

# 13 *Multicultural Jurisdictions*

## The need for a feminist approach to Law and Religion

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### The work

Arguments for women's rights and equal status in law can be traced back many centuries,<sup>1</sup> but it was not until the 1980s that the field of feminist legal studies was established as 'a significant body of scholarship' in many Western countries.<sup>2</sup> Yet, the influence of feminist approaches upon legal scholarship has been uneven. Public Law has been said to have been 'peculiarly resistant to feminist analysis', even though its core tenets of citizenship, rights, sovereignty and democracy have been central to much feminist legal critique.<sup>3</sup> This resistance can also be found in the Law and Religion literature (where the focus, at least initially, was upon the constitutional position of religious groups).<sup>4</sup> Where Law and Religion work has interacted with legal or political theory it has tended to gravitate towards accounts of natural law and liberalism respectively and has failed to acknowledge the relevance and value of feminist insights.<sup>5</sup> This has gone uncorrected by many feminist legal scholars, who Failinger, Schlitz and Stabile argue have mostly 'avoided the study of the difficult place in which religious women find themselves – pulled apart by family expectations for their lives, feminist critiques of their choices, and religious demands on their consciences and loyalties'.<sup>6</sup> Although there are,

1 E Jackson and N Lacey, 'Introducing Feminist Legal Theory' in J Penner, D Schiff and R Nobles (eds) *Introduction to Jurisprudence and Legal Theory* (Butterworths, 2002) 779, 780.

2 J Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) *Journal of Law and Society* 351, 352.

3 A Bottomley and S Sheldon, 'Preface' in S Millns and N Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish, 1999) v.

4 With some notable exceptions such as the essays in MA Failinger, ER Schlitz and SJ Stabile (eds) *Feminism, Law, and Religion* (Ashgate, 2013).

5 See e.g., R Sandberg, 'Towards a Jurisprudence of Christian Law' in N Doe (ed) *Christianity and Natural Law: An Introduction* (Cambridge University Press, 2017) 220, and R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press, 2015).

6 MA Failinger, ER Schlitz and SJ Stabile, 'Foreword' in MA Failinger, ER Schlitz and SJ Stabile (eds) *Feminism, Law, and Religion*, xiii.

of course, exceptions,<sup>7</sup> this has meant there have been relatively few attempts to explore Law and Religion debates from a feminist perspective.

The lack of attention given to feminism in the Law and Religion canon is troubling given that Failinger *et al* view religious women as being ‘not only part of religious communities [but] arguably, essentially DNA from which many rich religious cultures are built’.<sup>8</sup> A feminist perspective is particularly important in the context of the ‘minorities within minorities’ debate. This concerns the protection that ought to be afforded to members of religious groups who are vulnerable because of their minority status within that religious group, for instance, as women or as homosexuals. The ‘minorities within minorities’ debate explores whether the state should play a role in ensuring that members of religious groups should not be denied the rights that they would ordinarily enjoy by virtue of their citizenship of the state, where the polity of the group differs from that of the state as regards gender roles.

Although the ‘minorities within minorities’ debate is a legal issue, most of the academic writings on the subject come from a political science perspective.<sup>9</sup> This is surprising given the debate has come to the fore in Law and Religion scholarship in recent years. In a number of jurisdictions there have been high profile moral panics about the operation of religious courts and tribunals. In Canada in 2004 a report authored by the former Attorney General, Marion Boyd, stating that the ‘Arbitration Act [1991] should continue to allow disputes to be arbitrated using religious law’,<sup>10</sup> led to riots in major Canadian cities and a statement by the Premier of Ontario, Dalton McGuinty, that: ‘There will be no shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians’.<sup>11</sup> While in London in 2008, a lecture by the Archbishop of Canterbury, Dr Rowan Williams,<sup>12</sup> in which he suggested that ‘we have to think a little harder about the role and rule of law in a plural society of overlapping identities’, was illustrated on the news with footage of stoning and led the Prime Minister Gordon Brown to state that ‘in Britain, British laws based on British values applied’.<sup>13</sup>

7 See for example, the essays in Failinger, Schlitz and Stabile (eds) *Feminism, Law, and Religion*.

8 Failinger, Schlitz and Stabile, ‘Foreword’ in Failinger, Schlitz and Stabile (eds) *Feminism, Law, and Religion*, xiii.

9 See, e.g. the essays collected in A Eisenberg and Spinner-Halev (eds), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press, 2005).

10 M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney General, 2004).

11 LE Weinrib, ‘Ontario’s Sharia Law Debate: Law and Politics under the Charter’ in R Moon (ed) *Law and Religious Pluralism in Canada* (UCB Press 2008) 239 at 250.

12 R Williams, ‘Civil and Religious Law in England – A Religious Perspective’ (2008) 10 *Ecclesiastical Law Journal* 262.

13 For an analysis of the media reaction to the Archbishop’s lecture, see ch. 7 of NA Kabir, *Young British Muslims* (Edinburgh University Press 2010) and R Grillo, *Muslim Families, Politics and the Law* (Ashgate, 2015).

These moral panics have resulted in a body of Law and Religion scholarship which has explored how certain religious tribunals have operated and how they currently and ought to be made compatible with the State legal system.<sup>14</sup> Although concerns about gender disadvantage have been ever-present in this literature, it has rarely been in the foreground. For this reason, the work of Canadian political scientist Ayelet Shachar has proved particularly influential because it takes an explicitly feminist approach.<sup>15</sup> The fact that Rowan Williams in his 2008 lecture discussed and praised her debut monograph *Multicultural Jurisdictions: Cultural Differences and Women's Rights*<sup>16</sup> as a 'highly original and significant' work and endorsed her call for 'transformative accommodation' has meant that her work has also become often cited (but less frequently discussed) within the Law and Religion literature.<sup>17</sup> This chapter will contend that Shachar's monograph should be regarded as a leading work because it serves as an exemplar of the need for a feminist approach to Law and Religion studies and that it should play a more influential role in the Law and Religion literature.

## The context

Shachar's work is concerned with the 'minorities within minorities debate'. Her focus is on *nomoi* groups, that is, 'minority communities that generate sets of group-sanctioned norms of behavior that differ from those encoded in state law';<sup>18</sup> and what she refers to as 'the paradox of multicultural vulnerability':<sup>19</sup> the concern that those who are inside *nomoi* groups are denied the rights that they

14 This has included several empirical studies, most notably S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001); S Bano, *Muslim Women and Shari'ah Councils* (Palgrave, 2012); and G Douglas *et al*, 'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts', available at <http://www.law.cf.ac.uk/cir/research/cohesion.html>, accessed 28 August 2018.

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16 A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001). The book had already been much lauded by political scientists. It won the 2002 First Book Award, American Political Science Association, Foundations Political Theory Section and was also cited by the Supreme Court of Canada in *Bruker v Macovitz* 2007 SCTT 54.

17 R Williams, 'Civil and Religious Law in England – A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262, 274. See, e.g., A Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish 2009) 51–52; B Jackson, "'Transformative Accommodation" and Religious Law' (2009) 11 *Ecclesiastical Law Journal* 131; M Malik, *Minority Legal Orders in the UK* (The British Academy, 2012) 36. For an exception see R Sandberg, *et al*, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2013) 33(2) *Oxford Journal of Legal Studies* 263.

18 Shachar, *Multicultural Jurisdictions*, 2.

19 *Ibid*, 3.

would ordinarily enjoy by virtue of their citizenship of the State.<sup>20</sup> Her argument is that the state should not endorse a strong version of multiculturalism whereby *nomoi* groups ‘are to be granted extensive, formal, legal and constitutional standing so that they may govern themselves in accordance with their *nomos*’ which would turn a blind eye to gender and other inequalities within the group. However, neither should the state adopt the other end of the spectrum where ‘a uniform secular state law is imposed upon all citizens in family law matters, regardless of those citizens group affiliation(s)’.<sup>21</sup> For Shachar, this would relegate ‘religious traditions to the margins, labelled as unofficial, exotic, or even dangerous (unrecognized) law’.<sup>22</sup> In her view, inactivity on the part of the state perpetuates the paradox of multicultural vulnerability. A stance of “non-intervention” may effectively translate into immunizing wrongful behaviour by more powerful parties’.<sup>23</sup>

Shachar’s work focuses on when and in what circumstances the state should intervene. She rejects what is often called the ‘right to exit’ argument which states that the role of the state should be limited to ensuring that at-risk group members are able to leave if they do not agree with their group’s practices. Like many feminist scholars,<sup>24</sup> Shachar argues that this ‘right to exit offers no comprehensive approach at all’ because it imposes ‘the burden of solving conflict upon the individual’ whilst ‘relieving the state of any responsibility for the situation’.<sup>25</sup> As she puts it: ‘The right to exit rationale forces an insider into a cruel choice of penalties: either accept all group practices – including those that violate your fundamental citizenship rights – or (somehow) leave’.<sup>26</sup> Shachar is critical of how this approach is predicated upon a ‘binary’ notion of identity whereby an individual is either an adherent of the group or a citizen of the state. As Shachar points out, this is based on the premise that individuals cannot simultaneously be members of both the state and the group. It presumes that group members ‘have relinquished the set of rights and protections granted to them by virtue of their

20 This refers to the way in which ‘the same policy that seems attractive when evaluated from an inter-group perspective can systematically work to the disadvantage of certain group members from an intra-group perspective’: Ibid. While *inter*-group equality is concerned with establishing equal treatment between cultural and religious *intra*-group inequalities is concerned with establishing equality within cultural and religious groups.

21 Ibid, 13, 63, 72–73.

22 A Shachar, ‘Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law’ (2008) 9 (2) *Theoretical Inquiries in Law* 573, 593.

23 Ibid; Shachar, *Multicultural Jurisdictions*, 37, 40.

24 Phillips, for example, denounces the ‘right to exit’ rationale as not attaching ‘enough significance to cultural belonging’: A Phillips, *Multiculturalism without Culture* (Princeton University Press 2007) 133. She writes that it is based on a ‘constructivist account of culture and universalist account of human nature’ (ibid, 135).

25 Shachar, *Multicultural Jurisdictions*, 41. As Levy points out, ‘to have a culture whose exit is entirely costless . . . is to have no culture at all’: JT Levy, *The Multiculturalism of Fear* (Oxford University Press 2000) 112.

26 Shachar, *Multicultural Jurisdictions*, 41.

citizenship'. Shachar is opposed to any oversimplified 'either-or' understanding of legal authority which is not tailored to respect individuals' manifold identities.<sup>27</sup>

Shachar's significant achievement is to call for 'an alternative way of practicing multiculturalism' which 'seeks to enhance the autonomy of distinct *nomoi* communities, whilst at the same time providing at-risk individuals with viable legal-institutional tools to enhance their leverage within the group', challenging the power relations within their minority groups' traditions.<sup>28</sup> She writes that we should recognise those people within religious groups – whom she referred to as 'citizen-insiders' – as being both 'culture-bearers *and* rights-bearers'.<sup>29</sup> This is an important step forward in two respects. First, her work reminds us that there are 'three parties to the multicultural triad'.<sup>30</sup> Although Shachar follows Will Kymlicka,<sup>31</sup> Charles Taylor<sup>32</sup> and Iris Young<sup>33</sup> in arguing in favour of respecting group-based cultural differences, she makes an important step forward because the 'earliest proponents of multiculturalism too often forget the position of the citizen-insider, who simultaneously belongs to, and is affected by, both the group and the state authority'.<sup>34</sup> Second, her work highlights the agency of the citizen-insiders.<sup>35</sup> Shachar criticises the caricaturing of 'women who remain loyal to minority groups' cultures as victims without agency. She calls for attention to be paid to what she called the 'complex and multi-layered nature of multicultural identity'.<sup>36</sup> She asserts that we cannot 'remain blind to the web of complex and overlapping affiliations which exist between these competing entities'.<sup>37</sup> This means accepting that religious adherents are not 'cultural dopes': their religious affiliation does not mean that they do not want to enjoy and exercise citizenship rights. It is not simply the case of understanding how citizen-insiders are affected by their joint membership of the group and the state, we need also to understand the actions, desires and intentions of citizen-insiders themselves.

27 Ibid, 12.

28 Ibid, 7, 71.

29 Shachar, 'Privatizing Diversity' (2008) 9 (2) *Theoretical Inquiries in Law* 573, 593.

30 Shachar, *Multicultural Jurisdictions*, 5.

31 Shachar draws in particular on Kymlicka's concept of 'differentiated citizenship rights': W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995) 26. Note, however, that in this publication at least, Kymlicka does not seek to explore institutional models. See Susan Moller Okin's famous critique of Kymlicka's liberal theory on minority rights in SM Okin, 'Is Multiculturalism Bad for Women?' in SM Okin *et al.* (eds) *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 7.

32 See, in particular, his ground-breaking essay, C Taylor, 'The Politics of Recognition' in A Guttmann (ed) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25.

33 See, e.g., I Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

34 Shachar, *Multicultural Jurisdictions*, 6.

35 As Phillips forcefully points out, reference to minority cultures is now 'widely employed in a discourse that denies human agency': Phillips, *Multiculturalism without Culture*, 9.

36 Shachar, *Multicultural Jurisdictions*, 15.

37 Ibid, 5.

Shachar therefore introduces her concept of ‘joint governance’. This describes the idea that people can belong to, show allegiance to and follow norms from more than one source of authority at any given time.<sup>38</sup> Joint governance seeks to overcome the problem of ‘artificially compartmentalizing the relationship between the group and the state into a fixed inside-outside division [which] conceals the extent to which both are in fact interdependent’.<sup>39</sup> It ‘promises to foster ongoing interaction between different sources of authority, as a means of improving the situation of traditionally vulnerable insiders without forcing them to adhere to an either/or choice between their culture and their rights’.<sup>40</sup> Rather than creating clear winners and losers as a result of a conflict of rights, principled compromises will be reached that will be fact and context specific.

*Multicultural Jurisdictions* reflects many of the concerns that can be found within feminist legal studies literature. Although feminist approaches to law are varied,<sup>41</sup> Shachar’s approach shares some core values of a feminist approach, for as Conaghan notes, it is possible and ‘useful to identify some common, recurring features of feminist academic engagement with law and to do so without either essentializing feminism or denying the complexity and contestability of the features thus described’.<sup>42</sup> A feminist approach ‘presupposes that gender has a much greater structural and/or discursive significance than is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility’.<sup>43</sup> By choosing to explicitly recognise this, in other words, to not be

38 As Shachar puts it: ‘Joint governance promises to foster ongoing interaction between different sources of authority, as a means of improving the situation of traditionally vulnerable insiders without forcing them to adhere to an either/or choice between their culture and their rights’: *ibid.*, 81.

39 *Ibid.*, 40.

40 *Ibid.*, 88.

41 This includes the identification of particular schools of feminist thought such as liberal, radical, cultural and postmodern. As Munro has argued talk of such classifications runs the risk that we ‘lose sight of the basic and fundamental convictions that continue to animate and unite theorists across these divides’: V Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Hart, 2007) 11. This does not deny that feminist legal studies employ a range of methodologies which are not necessarily distinct. Conaghan’s work on labour law shows how feminists use ‘a multitude of methods to interrogate labour law – empirical, doctrinal, textual, and so on’ and share methodology with other critical theoretical approaches: Conaghan, ‘Labour Law and Feminist Method’ (2017) 33(1) *International Journal of Comparative Labour Law* 93.

42 Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 (3) *Journal of Law and Society* 351, 358–359. See also Wishtik’s framework for inquiry for feminist jurisprudence: H Wishtik, ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ (1986) 1 *Berkeley Women’s Law Journal* 64, 72–75.

43 Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 (3) *Journal of Law and Society* 351, 359–360. It is possible to identify a shift in feminist legal literature moving from a focus on ‘women and law’ to ‘law and gender’; moving on from identifying a particular ‘women’s perspective’ to instead regarding ‘the framework of gender divisions as a general category for critical legal analysis’ which has ‘opened up the possibility that law’s contribution to the gendering of its subjects might interact with other social forces’.

silent on the gendered dimensions, issues of power are placed at the core of the discussions rather than on the margins. This questions and debunks conventional and traditional understandings about law and talk of law. For Conaghan, ‘the application of a gender lens works to: (1) expose the operation of gender bias and neglect; (2) destabilise the normative and conceptual infrastructure; and (3) historicise and contextualise the field’.<sup>44</sup> The feminist approach, therefore, is one of critique. It is, in the words of Jackson and Lacey, ‘an interpretative approach which seeks to get beyond the surface level of legal doctrine and legal discourse, and which sees traditional jurisprudence as ideological – and hence as an apologia for the status quo’.<sup>45</sup> Feminism is to be understood not as a discrete approach characterised by a fixed set of principles.<sup>46</sup> Rather, it is a dynamic ‘*process* of engagement or interaction – a dynamic *movement* of ideas’,<sup>47</sup> which ‘places distinctive substantive issues on the agenda of legal scholarship and legal theory’.<sup>48</sup>

As a result, Shachar’s work can be characterised as adopting a feminist perspective because it stresses the need to take gender as ‘a central organising principle of social life’ and emphasises how power affects social relations.<sup>49</sup> In doing this, Shachar makes visible the gendered dimension of the ‘minorities within minorities’ debate. This distinguishes her work from that of other Law and Religion scholars, whose neutral treatment of the subject serves to obscure the lived experiences of those affected by gendered power. Instead, Shachar’s feminist approach highlights the gendered aspects of law whilst probing what Conaghan refers to as ‘characterizations positing themselves as neutral and, more specifically, ungendered’.<sup>50</sup> Shachar’s is therefore a leading work in Law and Religion, for whether or not we choose to recognise it, gender is never absent from a discussion about where fundamental values in law come from, particularly when examining the wider context of social relations in which values are constituted and accepted. The conversation changes depending on whether we choose to emphasise or ignore gender. By refusing to accept gender as external to law, a feminist approach to Law and Religion, such as that adopted by Shachar, makes

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Katherine O’Donovan’s 1985 book *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985) is said to have ‘represented a watershed in British feminist legal scholarship’: Jackson and Lacey, ‘Introducing Feminist Legal Theory’ in Penner, Schiff and Nobles (eds) *Introduction to Jurisprudence and Legal Theory*, 779, 781.

44 Conaghan, ‘Labour Law and Feminist Method’ (2017) 33(1) *International Journal of Comparative Labour Law* 93, 100.

45 Jackson and Lacey, ‘Introducing Feminist Legal Theory’, 779, 789–790.

46 Ibid, 789; Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 (3) *Journal of Law and Society* 351, 356.

47 Ibid, 356 fn 17.

48 Jackson and Lacey, ‘Introducing Feminist Legal Theory’ in Penner, Schiff and Nobles (eds) *Introduction to Jurisprudence and Legal Theory*, 779, 789.

49 S Millns and N Whitty, ‘Public Law and Feminism’ in Millns and Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish, 1999) 1.

50 Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 (3) *Journal of Law and Society* 351, 359.



gender 'analytically central' to and 'deeply constitutive' of law.<sup>51</sup> Furthermore, it acknowledges that ideas about gender are both affected by and effect legal ideas.

Shachar's focus on the 'paradox of multicultural vulnerability' provides an alternative lens to understand both the roles of the group and the state. Her work fits into a rich feminist tradition of exposing the binary constructions that are often pervasive in masculine-dominated public discourse, such as the artificial boundaries between public and private spheres. A feminist perspective is critical of such dichotomies and highlights the connectedness and integrated nature of human existence, and in doing so, demonstrates that 'lives that are not splintered between private or public, personal or professional'.<sup>52</sup> This rejection of artificial binaries in law can be found in Shachar's work. *Multicultural Jurisdictions* recognises the importance of the multiple, nuanced ways in which agency can be exercised by minorities within minorities in line with the feminist legal studies literature. Shachar does this by emphasising the 'complex and multi-layered nature of multicultural identity'.<sup>53</sup> Shachar's perspective also forms part of the literature on intersectionality whereby the focus has 'shifted away from the concept of gender as an isolated category of analysis towards a concern with the way in which gender intersects with other categories of identity for purposes of understanding and combating inequality'.<sup>54</sup> This focus represents 'a growing recognition of the need to broaden the representational base of feminism to take better account, substantively and strategically, of differences between women' buoyed by 'a keen suspicion of categories of categories in general and of the category 'woman' in particular'.<sup>55</sup> However, Conaghan is critical of the literature on intersectionality for being premised upon identity 'as a core unit of analysis, with gender, race and other inequality "grounds" being repositioned as "dimensions" of identity which law fails adequately to capture and reflect'.<sup>56</sup> She is concerned that this has 'had the unfortunate effect of directing feminist efforts away from concrete, empirically-based legal research with a socio-economic or distributive focus

51 This accepts and furthers Cotterrell's work in the sociology of law which argues that the legal and the social cannot be separated; rather legal and social ideas constantly penetrate one another: R Cotterrell, *Law, Culture and Society* (Ashgate, 2006).

52 Failing, Schlitz and Stabile, 'Foreword' in Failing, Schlitz and S J Stabile (eds) *Feminism, Law, and Religion*, xiii, xv.

53 This fits with the ground-breaking work of Judith Butler and in particular her theory of performativity, which highlighted how gendered understandings are perpetuated by women's subjective understandings of themselves and the construction and reconstruction of their social and legal identities: J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990); J Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge, 1993).

54 'This shift is in large part spawned by rejection within feminism of 'essentialist' invocations of sex and gender and the corresponding collapse of the category 'woman' as a core unit of feminist engagement and critique': J Conaghan, 'Intersectionality and the Feminist Project in Law' in E Grabham, D Cooper, J Krishnadas and D Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge, 2009) 21.

55 *Ibid.*, 23.

56 *Ibid.*, 30.



towards more abstract theoretical encounters with gendered cultural and legal representations.<sup>57</sup> As we will discuss, this criticism can be levelled at Shachar's work too.

## The significance

The flaw with Shachar's schema is that, although she correctly identifies the problem, her proposed solution perpetuates the problem rather than helping to resolve it. In emphasising how individual identity is negotiated through membership of overlapping (and sometimes competing) groups, her account fails to give adequate attention to the citizen-insider. The minority within the minority is treated as the object that the group and state fight over.<sup>58</sup> Shachar's focus upon competition has been criticised for taking a 'rational actor view of the world' which is 'written in the language of the marketplace'.<sup>59</sup> When this perspective of the 'individual rights-bearer' is employed it arguably rests upon and perpetuates a liberal legal idea of the autonomous rational person.<sup>60</sup> This fails to appreciate the nuances that the language of the marketplace obscures. Shachar's diagnosis – that gender and agency must be central to understandings of the minorities within minorities issue – is sound. However, by viewing the state and the group as two competing entities, her solution ignores individual agency and the gendered nature of decision-making. It ironically suffers from some of the very problems she is keen to avoid.

Although Shachar presents 'a repertoire of accommodation designs which can be combined and applied in creative ways according to different social needs and arenas',<sup>61</sup> the first four variants of joint governance she identifies are portrayed as 'straw' arguments.<sup>62</sup> Her preference is clearly for the fifth variant, transformative accommodation. Shachar describes transformative accommodation as being based on four key assumptions: first, 'group members living within a larger political community represent the intersection of multiple identity creating affiliations'; second, 'in many real-life circumstances both the group and the state have normatively and legally justifiable interests in shaping the rules that govern behavior'; third, 'the group and the state are both viable and mutable social entities which are constantly affecting each other through their ongoing

57 Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) *Journal of Law and Society* 351, 370.

58 Sandberg *et al*, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2013) 33(2) *Oxford Journal of Legal Studies* 263, 291.

59 Phillips, *Multiculturalism without Culture*, 153.

60 Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) *Journal of Law and Society* 351, 360–361.

61 Shachar, *Multicultural Jurisdictions*, 7.

62 Namely federal-style accommodation, temporal accommodation, consensual accommodation and contingent accommodation. For discussion see R Sandberg *et al*, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2013) 33(2) *Oxford Journal of Legal Studies* 263, 274–282.

interactions'; and fourth, 'it is in the self-professed interest of the group and the state to vie for the support of their constituents'.<sup>63</sup>

These assumptions show that Shachar sees transformative accommodation as a competitive model. She observes that 'each entity must "bid" for these individuals' continued adherence to its sphere of authority'.<sup>64</sup> This takes a very passive and rational-minded approach to the question of agency and ironically leads Shachar to adopt the sort of binary solution which she is herself critical of. She argues that there is a need to establish 'clearly delineated choice options through which constituents can express approval or disapproval of state or group decisions'.<sup>65</sup> However, she presents this as the possibility to 'opt in' or 'opt out' of specific group positions and describes this possibility of opting in or out in such a way that it makes it appear that such movement will be exceptional.<sup>66</sup> It is difficult to see how the right to 'opt-out' does not suffer from most of the defects of the right to exit. This is an 'either-or' type understanding of legal authority which will be of little help to the vulnerable minority who is a matter of fact unable to leave. This and other problems with transformative accommodation means that Shachar's work fails to achieve its ambitions.<sup>67</sup>

Transformative accommodation therefore fails to solve what Hadfield has referred to as a 'feminist puzzle' or 'dilemma of choice'<sup>68</sup>: whether it is possible 'to protect women from the oppressive consequences of harmful, constrained choices . . . without divesting women of agency?'<sup>69</sup> In other words, the dilemma Shachar confronts in her work, but does not overcome, is how the agency of minorities within minorities is facilitated, whilst simultaneously appreciating the effect of gendered power issues that may have coerced or constrained the decision-making process. Recognising joint governance *and* agency is ambitious but it is achievable. Feminist scholarship should prove influential here: a grounded approach is one of the characteristics of such work. As Conaghan puts it, feminist theory is built 'from the ground up, from the shared experience of women talking from personal testimonies, story-telling, consciousness-raising, and other revelatory techniques aimed at highlighting perspectives ignored by

63 Shachar, *Multicultural Jurisdictions*, 118.

64 *Ibid*, 117.

65 *Ibid*, 121.

66 'The purpose is not to fracture group solidarity so that members can opt out at the slightest opportunity. The initial division of authority between group and state must remain meaningful and presumptively binding on its individual': *ibid*, 123.

67 Sandberg *et al*, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2013) 33(2) *Oxford Journal of Legal Studies* 263, 286–289.

68 G Hadfield, 'The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract' (1996) *Osgoode Hall Law J.* 337.

69 G Hadfield, 'Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law' (1998) 146 *University of Pennsylvania Law Rev.* 1235, 1237.

traditional narratives'.<sup>70</sup> A feminist approach is normative.<sup>71</sup> It questions traditional assumptions made by recognising the lived-in reality and particular ways in which power is exercised in relationships. By choosing to explicitly recognise this, one places the issues of power at the core of discussions rather than at the margins.

This does not assume that men necessarily have an oppressive role but it recognises that there is a power dimension between men and women in social life as a whole and especially when they are legal actors given the gendered nature of legal institutions, discourse and practices.<sup>72</sup> A theory that protects women *qua* women (and therefore as oppressed) fails to recognise the different contexts in which power imbalance occurs. Just because there are situations where women as minorities in minorities have less power and less autonomy, this does not mean these women are vulnerable or have less power because they are always weak in the face of inevitable male dominance. Indeed, it would be a mistake to presume a lack of agency when there is evidence of oppression or systematic subordination. As Meyers has argued, individuals experiencing multiple forms of oppression and structural inequality can still be partially autonomous and it should not be assumed they are unable to be autonomous because of structural constraints.<sup>73</sup> A more worthwhile use of feminism is instead to focus any concerns on the interests of people who are affected by power imbalance. The context of any situation must be assessed in a way that recognises gender without creating gendered stereotypes, and where both men and women have the power 'to truly make autonomous decisions because the context of agreements is recognised above formality'.<sup>74</sup>

70 Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) *Journal of Law and Society* 351, 364.

71 'It is concerned not just with describing or interpreting social arrangements but also with changing them, that is, with prescribing and effecting transformation, informed by a range of normative ideals including sexual equality, social justice, and individual self-development': Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 (3) *Journal of Law and Society* 351, 375. However, there is a difference between feminism in the academy and feminism in the political realm. We agree with Conaghan that 'feminist academics and politics are situated within different validity frameworks': 'as a scholarly engagement, feminism (seeks to) acquire(s) respectability and legitimacy through its explanatory and interpretative power; as a political movement, however, it gains its legitimacy through its ability visibly to bring about political change' (ibid, 355). As Conaghan puts it, 'feminism in the academy, then, is both expressive and interrogative of feminist politics' (ibid, 356).

72 S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart/Bloomsbury 2015) 9.

73 D Meyers, 'Intersectional Identity and the Authentic Self? Opposites Attract!' in C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000) 151.

74 Ibid.

As we have argued elsewhere,<sup>75</sup> an approach previously created and applied by Thompson in relation to prenuptial agreements provides a way forward to overcome the weaknesses in Shachar's argument: Feminist Relational Contract Theory (FRCT). FRCT builds upon the strengths of both relational autonomy and relational contract theory. Relational autonomy as developed in the feminist literature and applied to Family Law in the work of Jonathan Herring<sup>76</sup> stresses the constraints on an individual's ability to exercise autonomy that exist as a result of various pressures in relationships. Indeed, ultimately the term 'relational autonomy' is a paradox: it recognises by definition that complete autonomy cannot be achieved since we are all shaped and limited by our social interactions with one another.<sup>77</sup> However, relational autonomy (especially as applied by Herring) would not have the desired practical impact of both facilitating agency and recognising relational inequalities and there is evidence to suggest that a relational autonomy approach does not lead to significantly different outcomes in practice.<sup>78</sup> Relational Contract Theory (RCT), as developed by Ian Macneil,<sup>79</sup> provides a step forward by shifting the focus away from autonomy to focus on the situations where social agreements are formed; where, in the words of Martha Fineman, 'individuals are given the means to voluntarily and willingly assume obligations and gain entitlements'.<sup>80</sup> Like Herring's explanation of relational autonomy, RCT brings the relationships of the parties to the fore. While orthodox and legalistic understandings of contract are imbued with flawed notions of autonomy, RCT instead repurposes contract in a way that recognises the relational context in which individuals make decisions. For Macneil, highlighting the parties' relationship necessitates a focus on important contextual factors in commercial transactions, such as duration and trade customs. This replaces neo-liberal assumptions that depict contracting parties as being purely self-interested and disconnected individuals with a relationship-orientated approach. However, this does not go far enough. It does not question the structures that exist and the power disparities and inequalities that exist as a result. Although some work has extended it beyond this setting,<sup>81</sup> the commercial

75 Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice*; Sandberg and Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137 and S Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) *Journal of Law and Society* (forthcoming).

76 J Herring, *Relational Autonomy and Family Law* (Springer, 2014).

77 Sandberg and Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137, 148.

78 L Buckley, 'Relational Theory and Choice Rhetoric in the Supreme Court of Canada' (2014–2015) 29 *Canadian Journal of Family Law* 251, 256.

79 See, e.g., IR Macneil, 'Relational Contract: What we do and do not Know' (1985) *Wisconsin Law Review* 484; IR Macneil, 'The New Social Contract: An Inquiry into Modern Contractual Relations' (1996) 15(1) *Journal of Public Policy & Marketing* 157 and the essays in D Campbell (ed) *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001).

80 M Fineman, 'Contract and Care' (2001) 76(3) *Chicago-Kent Law Review* 1403, 1408.

81 E.g., on marriage law: L Cohen, 'Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life"' (1987) 16 *Journal of Legal Studies* 267; R Leckey, 'Relational Contract and other Models of Marriage' (2002) 40 *Osgoode Hall Law J.* 1, 5.

context in which RCT was forged means that it is unlikely to be sensitive enough to the numerous power imbalances experienced by minorities within minorities, particularly on gender lines.<sup>82</sup> And this is where FRCT steps in.

FRCT incorporates feminist perspectives that explicitly address power imbalances (especially those that are gendered) where RCT otherwise would not, directing critical fire at how social and legal structures reinforce power imbalances. For Campbell, a leading advocate of RCT, feminist contract theory is ‘something of an oxymoron’ because in his view it sacrifices the liberal values implicit in RCT (most notably the respect for individual autonomy) for the prioritisation of feminist equality.<sup>83</sup> However, FRCT is designed to overcome this incompatibility by building upon RCT but recognising as problematic and discarding the liberal values implicit in RCT. By applying an explicitly feminist approach, FRCT not only pays attention to the tacit understandings affecting intimate relationships, but also allows us to critique and subvert them. Focusing on gender creates ‘disturbances in the field – that inverts or scrambles familiar narratives of stasis, recovery or progress’ and ‘advances rival perspectives’.<sup>84</sup> It emphasises the various overlapping relationships which people are in and the effect those relationships have. It involves examining social agreements within the wider context of multiple power relationships.<sup>85</sup> This involves exploring in detail not just the agreement and the conditions surrounding it, but a number of interlocking relationships over a much longer period.

In the context of religious tribunals this would include looking at the entire relationship between the individual member and the group, the relationship between the two parties the case is concerned with, as well as family and community pressures and the gendered aspects of the decision-making process and court personnel. Another important consideration would be the context spanning the whole period in which the parties were members of the religious community. Crucially, agency is not abandoned when feminist understandings of power are combined with relational contract’s understanding of context. FRCT does not view choice as being a binary ultimatum between agreeing or disagreeing. It recognises instead that it is possible to follow a third route: staying within the group and negotiating a compromise.<sup>86</sup> FRCT can see that it may not be rational or

82 Sandberg and Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) *Oxford Journal of Law and Religion* 137, 156.

83 D Campbell, ‘Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting’ in L Mulcahy and S Wheeler, eds, *Feminist Perspectives on Contract Law* (Routledge 2005), 161, 165.

84 Cf. R Gordon, ‘The Arrival of Critical Historicism’ (1997) 49 *Stanford Law Review* 1023, 1024.

85 Sandberg and Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) *Oxford Journal of Law and Religion* 137, 158.

86 Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice*, 129. For an application of a contextual approach see in *Thorne v Kennedy* [2017] HCA 49 as discussed by S Thompson, ‘Thorne v Kennedy: Why Australia’s Decision on Prenups is Important for English Law’ (2018) 39(4) *Family Law* 415. See also S Thompson, ‘Feminist Relational Contract Theory: A New Model for Family Property Agreements’ (2018) 45(4) *Journal of Law and Society* (forthcoming).

practical for minorities within minorities to walk away, and so this does not mean that we should presume that they lack agency.

There are a number of similarities between Shachar's concept of joint governance and FRCT. Both employ a feminist perspective to focus on issues of power (though FRCT places a feminist perspective to the fore). Both are based on the assumption that individualised notions of autonomy assume a level playing field that does not exist. However, unlike Shachar's variants of joint governance, and transformative accommodation in particular, FRCT advances matters in a way which unlocks the promise of recognising agency whilst simultaneously appreciating the effect of gendered power issues. Shachar stresses the importance of agency but her variants of joint governance do not achieve this: rather they focus on a rational economic understanding of the relationship between the state and the religious group relegating citizen-insiders to be the spoils whom they fight over. Ironically, the concept of joint governance is itself binary since it has been taken to imply two competing sources of authority: the group and the state. FRCT, by contrast, places agency to the fore. It fully recognises the web of relationships by regarding them as social contracts and accepts that power imbalances exist and that the role of the law is to decide when those power imbalances are significant enough to override freedom of (social) contract. Shachar's work stresses that 'the action and agency of individuals, groups and states is situational, that is, it varies in different institutions settings and to some extent is shaped by them'.<sup>87</sup> FRCT takes this further to regard action and agency as situational *and* relational; being shaped by complex interlocking social relationships and social statuses. FRCT therefore goes further than Shachar's work in that it provides a means by which courts and other decision-making bodies can recognise and take into account the various relationships involved and the resulting power imbalances. An approach based on FRCT overcomes this by recognising various forms of identity but providing a concrete legal way based upon contract that can provide practical solutions.

## The legacy

A feminist perspective changes our view of Law and Religion scholarship drastically. It takes us away from an orthodox legal binary view of choice towards an understanding of the many and varied ways in which people really make decisions, and the social, economic and legal pressures they are under when making these decisions. Conventional understandings of legal actors as autonomous and rational decision-makers conjures up a monochrome painting of perfectly balanced scales. When we interpret this legal relationship from a feminist perspective, the picture suddenly becomes chaotic, disordered and is in bright technicolour because it depicts real people, real relationships and, importantly, the real issues with how power is exercised. *Multicultural Jurisdictions*, therefore, should be

<sup>87</sup> Shachar, *Multicultural Jurisdictions*, 89.

seen as a leading work in Law and Religion studies because it uses a feminist perspective to highlight aspects of the minorities within minorities debate that would otherwise be rendered invisible. Shachar's paradox of multicultural vulnerability provides an alternative lens through which to view both the roles of the group and the state. Her work fits into a rich feminist tradition of exposing the pervasive binary constructions. Her argument for joint governance is compelling, as is her recognition of the ways in which multi-layered identities are constantly being constructed and reconstructed.

However, Shachar's aim of ensuring that agency is recognised is in the end unrealised. Her preferred variant of joint governance, transformative accommodation, ultimately adopts an institutional approach which focuses upon the interaction of state and group. The citizen-insider is simply the one over whom the group and state fight. The needs, motives and feelings of the citizen-insider are absent from the analysis. Her approach still does not place enough emphasis upon agency. This does not mean, of course, that *Multicultural Jurisdictions* should not be regarded as an inspiration. It remains a leading work. It shows the value of a feminist approach to Law and Religion studies but it also shows that a feminist approach allows us to go further still. A relational approach provides a step beyond this, recognising how 'identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender and ethnicity'.<sup>88</sup> FRCT grounds this analysis using notions of relational contract by focusing on gendered power relations. This provides real recognition of joint governance<sup>89</sup> in that, unlike Shachar's schema, FRCT takes into account not only the claimant's relationship with the religious group and the state but also considers the claimant's relationship with co-religionists. It focuses on questions of power and recognises the importance of facilitating the agency of minorities within minorities.

A characteristic of feminist legal studies, as a form of the critical legal studies movement, is that it highlights, challenges and disrupts understandings and narratives about law. The work of Lacey has shown that a feminist critique questions 'a number of assumptions common to positivistic and liberal legal scholarship': notions that legal reasoning is neutral, that law is a system of enacted norms or rules that have a unity and coherence and are rational, neutral, objective, autonomous and central to social relations.<sup>90</sup> A feminist approach exposes how 'the very fabric of law itself is gendered'.<sup>91</sup> This has two important consequences. The first is that it is crucial also to recognise that law is in part responsible for these imbalances because it is based on gendered norms and assumptions. The question

88 C Mackenzie and N Stoljar, 'Autonomy Refigured', in Mackenzie and Stoljar (eds), *Relational Autonomy: Feminist Perspectives*, 3, 4.

89 Or what might be more accurately called 'multi-governance' because there may be more than two sources of influence in play.

90 N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, 1998) 4.

91 E Jackson and N Lacey, 'Introducing Feminist Legal Theory' in Penner, Schiff and Nobles (eds) *Introduction to Jurisprudence and Legal Theory*, 779.



of how feminism can operate within law to produce solutions given that law is part of the problem is perhaps the greatest challenge for a feminist methodological approach in law.<sup>92</sup> The second, and related, consequence is that it is crucial to recognise that law is not disconnected from social norms and prejudices. Rather, law ‘must be analysed in terms of the part it plays in conjunction with other regimes or “discourses” to regulate our familial and gendered lives’.<sup>93</sup> The co-existence of these two consequences means that the feminist critique of law cannot operate entirely separate from and outside conventional legal discourse. To transform law, a feminist approach needs to recognise that law and social ideas are inseparable and that the feminist project is shaped by and shapes both. This means that feminist legal methods are able to ‘complement traditional legal method by incorporation of alternative views, experiences, perceptions and values which traditional method, in its insistence on logic and deductive thought, may exclude’.<sup>94</sup> A feminist perspective should not necessarily be placed in opposition to conventional accounts. Instead, it can improve those accounts by criticising the law whilst operating within its confines.<sup>95</sup> Feminist perspectives provide useful toolkits that we can use when building an analysis of law. However, as with any form of critique, feminism serves as an exercise in deconstruction and reconstruction. Feminist scholarship does not simply diagnose; its grounded nature means that it is especially well-placed also to be the needed medicine that rebuilds, re-strengthens and improves.

A feminist approach is critical not only of law as an institutional system but also law as a discourse, as a body of knowledge. Feminist legal scholarship disturbs both the narrative and the sources used by traditional accounts, being directly concerned with questions of power and focusing upon the agency of those that conventional accounts invariably overlook. This exposes the ‘conceptual and normative architecture supporting the field of knowledge, thereby inviting its (critical) scrutiny’.<sup>96</sup> A feminist approach to legal sub-disciplines such as Law and Religion can be used to criticise processes of inclusion and exclusion, assumptions made, the authority given to certain voices and the importance afforded to particular topics and arguments. Indeed, the critique a feminist perspective proffers is likely to require the deconstruction and reconstruction of the field. This is likely to entail a deeper awareness of the ways in which the parties involved and implicated in religious relationships (adherents, group officials, State officials, those outside the group not to mention the family and cultural bonds that these

92 See C Smart, *Feminism and the Power of Law* (Routledge 1989).

93 A Diduck and K O’Donovan, ‘Feminism and Families’ in A Diduck and K O’Donovan (eds) *Feminist Perspectives on Family Law* (Routledge, 2006) 1, 3.

94 H Barnett, *Introduction to Feminist Jurisprudence* (Cavendish, 1998) 25.

95 V Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Hart, 2007) ch. 2.

96 Conaghan, ‘Labour Law and Feminist Method’ (2017) 33(1) *International Journal of Comparative Labour Law* 93, 107.

people involved in negotiating and re-negotiating) interact, interpret and use (and are represented in) law. *Multicultural Jurisdictions* provides an important step forward in this regard and can properly be seen as a leading (and perhaps foundational) work. However, it does not go far enough in terms of its proposed solutions. Thompson's FRCT provides a means to capture, analyse and protect this. Such an approach would truly recognise the definition of religion law proposed by Sandberg as being 'concerned with the recognition and regulation of certain religious *relationships*'.<sup>97</sup>

Moreover, a feminist approach can question and dissolve disciplinary boundaries and sub-disciplinary demarcations within law.<sup>98</sup> As Bottomley notes, feminism 'gives rise to the recognition of the contingency of attempting to form of asserting or claiming subject status'.<sup>99</sup> As Conaghan points out, like any critical approach, a feminist approach 'troubles categories, blurs boundaries, subverts meanings and contests normative priorities'.<sup>100</sup> A feminist approach not only has the potential for dissolving demarcations within law, it also has the potential to debunk disciplinary demarcations. The infiltrated understanding of law and society as shaping and being shaped by one another means that a firm line between law and other disciplines cannot be made. As Conaghan puts it, 'law emerges simultaneously *gendered* and *gendering*'; both 'a repository of values replicating and reinforcing wider social and cultural arrangements – including gender-based attitudes, practices, and beliefs – and also actively implicated in the construction and maintenance of such arrangements'.<sup>101</sup>

A feminist approach to Law and Religion studies can therefore disrupt the narratives, values, structures, priorities and questions of the sub-discipline by centring upon gender and the questions of power this raises. Given the interactions between Law and Religion studies and other areas of law, a feminist approach can be used to question the historical development of frameworks, concepts and assumptions transplanted from those other areas of law and the erection and rigidity of sub-disciplinary dividing lines. As the prologue to this volume pointed out, this and the resulting 'ghettoisation' is a major concern and one that can be questioned, deconstructed and reconstructed using a feminist approach to the creation of knowledge and to the development of a Law and Religion discourse.

97 R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 11 (emphasis added).

98 The growth of interdisciplinary literature and thought shows that the questioning and transcending of disciplinary distinctions is not exclusive to feminist approaches. As Conaghan notes, the 'blurring of legal disciplinary boundaries is not peculiarly feminist': Conaghan, 'Labour Law and Feminist Method' (2017) 33(1) *International Journal of Comparative Labour Law* 93, 111.

99 A Bottomley, 'Introduction' in A Bottomley (ed) *Feminist Perspectives on the Foundation Subjects of Law* (Cavendish, 1996) 1, 2.

100 Conaghan, 'Labour Law and Feminist Method' (2017) 33(1) *International Journal of Comparative Labour Law* 93, 114.

101 *Ibid*, 112.

A feminist approach to Law and Religion studies is therefore crucial. Developing Shachar's work and the literature of which it is part to provide a feminist approach to Law and Religion studies has the potential to cause a significant disturbance of unknown magnitude. A feminist critique in and of Law and Religion studies may well involve dismantling the status quo and creating something entirely new.