

Human Rights

The Hard Questions

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Introduction

The family sits at the besieged juncture of the private and the public, intimate relations and communal affiliations, contract and status, state and faith-based jurisdictions, raising hard questions for human rights scholars and activists. This chapter focuses on contemporary dilemmas that place minority religious women at the center of charged debates about diversity and equality. It explains the critical role these debates play in broader citizenship and membership, human rights and private ordering challenges that have emerged recently in neoliberal states, before turning to explore possible ideas for overcoming, or at least mitigating, the current impasse.

Informed by jurisprudence from the world of comparative constitutionalism, the geopolitical focus of my discussion will be on secularized societies in Europe and North America that have adopted a relatively sharp distinction between secular, state-centered legal institutions and other types of institutions (religious, voluntary associations, communal dispute resolution processes, subnational or transnational institutions). Harold Berman famously argued that “it was out of the explosive separation of the ecclesiastical and the secular polities that there emerged the modern Western legal science” (Berman 1977, 898). This transformation has been accompanied by the creation of a “special class of legal professionals (lawyers), themselves trained in a body of legal doctrine which had been systematized into a particular legal science or jurisprudence” (Ahdar and Aroney 2010, 7). This professionalization and secularization of Western legal science both resulted from and enabled the rise of the familiar constitutional structure of “separation of church and state,” although there are significant variations even within this model, in terms of conceptual origins, comparative manifestations, institutional structures, and so on (Esposito and DeLong-Bas 2001; Hirschl 2010). Unlike post-colonial societies that have long permitted a degree of communal autonomy in regulating matters of marriage and divorce (Agnes 2001; Larson 2001; Ndulo 2011; Shachar 2008), or “constitutional theocracies” that officially treat religion as a state-sanctioned source

of norm-making and interpretation in constitutional documents and family law codes (Esposito and DeLong-Bas 2001; Hirschl 2010), the human rights and family law challenges raised in stable, secularized, rule-of-law societies that have *rejected* the option of formal religious legal pluralism represent the most difficult test case on offer.

All over the world, arguments over the recognition that ought to be afforded to religious faiths and practices have risen to the forefront of public debate. This is illustrated by the recent veiling controversies across Europe, which reached the European Court of Human Rights on several occasions over the last decade (Howard 2011; Laborde 2008), and we may well see a new wave of controversy and litigation with the coming into force of face-covering laws and regulations. As if these charged debates over the boundaries of recognition (or, increasingly, restriction) of expression of religious-identity markers in the public sphere – what I will call the terms of *fair inclusion* – do not present enough of a hurdle, we are also starting to see a new type of challenge on the horizon: *privatized diversity*. Unlike fair inclusion, the latter pattern captures the growing pressures by more conservative elements within religious minority communities to promote a whole new kind of politics, which invites members of the faith community to turn to private, religious dispute-resolution processes in lieu of engagement with the ordinary institutions of the state and its human-enacted constitution (Hirschl and Shachar 2009). Whereas the quest for fair inclusion is centripetal, the pull of privatized diversity is *centrifugal*. In its extreme variants, it represents a call for insulation from the secular legal order as the general law of the land, and possibly also from international human rights standards, in effect asking members of minority communities to take the route of “private ordering.” This new trend and its impact on gender equality and the human rights of women in the family – the topic of my inquiry here – bears potentially radical implications for how we conceive of the relationship today between secular and religious law, especially in societies committed to their rigid separation. It also makes the attempt (however difficult) to balance gender equality with religious freedom an ever more pressing mandate.

Two kinds of multicultural claims: fair inclusion and privatized diversity

Let me begin by distinguishing between the fair inclusion and privatized diversity claims. I address each in turn.

Fair inclusion

No state is an island. And no state can be regarded as a *tabula rasa*. Each society makes collective choices about its official language(s), public holidays and national symbols, which welcome some members more completely than others. Even the most open and democratic society will have certain traditions that reflect the norms and preferences of the majority community, in part because the institutions of that society have been largely shaped in their image (Kymlicka 1995). To provide but one example, consider the controversial *Lautsi* decision recently handed down by the Grand Chamber of the European Court, the secular system's "highest priests" entrusted with the power and responsibility to interpret the provisions of the European Convention of Human Rights (*Lautsi and Others v. Italy* 2011). In *Lautsi*, the Court rejected the human rights claim of a Finnish-born mother residing in Italy who objected to the display of religious symbols (crucifixes) in her sons' public school. Rather than requiring state schools to observe confessional neutrality, the court upheld the right of Italy to display the crucifix, an identity-laden symbol of the country's majority community, in the classrooms of public schools.¹ Using the margin of appreciation technique, Europe's highest human rights court held that it is up to each signatory state to determine whether or not to perpetuate this (majority) tradition. In effect, this meant that non-Christian children and those professing no religion will continue to be educated (literally) under the cross in Italian state schools.

The *Lautsi* decision, with its privileging of a majority symbol, exemplifies a core concern that fair-inclusion measures are designed to address. Will Kymlicka succinctly makes the point: "The state cannot help but give at least partial establishment to a culture" (Kymlicka 1995, 111). On this account, the adoption of fair-inclusion measures is required in order to overcome "burdens, barriers, stigmatizations, and exclusions" under laws and institutions that "purport to be neutral ... [but] are in fact implicitly tilted towards the needs, interests, and identities of the majority group" (Kymlicka and

¹ In an earlier decision in this case, the Italian *Consiglio di Stato* interpreted the crucifix as a religious symbol when it is affixed in a place of worship, but in a non-religious context like a school, it was defined it as an almost universal symbol (from the perspective of the majority) capable of reflecting various meanings and serving various purposes, including "values which are important for civil society, in particular the values which underpin our constitutional order, the foundation of our civil life. In that sense the crucifix can perform – even in a 'secular' perspective distinct from the religious perspective specific to it – a highly education symbolic function, irrespective of the religious professed by the pupils" (*Lautsi and Others v. Italy* 2011, para. 16).

Norman 2000, 4). Fair inclusion, in other words, is a leveling-up remedy designed to allow equal opportunities and extensive human rights protections for members of non-dominant minority cultures.

An illustration of the principle of fair inclusion in operation is found in the influential *Multani* case, decided by the Supreme Court of Canada (*Multani v. Marguerite Bourgeois* 2006). This legal drama involved an 11-year-old, Gurjab Singh Multani, a Sikh immigrant enrolled in a French-speaking public school in Quebec. The Court considered whether the boy should be allowed to carry a *kirpan* (a ceremonial dagger) in accordance with his beliefs but in the face of potential safety hazards and an apparent conflict with the school board's prohibition on weapons and dangerous objects. Indeed, the very categorization of the *kirpan* – as either a prohibited weapon in a schoolyard (as the school board in Montreal claimed) or as an important religious symbol (the position of the student, his parents and the interveners on behalf of the Sikh community) – was at the heart of this legal dispute. The Court ruled that a decision to ban the *kirpan* universally was not the least drastic means to address the rather limited harm potential, especially when weighing the sincerity of the student's religious beliefs and the fact that the interference (the ban on the *kirpan*) was not trivial. The Court thus held in favor of Multani, offering a resounding statement of the fair-inclusion vision of human rights and equal citizenship:

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

Translating this commitment into a social reality is, of course, a major challenge. But it typically begins by placing on various public and private institutions an obligation to create fair conditions of inclusion for those once excluded and marginalized (often under the color of state law) from full and equal membership in our shared public spaces and the realm of citizenship. Moving beyond the traditional anti-discrimination measures that focus on the removal of formal and official barriers, proponents of this vision of substantive equality before the law also advocate anti-subordination interpretations of our social relations and human rights protections (Balkin and Siegel 2003; Fiss 1976), envisioning “a heterogeneous public, in which persons stand forth with their differences acknowledged and respected” (Young 1990, 119). This implies challenging established power relations; demanding a foothold

in shaping the “rules of the game”; gaining political representation; accessing, on fair terms, a given society’s economy and symbolic rewards; and so forth (Fraser and Honneth 2003; Habermas 1995; Taylor 1994).

Privatized diversity

The bulk of the literature on citizenship, multiculturalism and human rights has focused on the aspirations of fair inclusion, while almost completely ignoring the challenges raised by privatized diversity, which refers to growing demands emanating from politicized and “retro-traditionalist” interpreters of religious identity (Moghadam 1994) seeking to institutionalize privatized diversity practices for their members, especially in the family law arena. A dramatic example of this trend is found in acrimonious debates bearing global resonance that broke out in Canada with regard to the possibility of utilizing religious laws through private ordering to resolve, in a binding fashion, a range of family law disputes among consenting parties. In their most extreme variants, these demands amount to a call for the secular state (through its manifold institutions and agencies) to adopt a hands-off approach, whereby faith-based arbitral tribunals provide unrestrained choice of forum and choice of law to the parties, and operate, as it were, in a completely unregulated and parallel domain of service provision that is insulated from or oblivious to the general law of the land. On this account, respect for religious freedom or cultural integrity does not require inclusion in the public sphere, but exclusion from it.

This potential storm-to-come must be addressed head on because privatized diversity mixes three inflammatory components in today’s political environment: religion, gender, and the rise of a neoliberal state. The volatility of these issues is undisputed; they require a mere spark to ignite. In England, a scholarly lecture by none other than the Archbishop of Canterbury (the head of the Church of England/Anglican Church), contemplated the option of the legal system in England allowing Muslim communities “access to recognized authority acting for a religious group” (Williams 2008). The suggestion has provoked zealous criticism from across the political spectrum.

This response echoed a similarly divisive controversy in Canada that broke out following a community-based proposal to establish a private “Islamic Court of Justice” (or *darul-qada*) to resolve family law disputes among consenting adults according to faith-based principles. The envisioned tribunal (which ultimately never came into operation) would have permitted consenting parties not only to enter a non-state, out-of-court, dispute resolution

process, but also to use choice-of-law provisions to apply religious norms to resolve family disputes, according to the “laws (*fiqh*) of any [Islamic] school, e.g. Shiah or Sunni (Hanafi, Shafi’i, Hambali, or Maliki),” potentially delimiting rights and protections that the involved women would have otherwise enjoyed under prevailing statutory and constitutional provisions. In addition, the tribunal would have brought to the fore the multitude of interpretative challenges associated with the idea of “recognizing Shari’a” in a secular state.² In the United States the dynamics have taken a different twist. We recently witnessed a slew of state legislatures passing amendments that “pre-empt” the use of religious principles in private dispute resolution, specifically singling out sharia law and international law as competing normative orders that must be avoided (Helfand 2011).

With this background in mind, we can now see more clearly why the Archbishop of Canterbury’s lecture and the Shari’a tribunal debate in Canada provoked such uproar. These proposals were seen as challenging the normative and juridical authority, not to mention the legitimacy, of the secular state’s asserted mandate to represent and regulate the interests and rights of *all* its citizens in their family-law affairs, as well as its liberal democratic telos to protect their rights more generally, irrespective of communal affiliation. In this respect, the turn to religious private ordering in the regulation of marriage and divorce raises profound questions concerning hierarchy and lexical order in the contexts of law and citizenship: which norms *should* prevail? And who, or what entity, ought to have the final word in resolving value-conflicts between equality and diversity, should they arise? The state clearly retains an interest in marriage and divorce for public policy reasons, such as the value of gender equality, the welfare of children, and the impact of the family’s breakdown on third parties, to mention but a few. But it is no longer, if it ever has been, the only identity and norm-creating jurisdiction in town.

The narrative of gender and religion in the family has a long and complex history. The record is such that the state did not seize jurisdiction over marriage and divorce from the church until the late eighteenth century. (Once such control was seized, it took almost two additional centuries to remove persistent inequalities and legal disabilities that women suffered in the domestic sphere under color of state law and policy.) Among the conflicting claimants to sovereignty in the history of family law, it is therefore the state, not the church, that is the newcomer. Gaining the upper hand in regulating matters of the family was significant both politically and jurisdictionally. It

² For an excellent discussion of the complexities associated with “recognizing shari’a,” see Bowen (2010). As Bowen explains, the suggestion that there is a “universal set of rules that constitute ‘sharia law’ ... is a chimera. Not even Islamic legal systems, such as those in Pakistan or Bangladesh, enforce ‘shari’a law’; they enforce statutes” (Bowen 2010, 435).

represented the solidification of power in the hands of secular authorities, a symbol of modern state-building. As historian Nancy Cott observes, “For as long as the past millennium in the Christian West, the exercise of formal power over marriage has been a prime means of exerting and manifesting public authority” (Cott 1995, 108).

Even today, the family remains a crucial nexus where both collective identity and gendered relations are reproduced (Cott 2000; Shachar 2001; Yuval-Davis and Anthias 1989). The stakes are particularly high for women. Marriage and divorce rules govern matters of status and property, as well as a woman’s right to divorce, and remarry, and her legal relationship with her children. At the same time, it is a site that is vital for minority communities in maintaining their communal definition of membership boundaries. Religious minorities in secular societies are typically non-territorial entities; unlike certain national or linguistic communities (think of the Québécois in Canada, the Catalans in Spain, and so on), they have no semi-autonomous sub-unit in which they constitute a majority or have the power to define the public symbols that manifest, and in turn help preserve, their distinctive national or linguistic heritage. These minority communities are thus forced to find other ways to sustain their distinct traditions and ways of life. With no authority to issue formal documents of membership, to regulate mobility, or to raise revenues through mandatory taxes, religious family laws that define marriage, divorce and lineage have come to serve an important role in regulating membership boundaries. They demarcate a pool of individuals as endowed with the collective responsibility to maintain the group’s values, practices and distinct ways of life (if they maintain their standing as members in that community). This is family law’s demarcating function (Shachar 2001). As an analytical matter, secular and religious norms may lead to broadly similar results, coexist with one another despite tensions, point in different directions, or directly contradict one another. It is the latter option that is seen to pose the greatest challenge to the superiority of secular family law by its old adversary, religion.

The persistence of traditional norms in the family law arena is evidenced by the disproportionately high number of reservations to the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that were demanded by signatory countries that have refused to accept its equality provisions in the family. CEDAW uniquely focuses on the elimination of discrimination against women in both the public and the private spheres.³ Of its various provisions, Article

³ Provisions of gender equality are also found in other international human rights frameworks, including the United Nations Charter, Article 2 of the Universal Declaration of Human Rights, and Article 26 of the International Covenant on Civil and Political Rights.

16 has drawn particular attention because it guarantees equality between women and men in all matters relating to marriage and family relations. As Rebecca Cook explains, reservations allow a state to ratify an international treaty without obligating itself to provisions it does not wish to undertake (Cook 1990, 650). Tellingly, CEDAW has been “ratified with reservations by more states than almost any other human rights treaty to date” (Riddle 2002, 605).

Caught in the web of secular and religious marriage norms and regulations

Family law thus serves as a case-book illustration of today’s fraught gender and religion tensions.⁴ Consider, for example, the situation of observant minority religious women who may wish – or feel bound – to follow the requirements of divorce according to their community of faith in addition to the rules of the state in order to remove *all* barriers to remarriage. Without the removal of such secular and religious barriers women’s ability to build new families, if not their very membership status (or that of their children), may be adversely affected. This is particularly true for observant Jewish and Muslim women living in secular societies who have entered into the marital relationship through a religious ceremony – as permitted by law in many jurisdictions. For them, a civil divorce, which is all that a secular society committed to a separation of state and church can provide, is solely part of the story – it does not, and cannot, dissolve the religious aspect of the relationship. Failure to recognize their vulnerable “limping-divorce” status – namely, that of being legally divorced according to state law, though still married according to their faith tradition – may leave these women prey to abuse by recalcitrant husbands who are well aware of the adverse effect that this lack of coordination among these legal systems has on their wives, as these women fall between the cracks of the civil and religious jurisdictions.

For some religious minorities, family law comes close to serving the same core purposes that citizenship law does for the state, defining who holds a

⁴ In the United States, these tensions also manifest themselves in debates that surround same-sex marriage, or the flare-up that was caused by the requirement that religious organizations provide their employees with insurance policies that grant contraceptives and other preventive health-care services for women, to mention but recent examples. These topics are beyond the scope of my analysis in this chapter.

legal affiliation to the community. It thus reinforces the link between past and future by identifying who is considered part of the tradition. This is why gaining control over the religious aspects of entry into (or exit from) marriage matters greatly to these communities; it is part of their membership demarcation and intergenerational project. At the same time, family law is also the area in which women have traditionally been placed at a disadvantage, in part, because of the recognition of female members' vital role in "reproducing the collective" – both literally and figuratively. Although this core contribution to the collective could, in theory, have empowered them, in most places and legal traditions (religious and secular alike), in practice it has often led to tight control and regulation of women, treating them, by law, as less than equal. Claims for private, religious-based dispute resolution processes inevitably intersect and interact with these complex historical (and in some cases, post-colonial) legacies, as well as with contemporary human rights concerns about power disparities and inequities within the family.

Of particular interest here are the hard-won equality guarantees afforded to women, children, sexual minorities, and other traditionally more vulnerable members of the family. These protections are relatively recent and the removal of structural and societal barriers to gender injustice in state law and practice has been preceded by fierce political struggle, and remains "uneven, and, in much of the world, still incomplete" (Htun and Weldon 2011, 148).

These tensions are only accentuated when privatized diversity trends are added to the picture. If faith-based dispute resolutions processes occur on the ground yet remain "illegible" in the eyes of the state, there is nothing to restrict the appetite of unofficial religious mediators, to whom the parties turn in trust, from extending their powers over the "full package" of rights and obligations between divorcing parties (and their children), even if the woman who had turned to the religious tribunal was seeking a more limited and specific service than what the secular state is, by definition, unable to grant her: the religious divorce decree. This potential for overextension is a major concern, as reported by Samia Bano in her research of the Shari'a councils in Britain. These councils routinely "re-litigated" property matters that were already settled by the civil courts, and even extended their reach to child custody disputes, which, by law, are not to be delegated to any non-state authority (Bano 2008). Another major source of unease is the lack of clarification regarding the relationship between religious private ordering and the public entitlements and protections that individuals hold as bearers of human rights and as citizens of a "free and democratic

society,” to draw upon the terminology of the Canadian Charter of Rights and Freedoms.

The standard legal response to the privatized diversity challenge is to seek shelter behind a formidable “wall of separation” between state and religion, even if this implies turning a blind eye to the concerns of religious women caught in the uncoordinated web of secular and religious marriage bonds. Alas, there is no guarantee that this strict separation approach will provide adequate protection to those individuals most vulnerable to the community’s formal and informal pressures to accept “unofficial” dispute resolution forums in resolving family issues. Instead, it may thrust these tribunals and other privatized-diversity initiatives further underground, where no state regulation, coordination, or legal recourse is made available to those who may need it most.

It is therefore a grave mistake to assume that a legal ban on, or prohibition of, religious private ordering in family matters can simply make these matters – the “entanglement” of gender, religion and human rights – disappear. It may instead leave religious women in a more vulnerable position, whereby they will face increased pressures to turn to *unauthorized* and *unregulated*, *unofficial* private religious dispute-resolution processes, without providing them the securities granted by the laws of the state, international human rights norms, and protected constitutional provisions.

This is a lose-lose resolution for both marginalized women and statist institutions that claim to protect *all* citizens and populations within their reach. But these difficulties do not lead me to conclude that the best response to these pressing challenges lies simply in restoring a belligerent model of strict separation that requires turning a blind eye to the religious concerns of women caught in the uncoordinated web of secular and religious marriage bonds. Instead, by placing these once-ignored agents at the center of analysis, I wish to explore the idea of permitting a degree of regulated interaction (as I will call it) between religious and secular sources of obligation, so long as the baseline of citizenship-guaranteed rights is strictly maintained.⁵ From a human rights perspective, there is no justification for a secular state to abandon its governance responsibility toward its members, especially the vulnerable, simply because they may have contracted the marriage in another country, entered the relationship through a religious

⁵ “Citizenship rights” here apply to anyone who resides on the territory, regardless of their formal membership status; they are defined expansively to include both domestic and international human rights protections.

ceremony in addition to the civil marriage, or because they have the opportunity to turn to mediation or arbitration by a non-state religious actor. Militating against such a result, we are better off pursuing new terms of engagement between the major players that have a stake in finding a viable path to accommodating diversity *with* equality, including the faith community, the state, the individual, and local and international human rights regimes – in ways that will acknowledge and benefit religious women as members of these intersecting (and potentially overlapping and conflicting) identity- and norm-creating jurisdictions.

This makes urgent the task of investigating the importance of state action (or *inaction*) in shaping the context in which individuals “bargain in the shadow of the law” (Mnookin and Kornhauser 1979) – and to identify the legal system, or systems, under which the parties are, in effect, bargaining. Viewed from this perspective, privatized-diversity claims must be resisted if they place marginalized women and other potentially vulnerable members at jeopardy of losing the background protections, rights, and bargaining chips otherwise offered to them as equal citizens (a substantive restriction) or if they entail an unconstrained and unrestrained view of power and authority by private arbitration tribunals and other communal institutions that operate outside the official justice system (an institutional restraint).

The search for a new path: regulated interaction

Despite the understandable desire to “disentangle” law from religion by confining each to its appropriate sphere, the next step in my analysis is to investigate whether a carefully regulated recognition of multiple legal affiliations – and the subtle interactions among them – can permit devout women to benefit from the protections offered by the secular order, and to do so without abandoning the tenets of their faith. In other words, averting a punishing either/or dilemma: your culture or your rights (Shachar 2001).

Is it possible to find a more fruitful engagement that overcomes this predicament by placing the interests of women – as citizens, mothers, human rights bearers, members of the faith, to mention but a few of their multiple responsibilities and affiliations – at the center of the analysis? Arguably, the obligation to engage in just such renegotiation is pressing in light of growing demands to re-evaluate the relations between state and religion the world over. From the perspective of women caught in the web of overlapping

and potentially competing systems of secular and divine law, the almost automatic rejection of any attempt to establish a forum for resolving standing disputes that address the religious dimension of their marriage might respect the protection-of-rights dimension of their lived experience but does little to address the cultural or religious affiliation issue. The latter may well be better addressed by attending to the removal of religious barriers to remarriage, which do not automatically flow from a civil release of the marriage bond. This is particularly true for observant women who have solemnized their marriage relationship according to the requirements of their religious tradition, and who may now wish – or feel bound – to receive the blessing of this tradition for the dissolution of that relationship.

In a world of increased mobility across borders, these pressures also acquire a transnational dimension. In Britain, for example, many Muslim families with roots in more than one country (e.g., UK and Pakistan) perceive a divorce or annulment decree that complies with the demands of the faith (as a non-territorial identity community), in addition to those of the secular state in which they reside, as somehow more “transferable” across different Muslim jurisdictions. In technical terms, this need not be the case – private international law norms are based on the laws of states, *not* of religions (Carroll 1997). But what matters here is the perception that an Islamic council dealing with the religious release from the marriage may provide a valuable legal service to its potential clientele, a service that the secular state – by virtue of its formal divorce from religion – simply cannot provide.

These multilayered and intersecting challenges cannot be fully captured by our existing legal categories (Shachar 2008, 2010). They require a new vocabulary and a fresh approach. In the space remaining I will briefly sketch the contours of such an approach – regulated interaction – by asking what is owed to those women whose legal dilemmas (at least in the family law arena) arise from the fact that their lives have *already* been affected by the interplay between overlapping systems of identification, authority and belief – in this case, religious and secular law. The Jewish test case of the *agunah* (pl: *agunot*), a woman whose marriage is functionally over, but whose husband refuses to issue or grant a writ of Jewish divorce (a *get*), will serve as an illustrative example. In contrast with privatized diversity, the alternative I develop invites both the state and the faith community to accommodate individuals who are already entangled in both secular and religious bonds. Many jurisdictions permit the solemnization of marriage by recognized religious, tribal or customary officials, allowing a degree of regulated interaction between state and non-state traditions at the point

of entry into marriage. At least in theory, there is no restriction against envisioning some degree of coordination at the point of exit from such a relationship. This is already a reality in some jurisdictions. English law, for example, now permits collaboration between family courts and rabbinical tribunals (*beth din*, pl: *battei din*) in ensuring the removal of religious barriers to remarriage, as does the famous New York “*get* law” (State of New York 2012). Such engagement and coordination across the secular–religious divide is informed by a commitment to substantive (rather than merely formal) equality. It is designed to allow individuals with multiple belongings the same freedoms as other citizens, in this context, the right to be released from a dead marriage and to build a new family if they so wish. Taken to its logical conclusion, regulated interaction can be understood as a form of fair inclusion, taming and resisting the opposing centrifugal and harmful tendencies of privatized diversity.

The stirring motivation behind regulated interaction is to promote diversity *with* equality. This is not a prescription likely to be favored by advocates of privatized diversity who claim authority to define and enforce a “pure” or “authentic” manifestation of a distinct cultural or religious identity in face of real or imagined threats. Such self-proclaimed guardians of the faith wish to impose rigid readings of what are arguably more flexible and malleable traditions, and in the process stifle interpretative debates within the religious community itself about the potential for the adoption more gender-friendly readings of sacred texts and the tradition that evolved from them. The challenges for feminist and other equity-seeking religious interpreters are significant. Beyond gaining access to the historically male-dominated “temple of knowledge,” they must work within the tradition’s hermeneutic horizons so that their re-interpretive claims cannot be dismissed as “inauthentic.” This path of change-from-within may take years to achieve, but the winds of change are already blowing through the world’s major religious traditions. Nothing is, however, linear in our story. While women are challenging and changing the old ways, the tensions between minority communities and the state or the wider society frequently come to serve as a pretext to silence new voices from within the minority community. For those advocating privatized diversity, it is therefore convenient to portray the state as an external “enemy,” a foreign intruder that offers nothing by way of truly recognizing or accommodating the special needs of the faithful. Such hyperbolic arguments, irrespective of whether falsifiable or not, then serve as a pretext for justifying or encouraging community members to “contracting out” of the secular state’s legal order and regulatory control as part of an agenda to establish unofficial islands of jurisdictions that lie outside the governance

of the secular order. No less significant, such pressures can also be utilized to “legitimize” rules and practices that breach the hard-earned rights of citizenship for women with respect to marriage, divorce, property, and a host of other issues. In the process, these pressures obscure a critical reality: that traditions are always contested, and that marginalized women hardly have a fair say in shaping these traditions.

Regulated interaction can intervene to break the cycle of silencing and radicalization that privatized diversity facilitates. Adherents of the faith are simultaneously citizens of the state and members of the larger family of humanity. Even religious communities that seek to build walls around their members find that diffusion of human rights ideas and resources is already occurring. Indeed, constructivist understandings of culture submit that such interactions are a major source for the rise of “retro” and more radical interpretations of the tradition that claim to purify it from the corrosive effects of the outside world (Benhabib 2002; Deveaux 2006; Moghadam 1994; Shachar 2001; Song 2007). Assuming that such direct and indirect influences are ongoing, there is “no neutral position for the state here: action and inaction both have consequences for the distribution of power and [authority] inside the cultural community” (Williams 2011, 71). Given that cultural and religious traditions are never as uncontested or as inflexible as advocates of privatized diversity would like us to believe, there is, inevitably, a need for minority communities to find creative answers to the ongoing challenges of interacting with the “modernist” pressures around them. For those *within* the community who reject the wholesale option of privatized diversity but wish to uphold the most precious aspect of personal status law from the perspective of their faith (namely, defining the community’s membership boundaries and avoiding a breach of a strict prohibition), regulated interaction offers a viable alternative.

The secular system’s standard solution – simply ignoring the problem, wishing it away – is no solution at all. It will fall straight into the hands of advocates of privatized diversity, affirming their desire to take over the void left by state inaction. Such a position effectively immunizes the wrongful behavior of more powerful parties. It has the perverse result of disempowering these women, or reinforcing their vulnerability, in the name of protecting their rights. In the deeply gendered world of intersecting religious and secular norms of family law, these more powerful parties are often husbands who may refuse to remove barriers to religious remarriage (as in the Jewish *get* situation) or may seek to retract a financial commitment undertaken as part of the religious marriage contract (as might be the case with deferred *mahr* in certain Islamic marriages), thus impairing the woman’s

ability to build a new family or to establish financial independence after divorce. The broader concern here is that while their multiple affiliations might offer religious women a significant source of meaning and value, the affiliations may also make them vulnerable to a double or triple disadvantage, especially in a legal and governance system that categorically denies cooperation between the women's overlapping sources of obligation.

Arguably, the regulated-interaction structure is permissible from the legal perspective of the secular order. Although it requires a departure from the formal and formidable image of erecting a "high wall" between state and religion, such an adaptation is justifiable if it promotes substantive equality and inclusion of those otherwise left outside the purview of standard judicial review and other rights-protecting mechanisms, all without demanding that judges or courts review the doctrinal aspects of a religion (something that they are barred from doing in countries that maintain a strict separation of state from religion).⁶ Instead, the removal of *all* barriers to remarriage is the civil goal for which coordination with religious authorities is required.⁷ Without this coordination, women of faith may be exposed to unfair extortion from their former husbands as they seek a religious divorce decree, even after a secular divorce has been negotiated or granted.

No less important, regulated interaction may also prove acceptable from the viewpoint of those elements within religious minorities that seek to preserve a degree of control over demarcating their membership boundaries and finding plausible ways for their members to navigate the worlds of secular and religious marriage and divorce proceedings, yet without intruding on the broader catalogue of rights that adherents of their faith hold as citizens and as members of the larger family of humanity. Instead of asking women caught in the knots of secular and religious marriage regulations to leave their cultural worlds behind, it is preferable to make these cultural worlds visible and "legible" to the legal system. The legislative

⁶ In the United States, the recent *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC* (2011) decision recognized the so-called "ministerial exception" barring a lawsuit against a religious organization by an employee seeking relief pursuant to federal civil anti-discrimination legislation (in that particular case, the Americans with Disabilities Act) in the name of protecting religious liberty. The Supreme Court recognized the societal interest in the enforcement of equality-enhancing employment discrimination statutes, but ruled that "so, too, is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission." In categorically barring the option of seeking relief by the individual alleging a civil harm by her church (here in the employment context), the Court has arguably given religious liberty precedence over equality.

⁷ Canadian law, for example, recognizes this civil goal, which is incorporated in section 21.1 of the federal Divorce Act, RSC 1985, c 3 (2nd Supp). Ontario's Family Law Act, RSO 1990, c F.3, contains similar provisions in sections 2(4)-(6) and 54(4)-(7).

history of New York's "get law" confirms this observation; it was Agudath Israel of America, a national organization representing a broad coalition of Orthodox Jews under the leadership of rabbinic scholars, that spearheaded the efforts to reach out to the state legislature in an attempt to ensure such coordination that allowed Jewish men and women to have the religious barriers to remarriage removed as part of the civil divorce proceedings.

Briefly, let me demonstrate the potential benefits of such an approach, by focusing on the example of the *agunah*. In Jewish law, the plight of the *agunah* is recognized as one of the most agonizing challenges, and has been intensively discussed from antiquity to the present day. Although Jewish law (*Halakha*) is typically categorized by a non-hierarchical and pluralist hermeneutic discourse, proposed *Halakhic* solutions to the problem of the *agunah* "have met severe objections, frequently resulting in total rejection, accompanied by strong emotional reactions" (Westreich 2012, 331). No one doubts the importance of the matter. It is precisely this recognition that makes it so charged. The heightened sensitivity is the result of a unique combination of factors: the intersection of human rights and gender equality concerns in family affairs, which affects all members of society, along with the germaneness of marriage and divorce to defining the *Halakhic* boundaries of membership, as well as the subsuming of Jewish marriage and divorce bills under the command of *denim*. As Suzanne Last Stone powerfully demonstrates, the idea of separating certain aspects of law from religion has a long and established tradition not only from the familiar perspectives of European nation-state-building and Christian views conceptualizing church and state as separate entities, but also from within Jewish law (Stone 2008). For the purposes of our discussion, this opens up a political and jurisprudential space for the religious minority communities both to draw lines and to engage with the surrounding society's civil laws, offering a crucial path to *avoid* the privatized-diversity trap.

In Jewish law, matters of ritual and religious prohibition, under which marriage and divorce bills fall, permit no room (from the internal perspective of rabbinic Judaism) to "delegate" authority to civil courts to issue the religious divorce decree, the *get*. This structure allows, however, for state authorities to address "incidental" matters to the break-up of the relationship, such as property division, mutual support obligations between the spouses, child custody, and so on. Such a division of labor permits breaking up the (false) either/or choice between turning wholesale to state law or to religious law, allowing instead for a "retail" development of intersecting or joint-governance resolutions. This can help to address not only the plight of the Jewish *agunah*, but also to release Muslim women from the

Islamic marriage contract by Islamic religious authorities while leaving to the state the jurisdiction to address matters including child custody and spousal support.

Civil courts have in their arsenal plenty of resources, including an array of torts or contract-based remedies (where relevant) that can make a crucial difference in the lives of women caught in the knots, by taking into account the entangled dimensions of secular and religious family laws and traditions in shaping women's actual rights and bargaining positions. This is a path that civil courts in continental Europe have begun to develop by utilizing a range of causes of action and remedies in response to the harm caused to the anchored Jewish wife.⁸ As Talia Einhorn explains, under Dutch law, the denial of the delivery of the *get* is regarded as a breach of a duty of care that the husband owes his wife. French courts, too, regard the refusal to deliver or accept the *get* as a civil delict, either on the grounds of *faute* (fault), or on the grounds of *abus de droit* (abuse of rights) or *abus de liberté* (abuse of freedom) (Einhorn 2000, 148–149). The Supreme Court of Canada has also proceeded in just such a direction. In *Bruker v. Marcovitz*, a landmark decision involving the interaction of a private-law agreement and a non-secular *get*, the Court explicitly rejected the simplistic your-culture-or-your-rights formula. Instead, it pursued a balance between competing values and admitted of a role for civil courts in spite of the religious dimensions of a dispute: “The fact that a dispute has a religious aspect does not by itself make it non-justiciable” (*Bruker v. Marcovitz* 2007, para. 41, paras. 3, 92). The Court held that a nuanced approach to such matters “is consistent with, not contrary to, public order ... [It] harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally, and has been judicially recognized internationally.”

In the *Marcovitz* case, a Jewish husband made a contractual promise to remove religious barriers to his wife's remarriage in a negotiated, settled agreement, which was incorporated into the final divorce decree between the parties. This contractual obligation thus became part of the terms that enabled the civil divorce by a secular court. Once the husband had the secular divorce in hand, however, he failed to honor the agreement, claiming that he had undertaken a moral rather than legal obligation. The Supreme Court was not in a position to order specific performance, i.e., to force the

⁸ In Israel, secular courts, recognizing their inability to grant the *get*, have also turned to private-law mechanisms in order to protect women from the inequities that burden *agunot*. These secular courts have had to approach this problem creatively because they cannot order specific performance of the religious divorce decree; as we have seen, this is something that requires the aid of a religious authority.

husband to implement a civil promise with a religious dimension. Instead, the judgment imposed monetary damages on the husband for the breach of the contractual promise in ways that harmed the wife personally and affected the public interest generally. What *Marcovitz* demonstrates is the possibility of employing a standard secular-legal recourse – damages for breach of contract, in this example – in response to specifically gendered harms that arise out of the intersection between multiple sources of authority and identity in the actual lives of women who are members of religious minority communities and larger, secular states as well.

The significance of the *Marcovitz* decision for our discussion lies in its recognition that both the secular and the religious aspects of divorce matter greatly to observant women if they are to enjoy gender equality, be able to articulate their religious identity, enter new families after divorce, and rely on contractual ordering just like any other citizen. This regulated-interaction framework offers us a vision in which the secular system may be called upon to provide remedies in order to protect the human rights of religious women and place justifiable obstacles in the path of husbands who might otherwise cherry-pick their religious and secular obligations as they see fit. This is a clear rejection of privatized diversity, offering instead a more nuanced and context-sensitive analysis that begins from the ground up. This requires identifying who is harmed and why, and then proceeding to find a remedy that matches, as much as possible, the need to recognize the (indirect) intersection of law and religion that contributed in the first place to the creation of the harm for which legal recourse is now sought.

As we have seen earlier, marriage and divorce rules play a crucial role in shaping and exerting the authority of secular authorities, as well as that of competing claimants seeking to exert power over this charged arena of social life and legal regulation. Despite persistent and at times oppressive attempts by the modern state to monopolize an exclusive power to regulate the family, other relations and values have retained a hefty influence in this significant realm of life. These issues are among the most complex and sensitive to address in today's diverse societies. Alas, the almost automatic response of insisting on the *disentanglement* of state and church (or mosque, synagogue, and so forth) in regulating the family may not always work to the benefit of female religious citizens who are deeply attached to, and influenced by, both systems of law and identity. Their complex claim for inclusion in both the state and the group as full members draws upon their multilayered connections to both systems. Empowering the once voiceless has always been a central mission of human rights. To reach this goal, sometimes fresh ideas and innovative institutional designs are required in order

to challenge settled conventions, including the very assumption that it is impossible to grant consideration to religious diversity and gender equality at the same time.

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