⁷¹ United States Supreme Court Justice White suggested that a different answer could be another submatter split, this time in appellate jurisdiction: Upon appeal, the federal court can order that another decision and/or remedy be made, but the group court decides what the decision and/or remedy will be.⁷² Either way, family law cases require equality before courts that are competent, independent, and impartial.

A. A "Suit at Law"

Most of article 14 of the ICCPR is devoted to criminal trials, but article 14(1) specifically requires equality before the courts in any kind of case, and governs the independence and impartiality of courts that determine both criminal cases and/or "suits at law." Article 14 is therefore relevant to Shachar's book only if legal disputes about family law constitute "suits at law." The problem is that "the cases do not provide a clear definition of a 'suit at law.'"⁷³ While on the one hand the problem seems to be confined to a question of whether or not a right is an exclusively administrative one created by an elective relationship between the individual and the State (which family law is not, leaving no question that such cases are suits at law), on the other hand it is possible to argue that a small case being argued in the nether regions of a nongovernment group's private administration should not be analyzed as part of the State court apparatus at all. This Section will show that *any* adjudication of family law or group demarcational rights does constitute a "suit at law," and that the body deciding the suit must therefore conform to the requirements of article 14.

The primary "suit at law" case is *Y.L. v. Canada*, which noted that the "suit at law" concept was expressed differently in the five equally authentic language texts of the Covenant⁷⁴ and that the drafting history does not resolve this problem.⁷⁵ The basic idea behind a suit at law is that there needs to be an "organizational *separation between the judiciary*

71. 436 U.S. 49 (1978).

72. *Id.* at 76 (White, J., dissenting); see *infra* text accompanying note 92.

73. SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 282 (2000).

74. See ICCPR, *supra* note 1, art. 53(1), 999 U.N.T.S. at 186, 6 I.L.M. at 383.

75. *Y.L. v. Canada*, Communication No. 112/1981, U.N. Hum. Rts. Comm., 41st Sess., Supp. No. 40 ¶¶ 9.1–2, at 145, U.N. Doc. A/41/40 (1986).

and the administration.”⁷⁶ The principle established in *Y.L.* is that a “suit at law” must be analyzed based on the nature of the right involved, rather than the status of the parties (in which case a purely administrative right would involve the government on one side) or the forum (in which case the government might try to manipulate the outcome of a particular type of case by insulating it in an administrative tribunal).⁷⁷ In *Y.L.* the denial of an army pension by an administrative body did not constitute a violation of article 14(1) where the denial could have been appealed through Canada’s regular courts.⁷⁸ (Three members of the Committee, however, felt that the military-State relationship underlying the pension was fundamentally different from a labor contract such that the case did not constitute a suit at law.)⁷⁹ The Committee has also found possible suits at law in cases involving dismissal from the civil service, regulation of a legal professional body, deportation proceedings, and determination of social security benefits.⁸⁰

The question at hand is whether any of the issues that might be given to a cultural group to decide in a transformative accommodation system would constitute suits at law, thus requiring an independent and impartial tribunal. Where the case in issue is one of marital status or division of property at divorce or death, this would clearly constitute a suit at law. No government responsibilities are directly involved, and because changes in marital and property status are generally required to be registered with the State, “equality before the laws” demands that all groups in the State be subject to this protection. The outcome is less clear if the issue were more akin to that decided in *Kitok* (whether the appellant was allowed to rejoin a Sami village for reindeer herding purposes), because it is possible to argue that the rights at stake in village membership involved access to certain federally protected land and water rights granted only to segments of the population. This is an issue closely connected with the State, the adjudication of which might therefore resemble only an administrative decision. Broad readings of “suit at law” have been advanced based on the result in *Y.L.*,⁸¹ however, and the expectation of commentators seems to be that the Committee will require an independent tribunal in most cases where “civil rights and

76. MANFRED NOWAK, CCPR COMMENTARY 241 (1993).

77. *Y.L. v. Canada*, *supra* note 75, ¶ 9.2.

78. *Id.* ¶ 9.4–5.

79. *Id.* ¶ 3.

80. JOSEPH ET AL., *supra* note 73, at 281–82.

81. *E.g.*, D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 672 (5th ed. 1998); NOWAK, *supra* note 76, at 242.

obligations”⁸² are decided. Because the question of minority group membership exists independently of the State, article 14 is likely to apply to adjudication of that question.

Since transformative accommodation would require groups to decide and apply certain aspects of group law themselves, moreover, it is likely that intragroup dispute resolution will become necessary at some point. This means that groups will have to comply with ICCPR article 14(1) by ensuring equality before the tribunals, a full and fair public hearing, and a competent, independent, and impartial adjudicator. One way of accomplishing this is for groups to work together with States to ensure the equality of parties before traditional adjudicators, that adjudicators are properly selected, educated, and trained, and that adjudicators are insulated from group rule-making and rule-executing bodies. Where group membership includes lawyers trained in the majority legal system who also meet group requirements for holding authority positions, volunteers acceptable to both sides may be easy to find. Indeed such bicultural adjudicators could offer exciting possibilities for future transformation of group law if they do not themselves become subject to reactive culturalist demands to protect the group’s honor. Where groups are more isolated, however, this would require a tremendous amount of negotiation between a reactive-culturalist group and a State already stressed from working out the details of the underlying demarcational/distributional scheme, especially since groups with clearly defined courts often like them the way they are. Indeed, traditional courts are perhaps likely to be perceived as part of the group law package. Because the suit at law requirement is deemed waived where a right of appeal to the general courts exists,⁸³ the much easier option (at least initially) would simply be to include such a provision in the transformative accommodation requirement. Even this option, however, would need conditions placed on its exercise in order to ensure that the true division of jurisdiction along submatter lines remained substantive enough to be politically convincing to the group. Very similar issues have been raised in the U.S. Native American context, explored below.

82. NOWAK, *supra* note 76, at 242 (referring to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as being similar to ICCPR article 14).

83. See *Y.L. v. Canada*, *supra* note 75, ¶ 9.4–.5; HARRIS, *supra* note 81, at 672–73; NOWAK, *supra* note 76, at 242.

B. Santa Clara Pueblo v. Martinez and Group Court Review

The case *Santa Clara Pueblo v. Martinez*⁸⁴ presents many of the problems discussed above. The plaintiff was a Santa Claran woman who had married a Navajo man and raised her children on the Santa Clara Pueblo, where they “[spoke] the Tewa language, participate[d] in its life, and [were], culturally, for all practical purposes, Santa Claran Indians.”⁸⁵ A brand-new tribal rule adopted two years before the marriage denied tribal membership to the children of women, but not of men, who married outside the tribe—not because of any internal patrilineal tradition but because the experience of the group was that men, whether tribal members or not, tended to dominate the cultural affiliation of mixed-heritage families and the use of family-controlled land, which was of paramount economic and cultural concern to the tribe.⁸⁶ When presented with the opposite result in the persons of Julia Martinez and her daughter Audrey, the Santa Clara Pueblo Council, in which the legislative and judicial powers of the group were vested,⁸⁷ declined to change the rule, which carried with it the full panoply of economic and civil consequences.⁸⁸ The United States Supreme Court chose to find the suit, which was based on Title I of the Indian Civil Rights Act (ICRA) of 1968, barred by sovereign immunity as against the tribe, and barred by lack of explicit statutory authorization of the suit against the Pueblo’s officers.⁸⁹

Part of what makes the case so interesting is that it describes a number of methods of judicial review of tribal actions that Congress

84. 436 U.S. 49 (1978).

85. *Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 18 (D.N.M. 1975), *rev’d*, 540 F.2d 1039 (10th Cir. 1976), *rev’d*, 436 U.S. 49 (1978).

86. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 66–67 (1987). Apparently the rule was promulgated in response to the federal General Allotment Act, *see* 25 U.S.C. §§ 331–58 (2000), which “divided up communal lands into individually held parcels,” thus facilitating the appropriation of tribal lands by white men marrying Native American women. *Id.* Though the Act did not apply to the Santa Clarans, they nevertheless “recognized that Congress could apply it to them at any time.” *Id.* at 66.

87. *Martinez*, 436 U.S. at 82 (White, J., dissenting).

88. *Id.* at 52–53. Several times Natalie Martinez, a daughter of Julia Martinez deceased at the time of trial, was denied emergency medical care for strokes she suffered during the course of her final illness because of her lack of Santa Claran Indian status. Respondent’s Brief at 2–3, *Martinez*, 436 U.S. 49, *cited in* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 721 (1989).

89. *Martinez*, 436 U.S. at 59, 70. The Tenth Circuit had found that “since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles.” *Martinez*, 540 F.2d at 1042; *see also Talton v. Mayes*, 163 U.S. 376 (1896) (tribal authority does not spring from the Constitution, but Congress has plenary authority to limit or modify local powers of self-government).

considered, but discarded, while developing the ICRA.⁹⁰ An early draft of the ICRA included a provision that would have allowed *de novo* court review of tribal decisions in criminal cases, and allowed the Attorney General to receive, investigate, screen, and possibly pursue civil claims against tribes in federal courts. It was also suggested that the Department of the Interior could have retained administrative authority over civil complaints arising on Native American reservations, with appellate review in the district courts.⁹¹ Justice White seemed particularly to support a proposal that tribal decisions be reviewed in federal courts only with respect to *whether* the constitutional rights of the accused were violated, with the appropriate remedy being either dismissal or remand to the tribal court with instructions to find a constitutionally acceptable solution to the problem.⁹² Appellate review was broken down into the submatters, so to speak, of whether relief is appropriate and what the relief should be. This system would be considerably less intrusive and resource-consuming than *de novo* review, and would allow unique cultural problems to continue to be solved by tribes instead of federal courts, so long as such solutions could pass minimal constitutional muster. This sounds similar to the limited appeal in special circumstances that was available in *Kitok*, but in this case the ultimate remedy would be shaped by the group itself rather than by the reviewing court.

There are two major points of comparison between White's institutional solution and national government supervision of the independence and impartiality of tribal courts: White's solution would comply with the article 14 requirements of the ICCPR with far less day-to-day interference by the government in group courts, but it also might require more interpretive creativity by group judges in the future, which groups could experience as ongoing interference jeopardizing the health of the transformative accommodation system. At any rate, White's proposal could be easier to negotiate. Shachar generally rejects systems that depend on federal appeal from group bodies for protection of individual rights.⁹³

90. The legislative history of the ICRA showed that many Senators supported some form of federal review of tribal court decisions in civil cases. They were supported by some Native Americans who testified that power-hungry local governors were violating individual rights with no possibility of redress, yet "bitterly opposed" by tribal leaders who felt that *de novo* review by the District Courts would lead to huge intrusions into tribal authority. *Martinez*, 436 U.S. at 66–69; *id.* at 79–82 (White, J., dissenting). Justice White, who dissented in the case, pointed out that "[t]he extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government," *id.* at 83 (White, J., dissenting), but apparently that was thought to be neither here nor there.

91. *Id.* at 68.

92. *Id.* at 76 (White, J., dissenting).

93. Shachar, *Perils*, *supra* note 10, at 298.

She makes the very good point that such structures place too much responsibility on a group member already burdened by a difficult legal and social situation to take the initiative to file an appeal, although she also suggests that such burdens can be mitigated by granting *amicus* status to governmental or nongovernmental bystanders.⁹⁴ Her other concern with appeals to government courts is that groups are unlikely to agree to a system in which they have no control over what happens to cases on appeal.⁹⁵ White's system is somewhat responsive to this concern, and other governmental limitations could be drawn up as well that might assure groups that their most important concerns will be taken into account.

Family law is, as Shachar recognizes, some of the most critical law in people's lives. As such its adjudication must meet the standards set out in ICCPR article 14(1) for equality before competent, impartial, and independent tribunals. In some situations, especially where interest in compliance with international human rights law is weak, compliance with article 14 in a transformative accommodation system imposes an extra layer of institutional finesse that may not be politically desirable to the group or the government. But where activists and governments are dedicated to observing the international human rights rule of law, carefully crafted review of minority group adjudication is a necessary and important component of the negotiation of a transformative accommodation scheme.

III. GOVERNMENT REVIEW OF GROUP ADJUDICATION: THE SULLIVAN FRAMEWORK

If, as suggested in Part II, it becomes necessary for government courts or administrators to perform limited review of group decisions made in the context of a transformative accommodation institutional agreement, undoubtedly the agreement itself will specify certain policy concerns and ideals that the government courts or administrators will consider in the particular case of the group at hand. This section will briefly discuss general issues that government courts or administrators will need to keep in mind, including awareness of traditional majority values, consideration of how the structure of adjudication may distort the assertion of group-related rights, and the jurisprudence of the Committee on the Elimination of All Forms of Discrimination Against Women. This section will also briefly suggest that the framework put forward by Donna Sullivan for adjudicating claims involving conflicting gender and

94. *Id.*

95. *Id.*

religious rights⁹⁶ could offer a starting point for negotiations between groups and governments about foundational values to be considered whenever a government reviews a group court. These are only starting points, but they are important ones.

The first, and most elementary, point is that constitutional or other civil rights protections developed in the majority's legal tradition, especially through a long lineage of common law precedent, are usually highly contextual, even though adjudicators may not think of them as such. They shape and are shaped by majority values and ideals and are not always appropriate for wholesale application to minority groups, no matter how frequently applied in the majority setting.⁹⁷ They need not always be abandoned entirely, but attention to legal history can help to separate necessarily applicable principles from mere traditions.

A second point is that the architecture of the conflict the court is called upon to discuss may be quite complex, first in terms of its intrinsic structure based on who the parties are, and secondly on the basis of the rights the parties may have to assert. A useful case for visualizing these problems is the infamous *Shah Bano* case,⁹⁸ in which the Supreme Court of India upheld a ruling of alimony to be paid by a Muslim man to his seventy-three-year-old wife of forty-three years under a criminal statute aimed at preventing indigence. The husband had divorced her precisely so that he would not have to pay her long-term maintenance, which is recommended but not required under classical Muslim law.⁹⁹ Adjudication tends to be fundamentally bilateral, flattening out the interests at stake when only two of three necessary actors are present.¹⁰⁰ Shachar calls this split in interests and jurisdiction—between the individual group member asserting her right, the group claiming shelter

96. Sullivan, *supra* note 2.

97. Obvious examples in the U.S. context would include tests for whether a measure is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or "deeply rooted in this Nation's history and tradition," *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977), both of which are considered basic standards for adjudicating individual constitutional rights.

98. Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 2 S.C.C. 556 (India).

99. Although certainly not customary in Indian practice, even one of the most vocal opponents of the *Shah Bano* court victory framed the problem as whether what Islam recommended as good and desirable could be mandated by the secular State. Syed Shahabuddin, *The Turmoil in the Muslim Mind*, ONLOOKER, Mar. 16–31, 1985, at 32, 34, *quoted in* Zakia Pathak & Rajeswari Sunder Rajan, "Shahbano", 14 SIGNS 558, 564 (1989). The judgment was met with "mass demonstrations, strikes, and petitions presented by Muslims calling for a reversal of the judgment, which was seen [by some Muslims] as violating Muslim Personal Law." Amrita Chhachhi, *Forced Identities: The State, Communalism, Fundamentalism, and Women in India*, in WOMEN, ISLAM, AND THE STATE 144, 146 (Deniz Kandiyoti ed., 1991).

100. See SHACHAR, *supra* note 3, at 27; Shachar, *Perils*, *supra* note 10, at 286–87.

under a communal policy (even though the commune may be internally divided over the issue), and the State—a “trichotomy.”¹⁰¹

In the *Shah Bano* case, the State sued the ex-husband for nonsupport; only the interests of the conservative Muslim community member and the State were balanced; and Shah Bano herself receded into the background as the State and the (unappointed) group representative defended its response to her needs as each saw them. The internal conflict among Muslims along class and theology lines, the effect of the Muslim-Hindu conflict on the terms of the debate, and Shah Bano's identity beyond that of the generic Muslim female were not represented in court, leaving the court to reconstruct these interests as best it could, and leaving Shah Bano vulnerable to bitter recrimination outside the courtroom. Moreover, because Muslims in India have religiously-based personal status laws but are not accorded any other judicially protected minority status, the ex-husband's communal claim was easily collapsed into a mere balancing of the individual right to religious conscience as against the State. Yet group claims based on religious traditions are not necessarily the same as freedom of conscience rights; the individual who makes a claim against the group is often asserting an interpretation of a rule that enjoys considerable support within the group, and the State's interest in promoting equality between its citizens may be wholly irrelevant to the parties involved. Courts must be careful not to mix their parties or their rights, and it may be difficult to get all the information necessary to understand what the issues are in the case. Liberal *amicus* and third-party intervention rules, among others, can help alleviate these problems, but may not solve them entirely.

A third point of reference for the State committed to upholding its international human rights obligations is that many of the aspects of family law that are likely to arise in a family law transformative accommodation scheme have been analyzed by the Committee of the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁰² The Committee's rulings are useful whether the issue arises directly before a national court or on appeal from a group court. Because the State is most likely to control the distributive aspects of family law in Shachar's system, the major decisions on property division at divorce are summarized here. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (not to mention article 16 of the Universal Declaration of Human Rights¹⁰³ and article 23

101. Shachar, *Perils*, *supra* note 10, at 287.

102. See CEDAW, *supra* note 57, arts. 17–22, 1249 U.N.T.S. at 21–22.

103. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

of the ICCPR¹⁰⁴) requires States to take all appropriate measures to eliminate gender discrimination "in all matters relating to marriage and family relations," including measures to guarantee equal rights during marriage and at its dissolution (article 16(c)), and equal rights regarding property (article 16(h)).¹⁰⁵ In paragraph 30 of the CEDAW Committee's General Recommendation Number 21¹⁰⁶ on equality in marriage and family relations, the Committee rejects the idea of entirely separate property altogether, advocating instead a mixing of spousal property acquired during marriage. The reason is stated in paragraph 32: "[S]uch contributions of a non-financial nature [as household duties and caring for elderly relatives and children] by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight [in determining contributions to marital property]."¹⁰⁷ In addition, paragraph 28 rejects the idea that divorced women are to be supported by male relatives:

Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage . . . is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.¹⁰⁸

General Recommendation Number 21 was developed in honor of 1994 as the International Year of the Family, and makes pointed reference to multiple instruments that enshrine rights to equality within marriage,¹⁰⁹ so the above is potentially relevant even to nations that have not ratified CEDAW. Courts should remember that cultural laws on property distribution are usually operating outside their native context in

104. ICCPR, *supra* note 1, art. 23, 999 U.N.T.S. at 179, 6 I.L.M. at 375.

105. CEDAW, *supra* note 57, art. 16, 1249 U.N.T.S. at 20.

106. General Recommendation No. 21, CEDAW Comm., 13th Sess. ¶ 30, in *Compilation of General Comments*, *supra* note 51, at 90.

107. *Id.* ¶ 32.

108. *Id.* ¶ 28.

109. *Id.* ¶ 2 (citing the Universal Declaration of Human Rights, *supra* note 103; ICCPR, *supra* note 1, 999 U.N.T.S. at 171, 6 I.L.M. at 368; Convention on the Nationality of Married Women, Aug. 11, 1958, 309 U.N.T.S. 65; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 9, 1964, 521 U.N.T.S. 231; Nairobi Forward-Looking Strategies for the Advancement of Women, Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women, July 15–26, 1985, U.N. Sales No. E.85.IV.10).

a transformative accommodation situation, and should not defer to group tradition where there is reason to think that modifying a rule is likely to increase the effectiveness of its policy.

Fourth, States that need to review minority-court actions for possible national rights violations need an appropriate framework for assessing the rights and policies asserted by individuals and group authorities. As discussed above, the content of the transformative accommodation agreement negotiated with the group will likely help to structure such review. A useful starting point for such assessments is provided by Donna Sullivan, who has developed a framework for analyzing women's equality rights and religious claims. She offers a complex balancing procedure that is worth quoting in full:

One of the primary factors to be considered is the relationship between the specific equality right at issue and the overarching goal of gender equality. A second factor, conversely, is the importance of the religious law or practice to the right of religious freedom upon which it is premised. Assessments of the significance of a religious practice should proceed from the significance accorded that practice by the religion or belief itself. A third factor to be analyzed is the degree to which each practice infringes the other or the underlying rights and interests. In other words, does the conflict result in only a slight degree of interference, or is either of the practices totally barred and the exercise of the underlying rights extensively restricted or foreclosed? A fourth factor to be considered is whether other human rights are implicated. For example, if the religion in question is one practiced by a minority group, the impact of the proposed restrictions on the rights of minorities under article 27 of the Political Covenant must be taken into account. Fifth, if religious law imposes a series of limitations on women's rights, their cumulative effect on women's status should be weighed, as should the effect of multiple restrictions of religious practice on the religion concerned. Finally, where the state has determined that restriction of a religious law or practice is necessary for the purpose of ensuring women's rights under [CEDAW] or general guarantees of gender equality, the proportionality of the restriction must be assessed.¹¹⁰

This approach is particularly useful in the transformative accommodation setting because it strives to synthesize gender, religious, and minority claims, in keeping with the supposedly "universal, indivisible,

110. Sullivan, *supra* note 2, at 821–23 (citations omitted).

and interdependent and interrelated” character ascribed to the totality of human rights.¹¹¹ Equally important is the “anti-essentialist”/“cross-cultural” approach to gender, which is important to avoiding inappropriate generalizations from the majority to the minority about what women need.¹¹²

Sullivan’s framework can be compressed somewhat to fit the transformative accommodation situation, and other situation-specific issues could be added to this list. One means by which the factors could be explained to the appellate court might be a pleading requirement in which the parties are required to submit their assessments of how these factors apply to the case at hand.

Sullivan’s primary factor is “the relationship between the specific equality right at issue and the overarching goal of gender equality.”¹¹³ It is worth noting that although not every restriction placed on women is experienced as an important one, family law is one area in which most specific equality rights are likely to have a significant impact on the situation of women overall. Sullivan’s second factor, the importance of the particular law or practice to the adherent’s right of cultural and/or religious freedom; the third factor, the degree of interference in that right; and the last factor, the proportionality of the restriction, place special emphasis on the content of the culture as opposed to the group’s autonomy rights. This is necessary given the values expressed in ICCPR article 27, but is likely to be a point of some contention, given that while the whole point of transformative accommodation is to encourage the group to amend discriminatory practices from within, the aim of judicial review at this stage of the litigation is to determine whether the group must be told to develop an acceptable remedy by changing a practice. This may need to be a special point of negotiation with the group; for instance, the group may wish to explain how the practice should be understood in light of the group’s planning to ensure its future survival. The fourth step in Sullivan’s analysis reminds us that cultural, linguistic, religious, and ecological rights can and sometimes should be analyzed separately, because their costs and effects can vary widely. The fifth aspect of Sullivan’s framework, the cumulative effect upon women of multiple restrictions imposed by religious law, and the cumulative effect upon religion of restrictions imposed on its own law, reminds the adjudicator to avoid myopic analysis of practices without holistic reference to the entire social context. Overall, Sullivan’s framework for adjudicating

111. Vienna Declaration and Programme of Action, in Report of the World Conference on Human Rights, pt. 1 ¶ 5, at 23, U.N. Doc. A/CONF.157/24 (1993).

112. See, e.g., Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89, 119–20 (1996).

113. Sullivan, *supra* note 2, at 821–22.

conflicts between religious and gender rights shows how difficult human rights problems can be approached with respect for the complexity of the issues involved, without forcing participants to choose among aspects of their personal identities or to mischaracterize their needs in order to have their rights vindicated.

National court review of group court decisions, or, for that matter, national court adjudication of group rights claims in the first instance, is likely to be politically contentious and possibly bewildering for the adjudicators involved. To start from the premises listed above—analyzing whether majority legal traditions are appropriately applied to the group, careful attentiveness to parties and rights that are difficult to represent in the majority legal culture, familiarity with the precedents of the CEDAW Committee, and a preliminary examination of the Sullivan factors in every case—would not only be useful for the court but would also signal its good faith to the group involved. ICCPR article 14(1) need not be a barrier to the successful development of a transformative accommodation system, but, like everything else in the international human rights regime, it must be considered and implemented carefully.

CONCLUSION

Multicultural Jurisdictions describes so beautifully a problem so destructive and so frequently encountered—the holding hostage of women by their communities in the name of group uniqueness—that it is difficult not to fault Shachar for not solving every manifestation of the problem. While the book will be of great interest to women's rights activists dealing with the cultural difference argument, Shachar's institutional solutions to the reactive-culturalist problem were not designed to apply in other, equally depressing contexts. For instance, sometimes the problem is that demanding strict adherence to cultural law makes it easy for elders to claim that marriages are invalid where complex wedding traditions, which can take years to concretize, break down because of urbanization, migration, colonialism, and transitions from agricultural to cash economies.¹¹⁴ Even if a reactive-culturalist situation is at work here, transformative accommodation cannot turn back the clock, nor would we want it to. Also, there is no real solution to the problem posed in, for instance, South Africa, where a new constitution pledging to protect equality on the basis of, *inter alia*, race,

114. See Andrew P. Kult, Note, *Intestate Succession in South Africa: The "Westernization" of Customary Law Practices Within a Modern Constitutional Framework*, 11 IND. INT'L & COMP. L. REV. 697, 710–11 (2001).

gender, marital status, ethnic origin, culture, and birth¹¹⁵ was still not used by courts to protect the inheritance rights of a daughter where the denial thereof was the direct result of her being both supposedly illegitimate and the daughter of a man of African descent.¹¹⁶ These situations do not involve the problem that Shachar is addressing.

The problem that Shachar is addressing is, it appears, one where human rights law is not helpful because group leaders won't recognize it and prevent women from taking advantage of it. Will human rights advocates attempt to implement a transformative accommodation system in a given situation? This will depend in part on how much they perceive the necessity of a tacit admission that human rights law will not help to change conditions on the ground in a particular case. Otherwise there is considerable risk; what starts out as a limited departure from the way the ICCPR protects minority rights, taken in the name of protecting women in an unusual situation, could explode into other demands for protection of the group's autonomy. This could be a big and unjustifiable step to take, especially if a State has already committed under CEDAW to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."¹¹⁷ Of course, for many activists, international human rights law is only one weapon in their arsenal, such that departures like the ones necessitated by Shachar's approach are not a big problem if ultimately the job gets done.

The other question is whether the concern with courts' compliance with ICCPR article 14 would destroy the transformative accommodation system from Shachar's perspective. Activists may feel that the measures proposed here are not really enough to establish the equity of women,¹¹⁸ but Shachar may also feel that the intrusion of appellate review of the constitutionality of decisions undermines the division of jurisdiction to the point of untenability. Perhaps, again, such departures are not a big problem if ultimately the job gets done.

Therein lies the rub: *Multicultural Jurisdictions* offers a discerning and innovative strategy for solving what seems like an intractable problem, but the outcome of the implementation is always uncertain. No nation in the world has perfect international human rights law compliance, and whether a transformative accommodation system can help

115. S. AFR. CONST. § 9(3).

116. *Mthembu v. Letsela*, 2000 (3) SA 867 (A).

117. CEDAW, *supra* note 57, art. 2(f), 1249 U.N.T.S. at 16.

118. Article 2(c) of CEDAW requires States to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination." *Id.*

meet that goal is ultimately a very local and contextual judgment to make. Shachar is to be applauded for describing and analyzing so well the inherent problem of political claims of “culture” regarding women, and for explaining how various attempts worldwide to deal with cultural claims have simultaneously succeeded and failed. Future implementation of Shachar’s suggestions should be watched with anticipation; both international human rights law and women stand to benefit.