be exceptionally outraged and a minority whom it is difficult to offend. In *Constantin*. the CJEU apparently rejected the approach taken in the "Screw You" decision, when it says the context of a sign's use includes where appropriate the cultural, religious and or philosophical diversities which characterise that context. However, by identifying the importance of ascertaining the perception of average consumers for the relevant goods or services, it remains to be seen whether the CJEU test will enable the views of minority groups, be they defined by religion or culture, who would not on principle be consumers of goods or services carrying the mark, to determine whether it is offensive. This is especially the case because in the *Constantin* application, where the goods and services were wide enough to cover a multitude of goods from soaps to toys, the relevant consumer would undoubtedly be the majority of consumers. And offence taken to the word "fuck" would presumably not be linked to any particular, identifiable minority group. However, this will not always be the case. For example, in the UK case, *Pooja Sweets & Savouries Ltd. v Pooja Sweets Ltd.* [2015] 2 WLUK 243, the applicants sought to register the mark "Pooja Sweets and Savouries". Opponents claimed the sign was offensive as "pooja" is a "sacred term" describing a form of Hindu worship. The challenge failed. The Appointed Person held that observant Hindus as well as the wider population of consumers for the goods in question would not find use of the word "pooja" offensive. Nonetheless the judgment leaves open the possibility that, if the mark had been offensive only to observant Hindus, a small minority of the population, it would not have been registrable. Arguably, post-*Constantin*, the EU response in a similar situation remains unclear.

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UNREGISTERED RELIGIOUS MARRIAGES ARE NEITHER VALID NOR VOID

IN *Her Majesty's Attorney General v Akhter & Anor* [2020] EWCA Civ 122, the Court of Appeal confirmed that unregistered religious marriages are to be regarded as "non-qualifying ceremonies" which are outside the scope of marriage legislation. This means that the parties will be unable to seek the financial remedy provision available to married couples on relationship breakdown pursuant to the Matrimonial Causes Act 1973. The judgment reversed the decision of Williams J. at first instance, in *Akhter v Khan* [2018] EWFC 54, which applied what His Lordship called a "holistic" and "flexible" approach to hold that an unregistered religious marriage could be treated as a void marriage and be entitled to financial

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remedies. The Court of Appeal has re-established the previous position that Williams J.'s flexibility sought to circumvent.

The facts of the case relate to a typical unregistered religious marriage. In 1998, Nasreen Akhter and Mohammed Shabaz Khan had a nikah ceremony in the UK which was valid under sharia law but had not registered the marriage under civil law. They intended to do but as time went on Khan refused to register it. After 18 years and after having four children, the relationship broke down in 2016 and the petitioner, Akhter, issued a petition for divorce from the respondent, Khan. Khan defended the divorce on the basis that the parties had not entered a valid marriage according to English law. In her reply, Akhter put forward two arguments. The first was that that the presumption of marriage arising out of cohabitation and reputation applied so as to validate the marriage. In the alternative, she argued that that the marriage was a void marriage within section 11(a)(iii) of the Matrimonial Causes Act 1973.

At first instance, the first argument was quickly rejected on the basis that there was no evidence to support a presumed ceremony having taken place ([2018] EWFC 54, at [38], [40], [41]). However, the second argument was successful. Williams J. held that it had been a void marriage and issued a decree of nullity. Case law had established a threefold distinction between valid marriages, void marriages and non-marriages (at [6]). Williams J. noted that where a couple had undergone public marriage ceremony and had "lived a married life and been accepted as married by their communities" then designating this as a non-marriage felt "instinctively uncomfortable . . . and might rightly be regarded as insulting by many" (at [8]). This informed his judgment. Williams J. held that the marriage was void because there was an intention to follow up the nikah with a ceremony that complied with marriage law. He held that the law on nullity should be interpreted in a way that was "flexible to reflect in particular the Article 8 [ECHR] rights of the parties and the children" and this requires that the court take a holistic view of a process rather than a single ceremony (at [94]). It was a relevant factor "whether the failure to complete all the legal formalities was a joint decision or due to the failure of one party to complete them" (at [94]). Article 8 supported a finding of a decree of a void marriage "in respect of those who sought to effect or intended to effect a legal marriage" (at [80]). Williams J. held that "the expression non-marriage should be reserved only to those situations such as acting or children playing where there has never been any intention to genuinely create a marriage" (at [81]). The Attorney General, who had been an interested party at first instance, appealed. (Neither the petitioner nor the respondent took any active part in this appeal because they had reached an agreed settlement.)

Sir Terence Etherton M.R., Lady Justice King and Lord Justice Moylan, allowed the appeal ([2020] EWCA Civ 122) and set aside Williams J.'s order since "there was, in this case, no ceremony in respect of which a

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decree of nullity could be granted" (at [128]). The Court of Appeal considered that the case raised two issues: "(i) Whether there are ceremonies or other acts which do not create a marriage, even a void marriage, within the scope of s. 11 of the 1973 Act; and (ii) If there are, whether the December 1998 ceremony was such a ceremony, currently described as a non-marriage, or whether, as Williams J. decided, it created a void marriage" (at [5]). These were slightly odd questions to ask since it was not disputed that there may be some acts or ceremonies that would not create a void marriage. The question in play was rather where the line ought to be drawn and whether Williams J. had drawn the line in the right place by saying that there would be a void marriage where there had been any genuine intention to create a marriage. The Court of Appeal held that Williams J. had not drawn the line in the correct place. It insisted that there needed to be a ceremony under the Marriage Act 1949 which suffers from a defect in order for there to be a void marriage. Answering their two issues the Court concluded that (1) there could be ceremonies which do not create a marriage, or even a void marriage and so do not entitle the parties to a decree of nullity (at [65]); and (2) the religious ceremony did not create a void marriage because it was "a non-qualifying ceremony" (at [123]). The Court agreed with what it termed "Williams J.'s disquiet about the use of the term 'non-marriage'" (at [7]). However, it suggested that "a better way of describing the legal consequences of what has happened is to use the expression, 'non-qualifying ceremony' to signify that the relationships 'are outside the scope of both the 1949 and the 1973 Acts' and to stress 'that the focus should be on the ceremony'" (at [64]).

While Williams J. had focused on the unfairness of the category of non-marriage, the Court of Appeal was more concerned with preserving the certainty of the category of marriage (at [10]). It insisted that the question of "whether a ceremony created a valid marriage or a void marriage or was of no legal effect at all must be determined at the date of the ceremony" (at [124]). It could not "depend on whether the parties might have agreed to undertake a further step or steps" since this "might result in a party being married even when they had changed their mind part way through the process" (at [126]). The Court pointed out that no one can be forced to marry and indeed, forcing someone to marry is a criminal offence (at [88]). The Court of Appeal was also quick to disregard the Article 8 argument, applying *SerifeYigit v Turkey* (Application no. 3976/05 (2011) 53 E.H.R.R. 25), to hold that while Article 8 was engaged "the failure of the state to recognise the Nikah as a legal marriage is not in breach of those rights" (at [106]). It was also noted that in *Serife* the Turkish "rules laying down the substantive and formal conditions governing civil marriage are clear and accessible and the arrangements for contracting a civil marriage are straightforward and do not place an excessive burden

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on the persons concerned". The Court of Appeal stated that this was also true of England and Wales. However, the widespread concerns about unregistered religious marriages and the current review of weddings law by the Law Commission, suggest that the law is far from clear, accessible, straightforward and burden-free.

The Court of Appeal has removed a flawed solution to the unregistered religious marriages issue but it is clear that the problem still remains. There is a need to provide redress for those who are in unregistered religious marriages either where this is unwitting on the part of one or both of the parties or where this is not agreed by one of the parties (such as in this case where the husband promised that they would comply with marriage registration laws at a later date). In the event of relationship breakdown, those who are in unregistered religious marriages are left either to resolve the dispute themselves or to use a religious form of authority such as a Sharia Council. This is inadequate. The Marriage Act 1949 (Amendment) Bill, a Private Members Bill currently before Parliament, seeks to deal with the issue by making it an offence to purport to solemnise an unregistered religious marriage. This, however, assumes that the issue lies with celebrants, is unlikely to stop the practice, and would fail to provide a remedy for those in unregistered marriages when a relationship breaks down. A preferable solution would be to deal with this in the context of cohabitation law reform. The Court of Appeal decision confirms that parties in unregistered religious marriages will continue to have the same legal status as cohabiting couples. England and Wales currently has no legislative provision that specifically provides cohabitants with financial relief in the event of the ending of a relationship that has generated economic disadvantage. Remedying this would mitigate the problem of unregistered religious marriages meaning that there would be no need for the well-meaning but flawed judicial creativity which the Court of Appeal has now rightly rejected.

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TRAVELING BEYOND THE BINARY: NO RIGHT TO UNSPECIFIED PASSPORTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In recent years, transgender (trans) and non-binary rights have become a topic of heated public conversation in the UK. From reforms to the Gender Recognition Act 2004 (GRA) to single-sex spaces, and from the medical treatment of trans youth to women-only sports, the appropriate contours of gender identity protections in this jurisdiction are a growing source of social, political and legal debate. In *R. (on the application of Elan-Cane)*

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