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Entangled: State, Religion, and the Family

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INTRODUCTION

Citizenship is yet again central to contestations about the relations between state and religion. Arguments over the public recognition of cultural difference and especially the degree and type of recognition that ought to be afforded to faiths have risen to the forefront of public debate. Increasingly, these renewed state and religion debates revolve around the regulation of women and the family, placing them at the center of larger debates about citizenship and identity.

Consider the following examples: the *hijab* (the headscarf worn by some Muslim women) has made headlines throughout Europe, engulfing courts and legislatures from Germany to Turkey to France, not to mention the European Court of Human Rights.¹ When the Vatican recently put together a twenty-first century list of seven social sins (drawing on the idea of the list of the seven deadly sins), it placed as the first item on the new list “‘bioethical’ violations, such as birth control.”² In the United States, several jurisdictions have established covenant marriages effectively providing

¹ The German Federal Constitutional Court addressed the hotly contested question of religious attire in the public education in the *Ludin* case (2003). See BVerfG, I BvR 792/03, 30 July 2003. Even the European Court of Human Rights was reluctantly dragged into this matter in its *Leyla Sabin v. Turkey* decision (2006), in which it affirmed Turkey’s ban on the wearing the *hijab*. See 19 BHRC 590 [2006] ELR 73 [European Court of Human Rights]. In France, the longstanding *hijab* drama culminated in 2004 with the introduction of a national law that banned the display of any “conspicuous religious symbols,” including the Islamic headscarf, in public schools. See Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

² See Flavia Krauses-Jackson, *Vatican Lists Seven Social Sins*, March 10, 2008, available at www.bloomberg.com

a legal route to stem the no-fault divorce revolution. In Egypt, on the other hand, an alliance of feminist organizations, civil court functionaries, and moderate religious authorities, has successfully led to the adoption of more gender-equitable readings of the religious tradition, which has been codified in that country's *Shari'a*-informed family law code. In England, a scholarly lecture by none other than the Archbishop of Canterbury (the head of the Church of England/Anglican Church), in which the Archbishop contemplated the option of allowing non-Christian tribunals the ability to determine certain aspects of family law disputes, has received zealous criticism from across the political spectrum. This pattern of response echoed a similarly acrimonious 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. These potentially far-reaching alterations to the legal system revolve ever more around the regulation of women and the family, placing them at the center of larger debates about citizenship and identity. These challenges cannot be fully captured by our existing legal categories; they require a new vocabulary and a fresh approach. I begin to sketch the contours of such an approach 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.³

While I object to the idea of conferring unchecked authority on any kind of tribunal, this does not lead me to conclude that the best response to pressing challenges raised by the reemergence of faith-based challenges in multicultural societies lies simply in restoring a strict separation of "church and state" model. This standard response is unsatisfactory, in part because of its willful blindness to the intersection of the various affiliations apparent in female group members' lives – to their state, community, religion, family, and so on. We can surely do better in this day and age. In the following pages I offer an alternative to the conventional view that a clear line can (and should) be drawn between public and private, official and unofficial, secular and religious, or positive law and traditional practice. Instead, I explore the idea of permitting a degree of *regulated interaction* between religious and secular sources of law, so long as the baseline of citizenship-guaranteed rights remains firmly in place.⁴ Counter-intuitively, I argue that the prospect of regulated interaction (rather than mere adherence to strict separation) may contribute to the improvement of the protection of women's equality and dignity under both systems, affording them the opportunity to express their commitment to both. In this richer conception of

³ The core arguments advanced here are addressed at greater length in Ayelet Shachar, *What We Owe Women? The View From Multicultural Feminism*, in TOWARD A HUMANIST JUSTICE: THE POLITICAL PHILOSOPHY OF SUSAN MOLLER OKIN 143-165 (Debra Satz & Rob Reich ed., 2009); Ayelet Shachar *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008); Ayelet Shachar *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L. J. 49 (2005).

⁴ "Citizenship rights" here apply to anyone who resides on the territory, regardless of their formal membership status.

citizenship, individuals and families are afforded options to express and redefine both their citizenship and their group membership rather than being forced to sacrifice one for the sake of the other.

I.

Although we now tend to take it for granted, the reign of secular law in regulating the family is of recent vintage. It has accompanied the rise of the modern state and the concentration and consolidation of power in the hands of elected officials and executive-branch functionaries in lieu of priests, clerics and ecclesiastical authorities. Despite the familiar “strict separation” approach adopted in the United States and elsewhere, historians and legal scholars have shown the manifold ways in which the secular notion of marriage as a monogamous union based on mutual consent has been heavily influenced by religious traditions (mostly those of the dominant Christian churches).⁵ At the same time, the regulation of the family is defined in almost all western countries as primarily a civil matter. But the reality on the ground has always been more complicated, especially for members of religious minority communities in otherwise secular societies. Take, for example, the situation of observant 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 barriers to remarriage. Without the removal of such barriers, women’s ability to build new families, if not their very membership status (or that of their children) in the community, may be adversely affected. This is particularly true for Muslim and Jewish women living in secularized societies who have entered into marriage by following the procedures of both a secular and a religious ceremony — as permitted by law in various jurisdictions. For them, a civil divorce is merely part of the story; it does not, and cannot, dissolve the religious aspect of the relationship. Failure to recognize their “split status” position — namely, that of being legally divorced according to state law, though still married according to their faith — may leave these women prey to abuse by recalcitrant husbands who are well aware of the adverse effect this situation has on their wives, as they fall between the cracks of the civil and religious jurisdictions.

The standard legal response is to refuse to provide a civil remedy to legal harms that even remotely bear an indirect religious aspect. Alas, this strict-separation solution does not work for those individuals who find themselves in a tight spot precisely because their legal quandaries are embedded in more than one law-making community of meaning and affiliation. While the argument for non-intervention on

⁵ The historical example of *Reynolds v. United States*, 98 U.S. 145 (1878) vividly demonstrates the point. There is a rich body of literature evaluating these interrelations. For a concise introduction, see generally Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. LAW 741 (1987-1988); Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in Late Nineteenth Century*, in *US HISTORY AS WOMEN’S HISTORY* 107-21 (Linda Kerber et al. eds, 1995).

the grounds of allowing associational communities as much freedom as possible to pursue their own visions of the good is clearly valuable, hardly anyone suggests that religious liberty is absolute; it may be overridden or restricted by other liberties or compelling state interests. Without such limitations in place, the secular polity may become an implicit accomplice in tolerating violations of women's rights in the name of respecting cultural and religious diversity. At the same time, our current legal framework relies upon, and replicates, a polarized oppositional dichotomy between either promoting (gender) equality or promoting (religious) liberty. But this misses the mark: devout women are *both* culture bearers *and* rights bearers.⁶ The challenge they pose to the secular and religious orders is that of finding new paths for reconciling overlapping (and at time competing) sources of law and identity.

Pressing at the edges is another, less easily categorized challenge in the convoluted relationship between state and religion, which I refer to, for the sake of clarity and simplicity, as *privatized diversity*. Proponents of privatized diversity argue that respect for religious freedom or cultural integrity does not require inclusion in the public sphere or recognition by state law. Instead, it is a demand for *exclusion* from the purview of secular norms and institutions. This leads to a demand that the state adopt a hands-off, non-interventionist approach, placing civil and family disputes with a religious or cultural aspect *outside* the official realm of equal citizenship. To illustrate the force of this coming storm, I explore a charged debate that broke out in Canada after a small and relatively conservative nongovernmental organization, named the Canadian Society of Muslims, declared in a series of press releases its intention to establish a faith-based tribunal that would operate as a forum for binding arbitration on consenting parties. The envisioned tribunal (which eventually never came into operation), would have permitted consenting parties not only to enter a less adversarial, out-of-court, dispute resolution process, but also to use the Act's 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)."

Acceptance of such a vision of "privatized diversity" may indirectly make room for non-state norms to operate authoritatively within what are otherwise secular legal systems. However, it could also potentially immunize such institutions from the regulatory reach of statutory or constitutional norms; of specific concern here is the protection of hard-won gender equality norms.⁷ The proposal to establish private,

⁶ AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 117-45 (2001).⁷ This strand of liberal theory is defended in works such as CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM (2003); Jeff Spinner-Halev, *Liberalism and Religion: Against Congruence*, 9 THEO. INQ. L. (2008). For an illuminating critique of these arguments, see ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 136-157 (2007).

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non-state *Shari'a* tribunals can therefore be interpreted as challenging the normative and juridical authority, not to mention the legitimacy, of the secular state's accepted mandate to represent and regulate the interests and rights of *all* its citizens in their family-law affairs, irrespective of communal affiliation. The demand for privatized diversity therefore 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, if and when they arise. No less significant for our discussion is the acknowledgement that the mere proposal to establish a non-state arbitration tribunal of this kind does *not* by itself provide a conclusive answer to determining how secular and religious norms should interact in governing the family. Instead, it importantly serves to provoke just such a debate. As an analytical matter, secular and religious norms may stand in tension with one another, point in different directions, lead to broadly similar results, or directly contradict. 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.

Of special interest here are those situations in which claims for so-called private, religious-based arbitration intersect and interact with public concerns about power disparities between men and women in the resolution of family-law disputes. The reincarnation of this debate raises a slew of important questions for our conception of citizenship in contemporary societies in the context of a wider trend towards the privatization of justice in family law. In addressing these weighty issues, I am guided by a *multicultural feminist* approach, with its deep commitment to respecting women's identity and membership interests, as well as promoting their equality both within and across communities.⁸ I am also informed by an understanding of culture and religion as malleable to change and open to a plurality of interpretations.⁹ Despite the desire to "disentangle" law from religion by metaphorically caging each in its appropriate sphere or domain, I argue that a carefully regulated recognition of multiple legal affiliations (and the subtle interactions among them) can allow devout women to benefit from the protections offered by the state to other citizens, yet without abandoning the tenets of their faith.

The core issue for us to examine, then, is whether and under what conditions women's freedom and equality can be partly *promoted* (rather than inhibited) by law's recognition of certain faith-based obligations that inform the regulation of marriage and divorce for religious citizens. The additional challenge is to develop a crafty legal approach that can inform viable institutional paths for cooperation that begin to match the actual complexity of lived experience in our diverse societies. I demonstrate the possibility of implementing such a vision by reference to a recent decision by the Supreme Court of Canada, *Braker v. Marcovitz* (2007), which breaks new grounds.¹⁰

⁸ See generally Shachar, *What We Owe Women?* *supra* note 3.

⁹ See e.g., SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL AGE* 5-11 (2002); ANNE PHILLIPS, *MULTICULTURALISM WITHOUT CULTURE* 11-72 (2007).

¹⁰ *Braker v. Marcovitz* [2007] 3 S.C.R. 607 [Canada].

Finally, in revisiting the *Shari'a* tribunal debate, I distinguish between *ex ante* and *ex post* regulatory oversight mechanisms, explaining why the former are preferable over the latter. I close by reflecting on the government's chosen policy to *ban* any type of family arbitration by faith-based tribunals, thus reaffirming the classic secular/religious divide. While this decision is politically defensible and symbolically astute, it does not necessarily provide adequate protection for those individuals most vulnerable to their community's formal and informal pressures to turn to "unofficial" dispute-resolution forums in resolving marital issues. The decision may instead push these tribunals underground where no state regulation, coordination, or legal recourse is made available to those who may need it most.

A final caveat is required before we proceed. Religious citizens may find little solace in the recommendation (often presented by well-meaning theorists and jurists) that they simply "exit" their home communities, if they experience injustice within them.¹¹ If pious women wanted to leave their communities, the legal dilemmas that haunt them – and which are at the center of my analysis here – namely, the challenge of adhering to both secular and non-state religious requirements of forming and dissolving marriage, would not have arisen in the first place. Clearly this is not the situation we are dealing with. For instance, a Jewish woman who seeks a *get* (religious divorce decree) or a Muslim former wife that is trying to convince a secular court to enforce the *mahr* owed to her former husband after a *talaq* divorce may well wish to remain faithful to those identity-demarkating aspects of religious codes that in part made the civil marriage union possible and legitimate. Instead of asking women "caught in the knots" of secular and religious marriage laws to leave their cultural worlds behind, we can better categorize their claim for recognition as a search for voice both within the community and in relation to the wider society to which they belong.¹² This quest is not easily met, however, in part because of the entrenched gendered construction of their roles in the family as mothers and spouses, depicting them as moral figures and guardians of the home who engage in the crucial task of literally and figuratively "reproducing" the collective. Despite – or perhaps because of – their indispensable contribution to the family, women have traditionally occupied a legally disempowered position when it comes to the initiation or negotiation of the terms of marriage and divorce.

II.

The standard legal response offered by the strict separation, or state neutrality approach, is to ask religious women to hold faith only to the civil definition of the

¹¹ For a critical discussion of the exit option, see Susan Moller Okin, "*Mistresses of Their Own Destiny*": *Group Rights, Gender and Realistic Rights of Exit*, 112 *ETHICS* 205 (2002).

¹² ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30-43 (1970). The importance of voice in analyzing religious women's claims is also emphasized by Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495 (2001).

dissolution of marriage and divorce, leaving it up to each individual woman to somehow negotiate a termination of the religious aspect of the relationship—a task that may prove extremely difficult if the husband is recalcitrant.¹³ The “privatized diversity” approach, on the other hand, takes a diametrically opposed line of response. It places the need to address the religious side of the marriage at the heart of the non-statist legal response, for instance, by recommending that parties move the “full docket” of their disputes from public state-provided courtrooms to private faith-based tribunals that may or may not comply with statutory and constitutional protections of rights and obligations. This is a dramatic redefinition of the relationship between state and religion under the guise of mere procedural reliance on private alternative dispute resolution mechanism. The price to be paid for such a move is dangerously high: forfeiting the hard-won protections that women won through democratic and equity-enhancing legislation, itself achieved as a result of significant social mobilization by women’s groups and other justice-seeking individuals and communities. While offering opposing solutions, the strict separation and privatized diversity approaches rely on a common matrix of denying their *shared* responsibility and obligation to assist women whose marriage regulation is grounded in an uneasy amalgam of secular and religious traditions, forcing instead an all-or-nothing choice between these sources of law and identity.

Is it possible to find a more fruitful engagement that overcomes this either/or predicament by placing the interests of these historically marginalized participants at the center of analysis? Arguably, the obligation to engage in just such renegotiation is pressing in light of growing demands to reevaluate the relations between state and religion the world over in the crucial social arena of family law. From the perspective of women caught in the web of overlapping and potentially competing systems of secular and sacred 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 unfortunately does little to address the cultural/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 the Canadian debate, this constituency also inserted a transnational element, suggesting that in families with roots in more than one country, a divorce agreement that complies with the demands of the faith (as a non-territorial identity community), in addition to those of the state of residence, is somehow more “transferable” across different Muslim jurisdictions.¹⁴ In technical

¹³ This position informs, for example, the minority opinion in *Marcovitz*, *supra* note 10, para. 102-106.

¹⁴ Similar misconceptions are traced in England as well. See Lucy Carroll, *Muslim Women and Islamic Divorce in England*, 17 J. OF MUSLIM MINORITY AFFAIRS 97, 100-111 (1997).

terms, this need not be the case — private international law norms are based on the laws of states, *not* of religions. But what matters here is the perception that a faith-based tribunal 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.

The familiar legal response of relegating family disputes with certain religious aspects *beyond* the reach of the secular courts need not, however, be the sole or even primary response to such dilemmas, especially when “non-intervention” effectively translates into immunizing wrongful behavior by more powerful parties. 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, discussed below) 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 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, they may also make them vulnerable to a double or triple disadvantage, especially in a legal and governance system that categorically denies cooperation between their overlapping sources of obligation.

The challenge for multicultural feminists (like myself) is not to uncritically lend a hand to those wishing to dismiss offhand the often uneasy claims made by observant women, but to highlight instead the potential for renovating and reinvigorating both secular and religious traditions in ways that better respond to women’s identity and equality needs.¹⁵ While holding faith in deliberative processes of contestation and dialogue in civil society, we also face the urgent task of investigating and highlighting the importance of state action (or *inaction*) in shaping, through law and institutional design, the context in which women can pursue their claims for equity and justice vis-à-vis the group or those fellow citizens outside their community. Viewed through this perspective, the rise of so-called privatized diversity mechanisms to implement religious principles should rightly be perceived with a healthy dose of skepticism, particularly if the parties lose the background protections and bargaining chips otherwise offered to them through secular legislation and regulation. One may well wonder whether this development represents a whole new and convenient way for the state (and its public institutions) to avoid taking responsibility for protecting the rights of more vulnerable parties precisely in those areas of social life that are most crucial for realizing both gender equality and collective identity, such as the regulation of the family. Militating against such a result, multicultural feminists are searching for 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, and the individual—in ways that will acknowledge and benefit religious women

¹⁵ A similar conclusion is reached from a different angle by John R. Bowen, *Muslims and Citizens: France’s Headscarf Controversy*, BOS. REV. 31- 35 (February/March 2004).

as members of these intersecting (and potentially conflicting) identity- and law-creating jurisdictions.

III.

A number of ideal type responses present themselves, of which I will only point out two: emphasizing democratic deliberations and dialogue-across-differences in civil society is one promising alternative; highlighting the goal of changing the background conditions that shape such intra- and inter-cultural negotiations is another.¹⁶ The former, civil-society path emphasizes the importance of negotiation and deliberation within and among different cultural and religious communities, especially in diverse societies. This route permits revealing the internal diversity of opinions and interpretations of the religious and secular traditions in questions. Deliberation and contestation can also promote agency and direct empowerment through political participation. While fully endorsing and supporting these civil society venues, something else might be required in terms of institutional designs for those circumstances typified by negotiation breakdown, imbalance of power, and a need to restore or establish a right. In the context of our discussion, that “something else” translates into a focus on legal remedies that respond to the emerging concern that the erosion of women’s freedom and autonomy is increasingly the “collateral” of charged state-religious showdowns. To avert this disturbing result, I shall briefly explore how, despite the fact that the strict separation approach still remains the standard or default response, courts and legislatures have recently been breaking new ground by adopting what we might refer to as “intersectionist” or “joint governance” remedies. One such example is found in the Supreme Court of Canada’s 2007 decision in *Braker v. Marcovitz*, which explicitly rejected the simplistic “either/or” formula.¹⁷ Instead, it ruled in favor of “[r]ecognizing the enforceability by civil courts of agreements to discourage religious barriers to remarriage, addressing the gender discrimination those barriers may represent and alleviate the effects they may have on extracting unfair concessions in a civil divorce.”¹⁸ In the *Marcovitz* case, a Jewish husband made a contractual promise to remove barriers to religious 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 he signed to remove the religious barriers to his wife’s remarriage, claiming that he had undertaken a moral rather than

¹⁶ This categorization fits well with Seyla Benhabib’s “dual track” approach. See *supra* note 9, at 130-132. A similar distinction between the “legal track” and “citizen track” is found in a major report recently published in Quebec about the boundaries of reasonable accommodation. See GERARD BOUCHARD AND CHARLES TAYLOR, REPORT: BUILDING THE FUTURE – A TIME FOR RECONCILIATION (2008).

¹⁷ *Marcovitz*, *supra* note 6.

¹⁸ *Id.*, paras. 3, 92.

legal obligation. The Supreme Court was not in a position to order specific performance (“forcing” the 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 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, articulate their religious identity, enter new families after divorce, or rely on contractual ordering just like any other citizen. This joint-governance framework offers us a vision in which the secular system may be called upon to provide remedies in order to protect religious women from husbands who might otherwise cherry-pick their religious and secular obligations as they see fit. This is a clear rejection of the simplistic “your-culture-or-your-rights” approach, 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.

IV.

The last set of issues that I wish to address relates to the thorny challenge of tackling the potential conflict between secular and religious norms governing family disputes. The fear of religious law as a competitor normative system that resists the lexical superiority of the statist rule of law clearly played a significant part in the anxiety that surrounded the *Shari'a* tribunal debate. Given the deference typically afforded to out-of-court arbitration procedures, critics of the proposal charged that nothing less than an attempt to use a technique of privatized diversity to redefine the relationship between state and religion was underway. This is an existential threat that no secular state authority is likely to accept with indifference (not even in tolerant, multicultural Canada).¹⁹ And so, after much contemplation, the response chosen to the challenge presented by the proposed tribunal was to quash it with all the legal force the authorities could muster. This took the shape of an absolutist solution: prohibiting by decree the operation of any religious arbitration process in the family law arena.²⁰ Such a response, which relies on imposition by state fiat, sends a strong

¹⁹ See Ran Hirschl and Ayelet Shachar, *The New Wall of Separation: Respecting Diversity, Prohibiting Competition*, 30 *CARDOZO L. REV.* (forthcoming).

²⁰ The government adopted this solution with the enactment of the Family Statute Law Amendment Act, 2005 (amending the Arbitration Act, 1991) and the subsequent regulations that followed in 2007. See Family Arbitration, O. Reg. 134/07 (Ontario).

symbolic message of unity, although a unity that is manufactured by prohibition instead of dialogue. This universal ban effectively shuts down – rather than encourages – coordination between civil and religious authorities. A less heavy-handed approach might have been worth exploring, especially once the idea of granting unrestricted immunity in the name of religious freedom to any kind of dispute resolution forum is rejected. The alternative might include a range of options that permit a mixture of *ex ante* and *ex post* regulatory oversight, mandatory provisions that no party is permitted to waive, and enhanced access to whatever public-sponsored resources are normally available to anyone facing a family breakdown.

The literature on institutional design distinguishes between different forms or techniques of oversight. The classic approach adopted in arbitration is to allow minimal oversight; the idea is that the consenting parties intentionally removed their dispute from the public system, preferring instead an out-of-court process. In the case of severe breaches of procedural justice, however, laws governing alternative dispute resolution processes (including Ontario’s Arbitration Act, which was so central to the *Shari’a* tribunal debate) permit the arbitrating parties to seek judicial review.²¹ This represents a classic “fire alarm” response, referring to decentralized and ex-post review initiated by individual complaints or public interest groups, as opposed to more centralized, governmental ex-ante regulation referred to in the literature as “police control.”²² The fire-alarm oversight technique decentralizes regulation; the burden of monitoring alleged violations in the arbitration process, for example, is passed on to those who are seen to be best informed about the process and who possess the strongest interest in identifying and reporting such breaches: the parties themselves.

While the fire-alarm model might in theory fit the realm of commercial or civil arbitration with its strong emphasis on party autonomy, agency, and parity, it may fail miserably in the family arbitration context. Here, there is a serious concern about power and representation inequities, which disrupts the ex post judicial review model’s basic assumption about both parties being equally positioned to “pull” the fire alarm and call attention to potential breaches in the arbitration process. Given the gendered concerns identified above, the idea of placing the burden of initiating the process of ex post review on the more vulnerable party, which may have been semi-coerced in the first place into consenting to a religious tribunal’s authority, is implausible. If anything, it provides a (unintended) guarantee that very few, if any, of the most serious violations will ever be reported. This result stands in direct contravention of the logic of active agency that lies at the basis of this oversight mechanism, making it a less attractive option to respond to the complex gendered and communal pressures at issue.

Instead of merely relying on ex-post judicial review, it appears that a complementary technique of regular ex-ante oversight is required once we move to

²¹ For instance, see the provisions (prior to its amendment in 2006) of the Arbitration Act, 1991 S.O., ch. 17, §§ 6, 19, 45-47.

²² These two models are described in Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

the realm of family arbitration. This may include requirements such as subjecting family law arbitrators to a licensing-like training process, demanding that they keep records containing both the evidence presented and notes taken at the hearing, ensuring that both parties entering a family arbitration process received counsel by an independent legal advisor before entering the arbitration, and so on.²³ These protections can assist individuals by reducing information asymmetries and power imbalances; regrettably however, just like any other legal measure that respects choice, they may fall short of providing full guarantee that no communal (or other) pressure was imposed on those seeking to turn to an alternative dispute resolution forum. To address these real concerns, an ex ante oversight scheme must ensure that women are not dispossessed of whatever rights and protections they have as citizens when they raise a legal claim that bears a religious dimension as well; that is precisely what the *Marovitz* ruling clarifies. Furthermore, a model of regulated interaction would place the burden on religious and secular decision-makers themselves (arbitrators or other authorities) to show that they have complied with the government's predefined standard rules and procedures, rather than placing the responsibility of taking action on a particular individual who may already be experiencing heightened vulnerability. Notably, this shift in regulatory emphasis does not require, or entail, total abandonment of the ex post review model. The two models can live happily side by side.

With these background conditions firmly in place, we can appreciate the potential dynamism and behavior alteration of regulated interaction, for instance, by delegating to communal decision-makers trained in both civil and religious law an opportunity to determine, through their actions and deeds, whether to enjoy the benefits of state recognition of their decisions — including the boon they were seeking of public enforcement of their awards — if they followed the requirement of the faith in dissolving the religious side of the marriage (while the state holds the power to issue a civil divorce) and complied with administrative fairness and equity thresholds or default rules defined in general family legislation in matters such as determining the post-divorce property and economic relations between the disputing parties. These safeguards typically establish a minimal baseline (or “floor”) of protection, above which significant room for variation is permitted. These protections were designed, in the first place, to address concerns about power and gender inequities in family relations, concerns that are not typically absent from religious communities, either. If

²³ These ex ante requirements now apply in Ontario based on regulations that went into effect in 2007. These regulations recognize family arbitration agreements that are conducted in accordance with:

- i. the law of Ontario, and the law of Canada as it applies in Ontario, or
- ii. the law of ___ (name other Canadian jurisdiction), and the law of Canada as it applies in that jurisdiction.

See s. 4(1) of O. Reg. 134/07. This definition does not permit family arbitration to proceed in accordance with any law but that of a recognized Canadian jurisdiction, thus prohibiting the application of faith-based principles.

anything, they probably apply with at least equal force in the communal context as in the individualized, secular case. Under this “self-restraint” scenario — which offers an alternative to the top-down prohibition model that was eventually chosen by the Canadian government — if a resolution by a religious tribunal falls within the reasonable margin of discretion that any secular family-law judge or arbitrator would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision-maker used a different tradition to reach a permissible resolution. The operative assumption here is that, in a diverse society, we can safely assume that at least some individuals might prefer to turn to their “communal” institutions, knowing that their basic state-backed rights are protected by these alternative forums. Against this backdrop, permitting community members to turn to a non-state tribunal may, perhaps paradoxically, nourish the motivating conditions for promoting a more dynamic, context-sensitive, and potentially moderate interpretation of the tradition that is acceptable to the faithful, as endorsed by religious authorities themselves. Such processes could plant the seeds for organic reform that improves women’s bargaining position and standing within their own communities and the wider society as well. The prospect for such “change from within” — or what I have elsewhere labeled *transformative accommodation*²⁴ — in this context may translate into a recognition by the tribunal’s arbitrators themselves that if they wish to issue final and binding decisions (which permit parties to turn to the civil system for enforcement where needed), they cannot breach the basic protections to which each woman is entitled by virtue of her equal citizenship status. Ignoring these entitlements would lose them the ability to provide relevant legal services to members of the community.²⁵ In this fashion, a qualified recognition of the religious tribunal by the state may generate conditions that permit an effective, non-coercive encouragement of more egalitarian and reformist changes from within the tradition itself. The state system, too, is transformed from strict separation to regulated interaction. It is no longer permitted to categorically relegate competing sources of authority to the realm of unofficial, exotic if not outright dangerous “non-law.” By bringing these alternative dispute resolution forums into the limelight, the regulated interaction approach discourages an underworld of unregulated religious tribunals and offers a path to transcend the either/or choice between culture and rights, family and state, citizenship and islands of “privatized diversity.”

V.

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

²⁴ SHACHAR, *supra* note 6, at 117-45.

²⁵ Such a result is unattractive for religious authorities, which strive to provide distinct legal services that no other agency can offer, as well as for the individual who had turned to this specialized forum in order to bring closure to a charged marital or family dispute that bears a religious aspect that simply cannot be fully addressed by the secular court system.

retained a hefty influence in this significant realm of life. As the belligerent responses to the Archbishop of Canterbury's intervention on the relationship between civil and religious law in England (or the public outcry that followed the actual attempt to establish a faith-based tribunal in Canada) dramatically revealed, these issues touch a raw nerve. Alas, the typical response of further 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. This was demonstrated by the *Marovitz* case, which challenged the very assumption that it is impossible to grant consideration to religious diversity and gender equality at the same time.

While we accustomed to seek shelter by hiding behind a high wall of separation between state and religion, a qualified yet dynamic "entanglement" between these old rivals—under combined *ex ante* and *ex post* regulatory conditions—may present our best hope for expanding recognition and equal citizenship for once-marginalized and voiceless female group members. We owe observant women nothing less than allowing them the potential to become promising agents of renewal of their own religious traditions and of the larger political communities to which they belong as equal citizens.

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