Part 4

Controversial issues
Some of the most complex legal challenges today involve multiple and often conflicting claims. Consider the following examples: gender equality vs. religious diversity; sexual orientation vs. freedom of association; face covering by a key witness in a criminal trial vs. the right of the accused to a fair trial (the latter usually involves seeing the facial demeanor of a witness, not just her eyes, as would be the case with the niqab). Other clashes involve employment anti-discrimination laws vs. the degree of institutional autonomy that is to be given to a church or a ministry (the US Supreme Court *Hosanna-Tabor* (2011) decision focusing on the “ministerial exemption” raises this very issue). To complicate matters further, in some cases the very same plaintiff, say a religiously observant woman, may in fact make a claim that is grounded in both principles of religious freedom and gender equality.

Throughout the discussion contained in this chapter, I challenge the deeply-engrained assumption that granting consideration to religious diversity and gender equality at the same time inevitably requires the triumph of one value over the other. In contrast with the winner-takes-all doctrinal approach favored by many in the legal academy and on the bench, the approach I propose here is informed by the tremendously rich experience drawn from the burgeoning world of new constitutionalism that has developed outside of the United States. This new constitutionalism relies on balancing and proportionality and involves an ongoing search for frameworks that embrace constitutional plurality without abandoning core normative commitments to dignity and equality. At its core, this approach is guided by an attempt to develop a “non-hierarchal way to solve conflicts between constitutionally protected rights or interests” (Grimm 2014: 13). As Dieter Grimm, former Justice of the Federal Constitutional Court of Germany explains, the technique of proportionality and balancing “requires the legislator or judge to take the colliding rights and interests seriously, weigh them against each other and try to preserve as much as possible of both” (ibid.).

The commitment to avoiding an either/or predicament does not save us from making hard choices; there will be situations where it will be impossible to maximize both the values of diversity and equality. Addressing with a clear voice those situations where such conflicts arise and are concrete and proven is an imperative of a just society. At the same time, recent years have witnessed a tendency to hyperbolically stipulate such inconsistencies, even if unsubstantiated. A more promising direction is to craft new ways of conceptualizing and facilitating diversity...
and equality so that they are seen as mutually reinforcing rather than conflicting and incompatible. This shift in perspective requires us to step back and revisit some of the oldest questions about recognizing collective identities. For example, who speaks for a religious minority? Who is listened to? Which entity ought to act as an arbiter between competing interpretations of what a given tradition requires of its adherents? Who is silenced when the state takes sides in disputes concerning membership demarcation or the distribution of rights and powers among group members? How can new participants and their multivernacular voices be guaranteed influence in the interpretation and rejuvenation of their respective traditions, a sphere of activity that has too long been reserved for male members only? Who is responsible for resolving these dilemmas? The state? The minority community? Women themselves, through grassroots action and legal challenge if required?

Despite the tendency to treat traditions as fixed and unalterable, religious women have become powerful agents of change in revitalizing their own communities’ ancient texts and ways of life. Dramatic and promising, this “change from within” is already occurring in many parts of the world. As Susannah Heschel, a feminist Jewish scholar, eloquently explains, “[w]e don’t simply ask what the [religious] text seems to be saying, but whose interests are being served. We examine what the text reveals, but also explore what the text conceals” (Heschel 1995: xii). Thus even if rigid and inegalitarian interpretations gained authoritative power during particular historical periods, they were always contested, representing “but only one element in a multitude of conflicting voices” (ibid.: xxiii). By infusing religious study with feminist perspectives, women are asserting not only their membership in their communities, but also their contribution as full participants (Biale 1984: 9).

This is an inspiring vision that combines voice, agency and active membership. None of this is easy to achieve; nor, however, has any past struggle for recognition and empowerment of the once-voiceless. While holding faith in the promise of change from within religious communities and institutions (see e.g., al-Hibri 2001), the crucial role that state action (or inaction) plays in creating conditions whereby women’s rights to equality and diversity are more likely to be fostered – or, conversely, made harder to realize – must be critically examined. It is high time to focus, as a recent report suggests, on “the experiences of women from religious minorities as a way of assessing how well countries are responding to the needs of their religious minorities” (Moosa 2010: 43). This is a useful path to follow as we navigate through the arduous terrain of gender, law, and religion.

My discussion explores contemporary issues ranging from head-covering bans to the denial of access to citizenship to the rise of private religions tribunals in family law. After briefly setting the conceptual terrain, I begin by examining conflicting rights claims in which minority women seek to gain inclusion into the public sphere without giving up those symbols of religious faith and identity markers that they view as significant to who they are. The neutral state’s role here is not to succumb to majority pressures but to act as an enabler (rather than constrainer) of the religious freedom and equality claims of minority women. I then shift to examine acrimonious tensions that have resurfaced in the deeply-gendered terrain of family law, leading to renewed questions about how best to envision the jurisdictional division of labor between official state law and unofficial faith-based dispute resolution processes that affect individuals lives, especially the most vulnerable, yet without providing a license for rights violations and inadvertently perpetuating power relations in the name of respecting tradition. The main challenge here, I will argue, is to find a new approach that permits greater interaction among competing sources of law and identity. I then offer several ideas about how to mitigate the potential strains between diversity and equality – the core values of our time – and chart the still unresolved and puzzling dimensions of these dilemmas that are ripe for critical analysis and innovative legal reform.
Competing rights: no easy answers

Much has been written about the rise and fall of multiculturalism and the eruption of a backlash against public expressions of religious identity and difference. Many authors have connected this backlash with an increased state focus on controlling and regulating women’s bodies and dress. Examples abound. Perhaps most familiar in this genre are the legislative bans passed by France and Belgium that criminalize face-covering in public spaces. Although cast in neutral terms, these laws are widely understood as directed at banning the niqab, a face veil worn by female members of more conservative branches of the Muslim faith that leaves only their eyes visible. These bans regulate the female body, which itself has become a symbolic new battlefield over which secularism and religiosity, enlightenment values and traditional ones vie for predominance. Despite the oversimplified and misleading nature of these dichotomies, they have gained a strong foothold in public debates, frequently shaping political rhetoric and even finding their way into supranational and national judicial decisions (Malik 2014).

It is in this political landscape that the Supreme Court of Canada has developed a more nuanced, contextual framework for cases involving the competing rights of individuals. As noted above, such cases raise deep dilemmas about the meaning that diversity and equality should have when engaging with public authorities. A case known as N.S. (2012) illustrates these tensions. N.S. involved a criminal proceeding for sexual abuse and required the balancing of two fundamental rights: the accused’s right to a fair trial, and the witness’s right to act in accordance with her religious belief. The complainant, N.S., alleged that she was repeatedly sexually assaulted by the defendants as a child. When called as a witness at the preliminary hearing against the accused, N.S. asserted that her religious belief required that she wear the niqab while testifying in court. The accused disagreed, arguing that the right to a fair trial required that legal counsel and the trier of fact be able to observe the witness’s demeanor while she was examined and cross-examined.

Writing for the majority, Chief Justice Beverley McLachlin began by framing her contextual approach as steeped in the tradition of balancing and proportionality. She noted that, when faced with conflicts between freedom of religion and other values, courts have typically respected the individual’s religious belief and accommodated it in the public sphere if at all possible. This approach places the competing interests in a balancing formula, rather than categorically prioritizing one set of interests over the others, reflecting the preference for proportionality and the minimal impairment of rights that are deeply entrenched in Canada’s constitutional jurisprudence. In light of this framing, the Court held that a total ban on the niqab is an intrusion by the state that is inconsistent with the Canadian Charter of Rights and Freedoms. Instead, the majority ultimately adopted a case-by-case approach, resisting the idea that users of the justice system must park their religion at the courtroom door, just as it rejected the response that says that a witness may always testify with her face covered.

The dissenting minority opinion reached a different conclusion. While “conced[ing] without reservation that seeing more of a witness’ facial expression is better than seeing less,” Justice Rosalie

1 On this rich body of literature, see for example, Vertovec and Wessendorf 2010; Benhabib 2010; Volpp 2007.
3 Id., at para. 54. See also para. 51: rejecting the view that the niqab-wearing practice should be banned because it breaches neutrality, the Chief Justice powerfully stated that such an approach is “inconsistent with Canadian jurisprudence, courtroom practice, our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible.”
Ayelet Shachar

Abella held that the assessment of demeanor can nevertheless be achieved even without seeing a witness’s face. While the debate among the justices focuses on the technical difficulties of assessing demeanor, the case reveals a series of deep disagreements: how far the principle of religious freedom will go when it fiercely conflicts with other protected rights, with the veil as a test case; how to conceptualize the balance between stability and change in an increasingly diverse society; and, how to navigate the competing interests at stake.

This is what makes N.S. such a hard case. As a minority woman and a sexual assault complainant, N.S.’s religious freedom claim also encapsulates a powerful plea for equality: namely, equal access to justice for women who profess a non-dominant religious belief or practice. The value of fairness to the complainant and the broader societal interest of not discouraging niqab-wearing women from reporting offences and participating in the justice system is vital to the court’s analysis. Indeed, these considerations, cogently expressed in both the dissenting opinion and in the majority’s reasoning, are now part of the public record.

The legal system is certainly not the most refined tool for dealing with intersecting and overlapping affiliations and the various possible expressions of religiosity, culture, and identity (Minow 1991). Nevertheless, N.S. has two important functions. First, it ensures that the focus remains on the sincerity rather than the strength of a complainant’s religious belief. In N.S., the Court refused to use N.S.’s past practice to undermine her religious freedom claim. Earlier, N.S. had willingly exposed her face to a female photographer when applying for a driver’s license, albeit under conditions where the office issuing her license accommodated her by screening her from the view of other employees. This is in itself significant. Had the Court seen N.S.’s prior engagement with the state as undermining the sincerity of her belief, legally coding it as a compromise, it could have inadvertently discouraged members of non-dominant faith communities from engaging with broader state institutions. The Court’s emphasis on the sincerity rather than the strength of N.S.’s belief has a second advantage. It allows Canadian courts to avoid making value judgments about the face-covering practice when deciding competing rights claims. As Abella notes in her dissenting opinion, controversies surrounding the niqab are prevalent both within and outside the Muslim community. These controversies include questions such as “whether the niqab is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it.” She further states that “[t]he [are complex issues about which reasonable people can and do strenuously disagree.”

Consider the contrast between the Canadian approach of side-stepping the debate about the symbolic meaning of the veil (and whether it is at all mandatory for Muslim women) and the framework of analysis which emerges from Europe’s highest human rights court as reflected in the European Court of Human Rights’ engagement with respect-for-differences claims brought by women who wished to practice a less extensive form of veiling, namely, donning the hijab (a head cover worn by some Muslim women, in which the face remains visible). Much like the decision in N.S., the European Court of Human Rights engages in a proportionality analysis and balances competing interests in decisions such as Dahlab and Sahin. But the difference lies in the

4 A witness wearing a niqab can still express herself through her eyes, body language and gestures, the content of her answers and the tone and inflection of her voice. These factors permit defense counsel an opportunity to engage in cross-examination. See N.S., id., at para. 105.
5 N.S., at para. 80.
6 Id.
7 Dahlab v. Switzerland, No. 42393/98, [2001] V ECHR 447; Leyla Sahin v. Turkey, No. 44794/98, [2005] XI ECHR. Dahlab was a challenge raised by a school teacher in Switzerland who was asked to remove her Islamic headcover (hijab) while performing her teaching duties, although there were no complaints
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level of abstraction with which the European Court of Human Rights approaches conflicts between religious diversity and gender equality. In N.S., the Supreme Court of Canada endorses a contextual approach that leaves the ultimate balancing decision with the trial judge who is closest to the parties and hears the facts directly. By contrast, in Dahlab and Sahin the “‘balancing’ that takes place is a balancing of abstract stipulated inconsistencies (secularism and democracy vs. the religious symbolism of the veil; women's equality and tolerance vs. Islamic religious obligation) rather than evidentially demonstrated in concreto conflicts of rights with other rights, or of rights with important public interests” (Bhuta 2014).

Yet, even in Canada, a restrictive approach to veiling women has been rearing its head. In Quebec, in 2010 legislation that would ban the niqab in public spaces was introduced (but not passed) by the provincial government. In 2013, a more expansive piece of legislation, which came to be known as the “Quebec Charter of Values” was proposed. The Charter of Values would have prevented government employees from wearing objects such as “headgear, clothing, jewelry or other adornments which, by their conspicuous nature, overtly indicate a religious affiliation” while at work. This prohibition would have applied even if such items – crosses, veils, turbans, and yarmulkes – were worn as an expression of a sincere religious belief. Among its most controversial clauses, the Quebec Charter of Values also stipulated that public services, broadly defined, could only be provided to and received by those whose faces are “uncovered.” If Quebec’s face-covering ban ever comes into effect, it will place squarely before the courts the question of the constitutionality of making it impossible for a niqab-wearing woman to receive government services while also maintaining her sincere religious belief. Even if couched in neutral language, such legislation disproportionately impacts the religious freedom of members of non-dominant religions and, more specifically, it places a heavy burden on women who belong to these religions.

The ultimate frontier of debates about the boundaries of inclusion and exclusion are found in the context of citizenship whereby states have become increasingly eager to employ naturalization requirements as a new means of restricting membership in the body politic. These naturalization requirements are used to determine whether migrants are sufficiently integrated into the new society. The French case of Faiza M. is illustrative. In this case, the Conseil d'État upheld a decision to decline citizenship to a niqab-wearing Muslim woman who spoke French, was married to a French citizen, and had three French children, because “she had adopted a radical practice of her religion, incompatible with the values essential to the French communauté, notably the principle of equality of the sexes.” This case dealt with an individual who was already residing in France as a lawful permanent resident by virtue of her marriage to a French national and sought to take the additional step of gaining full inclusion in the political community. She was denied such access because her cultural and religious differences made her, in the eyes of the state, unassimilable to French society. These differences were evidenced by her insufficient knowledge of the right to vote and the foundational principle of laïcité (secularism), as well as by her reclusive

from parents of the teacher’s pupils. The ECtHR ruled that the interference with the teacher's religious freedom to manifest her religious beliefs (Art. 9(2) of the ECHR) was justified and proportionate as a measure to protect the rights of others, namely, the schoolchildren. Sahin was a medical student who challenged (and ultimately lost her bid against) Turkey’s then in place ban which prohibited donning the hijab on university campuses.

8 This legal ruling was based on art. 21–4 of the Civil Code (as it applied in 2005), which states that “[b]y a decree in the Conseil d’État, the Government may, on grounds of indignity or lack of assimilation other than linguistic, oppose the acquisition of French nationality by the foreign spouse.”
and domestic-centered family life, which the *Conseil d'État* saw as a sign of both submission to the male figures in her family and a lack of assimilation with the French *communauté*.

This is an ironic reversal of the feminist emancipatory slogan, “the personal is political.” Here the state uses Faiza M’s conduct in her personal life as a basis for its decision as to whether she ought to qualify as a citizen. Granted, administrative agencies and courts have a long history of reviewing family the forms of family units to determine eligibility for government services and benefits. However, *Faiza M* goes a step further: it used the degree of an immigrant woman’s commitment to gender equality (or lack thereof) within her religious family structure as a foundation for denying her access to the most public of state entitlements: citizenship. This sends a chilling message to similarly situated women that they are not welcome as members of the contemporary French political community. The applicant’s lack of familiarity with the basic values and rights of citizenship in her adoptive country may indeed be alarming from the perspective of the state, especially if the objective of the naturalization process is to engender an informed and participatory citizenry. This governmental objective, however, could reasonably have been addressed by less drastic means, such as by allowing the applicant to enroll in citizenship classes or by counting her agency in challenging the naturalization-denial decision before the court system as evidence of a degree of civic engagement and immersion into French society.

By denying an immigrant woman citizenship, the *Conseil d’État* left her in a dependent position vis-à-vis her husband, who already had a secure legal status in France. What is more, it further politicized the debate over the compatibility of certain Islamic practices with both women’s rights and the *laïcité* predominant in France’s vision of citizenship, all while placing a substantial burden on women’s (covered) heads and bodies.9

Even in today’s age of globalization and privatization, the value of citizenship, especially for the vulnerable, remains invaluable. It has memorably been described as “nothing less than the right to have rights” by the US Supreme Court (echoing the famous words of philosopher Hannah Arendt).10 As such, any restrictions on accessing citizenship based on perceived cultural or religious differences must be narrowly tailored and used only as a last resort, for at stake is an individual’s vital membership and dignity interests. This is especially so when dealing with segments of the population that have long been excluded from political membership on ascriptive or identitarian grounds such as gender, race, or religion.

Even in Canada, where the Supreme Court of Canada refused a categorical ban on the niqab in *N.S.*, a stricter approach to veiling is evidenced in the context of citizenship oaths. Canada has amended its policy on the attire to be worn during citizenship ceremonies. Although Canada publicly endorses the values of religious freedom, accommodation and gender equality, officially stating that immigrants who seek naturalization are under “no pressure to assimilate and give up their culture” (Citizenship and Immigration Canada 2012), an executive ministerial order that has

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9 See, for example, *Benhabib 2002; Volpp 2007; Nussbaum 2012*. The same tensions are now echoed in primary legislation in France that bans the wearing of the niqab and the burqa (the latter is the most restrictive of all Islamic veils, as it covers the face in addition to the full body) in public spaces in which shared citizenship is experienced as a practice of “rubbing elbows . . . in shopping malls, corner stores, libraries, concert halls, auto repair shops, . . . elevators, churches, synagogues, mosques and temples — in a word wherever one can meet and converse” with others, as one Canadian judgment colorfully put it: see *Re Pourghasemi*, [1993] F.C.J. No. 232, 62 F.T.R. 122 (F.C.T.D.). The only exception to the French face-covering ban is its inapplicability to houses of worship.

10 Arendt 1968: 177: “We became aware of the existence of a right to have rights . . . and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights . . .” See also *Perez v. Bownell*, 356 U.S. 44, at 64 (1958) (Warren C.J., dissenting opinion). For further discussion, see Shachar 2012.
not yet been to be challenged in court now prohibits individuals participating in citizenship ceremonies from taking the citizenship oath while wearing any form of face-covering (ibid.). This is not merely a technical or ceremonial matter. Without taking this oath, newcomers cannot complete the naturalization process and become citizens. As in Faiza M., the power of the state is here utilized and overextended to corner religious women into choosing between their faith and membership in the body politic, instead of recognizing their ability to uphold both simultaneously.

**Family matters: rethinking the boundaries of engagement between civil and religious sources of law and identity**

Another arena that has become a hot-bed for conflicts between religious diversity and gender equality is the regulation of family law. Here, recent years have seen a growing tide of challenges to the modernist view that with the secularization of official state law, other sources of meaning and authority (especially those grounded in religious or confessional communities), will no longer play a role in governing the creation and dissolution of marriage and the various demarcating and distributive rights and obligations associated with the family. Whereas veiling and face-covering controversies test the boundaries of inclusion in – and exclusion from – the public sphere, the regulation of family law raises a different set of concerns that focus on how best to divide and share jurisdiction among competing claimants as part of the “search for justice in the domain of family law” (Foblets 2014: xi). This search for justice, in the legal arena, typically entails heated debates about which entity – the group, the state or the individual – should have a say and according to what criteria, on matters such as marriage, divorce and their distributive implications for all affected parties, thus placing gender and religion at the center of larger debates about citizenship and membership, equality and diversity, human rights and private ordering.

The issues are undisputedly volatile; they require a mere spark to ignite. In England, for example, a scholarly and nuanced lecture by the former Archbishop of Canterbury proposing that civil law further accommodate religious law has provoked zealous criticism from across the political spectrum. In the United States the debate has taken a different turn. Recently, a number of state legislatures passed amendments to preempt the use of non-state legal principles in private dispute resolution, specifically singling out both Shari’a law and international law as competing normative orders that must be avoided. In Canada, an acrimonious debate broke out following a community-based proposal to establish a private “Islamic Court of Justice” (or *darul-qada*) to resolve family law disputes among consenting adults according to faith-based principles. The envisioned tribunal (which ultimately never came into operation) would have permitted consenting parties not only to enter a less adversarial, out-of-court, dispute resolution process, but also to use choice-of-law provisions to apply religious norms to resolve family disputes, according to the “laws (*fiq̄h*) of any [Islamic] school, e.g. Shiah or Sunni (Hanafi, Shafi’i, Hanbali, or Maliki),” potentially delimiting rights and protections that the involved women would have otherwise enjoyed under prevailing statutory and constitutional provisions. In addition, as research conducted outside of Canada by John Bowen has shown, establishing such a tribunal would have brought to the fore the multitude of interpretative challenges associated with the idea of “recognizing Shari’a” in a secular state. This proposal, which represents a broader pattern we

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

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might call privatized diversity, was notable for another reason (Shachar 2008). It was seen as challenging the normative and juridical authority, not to mention the legitimacy, of the secular state's asserted mandate to represent and regulate the interests and rights of all its citizens in their family law affairs, as well as its liberal democratic telos to protect their rights more generally, irrespective of communal affiliation. In this respect, the turn to religious private ordering in the regulation of marriage and divorce raises profound questions concerning hierarchy and lexical order in the contexts of law and citizenship: Which norms should prevail? And who, or what entity, ought to have the final word in resolving value-conflicts between equality and diversity, should they arise? The state clearly retains an interest in marriage and divorce for public policy reasons, such as the value of gender equality, the welfare of children, and the impact of the family's breakdown on third parties, to mention but a few. But it is no longer, if it ever was, the only jurisdictional authority in town.

The narrative of gender and religion in the family has a long and complex history. The record is such that the state did not seize jurisdiction over marriage and divorce from the church until the late eighteenth century. Therefore, among the conflicting claimants to sovereignty in the history of family law, it is the state, not the church, that is the newcomer. Gaining the upper hand in regulating matters of the family as part of broader processes of state building, centralization of law and secularization was significant both politically and jurisdictionally. It represented the solidification of power in the hands of secular authorities, a symbol of modern state-building. As Nancy Cott observes, “For as long as the past millennium in the Christian West, the exercise of formal power over marriage has been a prime means of exerting and manifesting public authority” (1995: 108).

Even today, the family remains a crucial nexus where both collective identity and gendered relations are reproduced. Marriage and divorce rules govern matters of status and property, as well as a woman’s right to divorce, and remarry, and her legal relationship with her children. At the same time, it is territory that is vital for minority communities in maintaining their communal definition of membership boundaries. These mechanisms for collective identity formation and reproduction are often adhered to and valued by religious women. However, these very same mechanisms may also impose disproportionate costs and risks on women’s hard-won rights and protections in the name of respecting tradition.

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

Carroll 1997. In practice, however, given that certain aspects of religious (Islamic) law have been incorporated into the national legislation governing the family in many Muslim countries, “unregistered” Muslim marriages in England and Wales that are not recognized by the home country of citizenship or habitual residency as a valid and binding marriage may nevertheless gain recognition in the country of origin, assuming the relationship does not breach prohibited grounds and fulfills the conditions for a valid marriage in the respective jurisdiction.
These acute challenges cannot be fully captured and addressed by our existing legal categories. They require a new vocabulary and a fresh approach. In the space remaining I will briefly sketch the contours of such an approach, dynamic interaction, by asking what is owed 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. This is part of a broader re-examining of how law and governance – the pillars of institutional authority in the modern era – are engaged in shaping inter-communal and intra-group power relations. There is a well-regarded tradition of scholarship in law and political science that treats legal-institutional structures as variables which have a crucial effect on how behavior is shaped: it observes how individual and collective action is always influenced by the unique structures of authority under which it operates. This observation opens up a space for innovation and creativity at the level of institutional design. To this we must add the significance of agent-centered and voice-oriented paths for seeking change from within the community, for example, by the tremendous mobilization of women entering the temple of theological study so as to credibly pursue, within the hermeneutic horizons of the respective community, new interpretations and variants of gender roles and divisions of authority that can overcome or at least mitigate more conservative readings of ancient texts as well as established practices that impose disproportionate burdens on women as “conduits” of collective identity.\footnote{Much of my own work in this field has followed this path. See e.g., Shachar 2001.}

The ambition, easier to define than to implement, is to find a more fruitful engagement that overcomes the predicament we face by placing the interests of women – as citizens, mothers, human rights bearers, and members of a faith, to mention but a few of their multiple responsibilities and affiliations – at the center of the analysis. Arguably, the obligation to engage in just such renegotiation is pressing in light of the growing demands to reevaluate the relations between state and religion the world over. From the perspective of women caught in the web of overlapping and potentially competing systems of secular and divine law, the almost automatic rejection of any attempt to establish a forum for resolving standing disputes related to the religious dimension of their marriage might respect the protection-of-rights dimension of their lived experience, but does little to address the cultural or religious affiliation issue. The latter may well be better addressed by attending to the removal of religious barriers to remarriage, which does 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 that tradition for the dissolution of that relationship.

Thus the recommendation that religious women simply “exit” their home communities if they experience injustice within them is a nonstarter in this debate. If pious women wanted to leave their communities, the legal dilemmas that haunt them, 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. A Jewish woman who seeks a get (religious divorce decree) or a Muslim woman who wishes to be religiously released from a dead marriage relationship and have her mahr enforced, if she has an Islamic marriage contract – which is just that, a contract – may well wish to remain faithful to the identity-demarcating aspects of religious codes that, on legal and personal levels, were part of making the union possible and legitimate. Instead of asking women caught in the knots of secular
and religious marriage laws to leave their cultural worlds behind, it is preferable to make these colliding worlds visible and “legible.”

Although some may cling to the view that courts and legislatures can (and should) do is no more than uphold state law and ignore any other competing or overlapping sources of instruction and identity, it is impossible to return to a world of clean Mondrian-like lines of division of authority, if one ever existed. Instead, a major challenge facing constitutional democracies today is to rethink the relationship between state, non-state, local and transnational sources of law and identity, including the weight that ought to be given to religion, custom, and other norm-creating traditions. Calls for recourse to alternative faith-based dispute resolution processes (here, in the context of family law) are part of a pattern of constitutional pluralism that has emerged in the interactions between old and new, state and supranational bodies, individual or community. At the same time, such calls for private ordering are usually made by more conservative authorities or self-proclaimed guardians of the faith, and cannot be analyzed in isolation from broader discussions about power relations and who may legitimately “speak” and represent the interests of differently situated members of a religious minority.

The standard response that secular law is the only official law that is granted recognition by the state will not do either; this obscures the more complex reality of individuals adhering to both state and non-state sources of identity and meaning in governing their family affairs. Further, it relies on artificial and over-simplified distinctions between private and public, religion and citizenship, and contractual and moral (here, faith-based) obligations. Not only is this descriptively inaccurate, but it is also normatively unattractive. Awareness about the intersection between overlapping affiliations in the lives of individuals, especially women members of minority religions, remains absent. In this way, the official narrative of separation of state from religion artificially and harmfully turns a blind eye to the “close connection which many people – not just members of minority groups and communities – continue to make between law and religion” (Foblets 2014: xii). While providing a ready-made script for judges and legislatures to follow, this approach does not assist those most in need of legal protection and empowerment. It may also not withstand contemporary developments in private international law (giving greater priority to choice of law by the individual, including the turn to non-state sources of authority) or jurisdictional attempts to creatively envision alternatives that do not force women who belong to non-dominant religious communities into a punishing dilemma: your culture or your rights.

What can be done? Given that these strained interactions between law, religion and gender in the family arena are manifestations of deeper political and societial debates about justice and equality, diversity and unity, they will likely persist far into the future. There are several approaches currently available: some categorically advocate banning privatized diversity through a legal prohibition (although this may simply push the practice underground), while yet others favor turning a blind eye to the existence of non-state dispute resolutions processes, in the process inadvertently immunizing them from the purview of rights protections. Neither of these approaches stands up to scrutiny if we take seriously the idea that the experiences of women from religious minorities is the litmus test for assessing how well countries are responding to the needs of their religious minorities. Instead of wishing these complexities away, I believe the more promising and challenging route is to explore options for bringing non-statist sources of law, including certain aspects of religious law, into the fold of domestic, regional and international legal orders by introducing safeguards that will ensure that women who belong to minority religions are not forced to choose between their culture (or religion) and equality guarantees included in these multiple sources of law- and identity-making.

This is often easier said than done. We saw earlier that advocates of private (religious) ordering are mounting pressure on women to show their allegiance to the faith community by
rejecting the civil courts and other state agencies. This is a trend that must be countered and addressed head-on if we wish to recognize and respect women’s multiple and potentially overlapping affiliations as equal citizens and members of faith-based communities. However, it would be a grave mistake to assume that simply imposing a legal ban or prohibition against religious private ordering in family matters (or artificially ignoring its existence) will make these matters disappear. It may instead leave religious women in a more vulnerable position, whereby they will face increased pressures to turn to unauthorized and unregulated, unofficial private religious dispute resolution processes, without providing them the securities granted by pluralistic interpretations of personal status codes, international human rights norms, and protected constitutional provisions. Female members of juristic-centered religions, such as Judaism and Islam, will be hit especially hard by the framework of unofficial privatized diversity; they will have to fend for themselves under structurally unfavorable conditions.

Militating against such a result, we are better off pursuing new terms of engagement that give voice to those most affected, here, religious women caught in the web of religious and secular laws, as well as other key players who have a stake in finding a viable path to accommodating diversity with equality, including responsible leaders of faith communities, representative of various state agencies, judges, legislatures, members of religious minorities who straddle their loyalty and affiliation across jurisdictional and territorial borders, as well as potentially transnational or supranational players – in ways that will acknowledge and benefit observant women as members of these intersecting (and potentially overlapping and conflicting) identity- and norm-creating jurisdictions.

Even religious communities that seek to build walls around their members find that a diffusion of human rights ideas and resources is already occurring. Indeed, constructivist understandings of culture submit that such interactions are a major reason for the rise of “retro” and more radical interpretations of traditions that claim to purify it from the corrosive effects of the outside world (see e.g. Benhabib 2002; Moghadam 1994). Assuming that such direct and indirect influences are ongoing, there is “no neutral position for the state here: action and inaction both have consequences for the distribution of power and [authority] inside the cultural community” (Williams 2011: 71).

**Seeking alternatives: from Russian dolls to Venn Diagrams**

The current solutions on offer – either legislating away private ordering or simply ignoring the problem, wishing it away, or justifying action (in prohibiting face-covering, for example) or inaction (as in turning a blind eye to the existence of unregulated and unofficial faith-based tribunals and councils) under the cloak of “neutrality” – are no solutions at all. By failing to understand and respond to women’s unique demands, these tried and tested responses deliver neither justice nor fairness. Instead, they leave women with partial answers at best; such responses are easily co-opted by advocates of “recoiling” from engagement with the broader society and its laws, and affirm their desire to fill the void left by state inaction. Such a position effectively immunizes the wrongful behavior of more powerful parties. It has the perverse result of disempowering these women, or reinforcing their vulnerability, in the name of protecting their rights.

In the space remaining, I wish to briefly turn to explore the institutional horizons and possible justifications for permitting a degree of dynamic interaction (as I will call it) between religious and secular sources of obligation, so long as the baseline of equal citizenship is strictly maintained. The alternative approach I propose seeks to break the cycle of silencing and radicalization that the current situation facilitates. Adherents of the faith are simultaneously
citizens of the state and members of the larger family of humanity. In this way, diversity and equality, state and religion, are not perceived as Russian dolls that fit nicely and tightly into their own designed spaces, with its lexical or hierarchical order. Rather, we need a different imagery: they are entangled, like Venn Diagrams, they have certain separate components, by also intersecting and overlapping terrains that capture the nuance and variance of claims for equality and diversity that religious women increasingly bring to the fore. This new imagery permits us to ask what is owed to those women whose legal dilemmas 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.

Instead of asking women caught in the knots of these potentially rivalrous legal orders to leave their cultural worlds behind, the lessons of the new age of diversity encourage us to consider respecting a woman’s agency and choice if she voluntarily turns to non-binding religious sources for advice so long as nothing is then asked of her that would breach the basic rights and protections she has as a member of the larger society to which she belongs as an equal. We can think of such joint governance arrangements as facilitating freedom for individuals to turn to communal authorities to assist them with the removal of religious barriers to remarriage that deal with the demarcating aspects of group membership and collective identity that are of vital importance for any minority community operating within a larger political unit. Similarly they can turn to a family judge or civil arbitrator to resolve any related property, child custody or support obligations that deal with the distributive effects of the breakdown of a marriage relationship, and where the protected interests of religious women are not dramatically different from those of any other similarly-situated individual who has to get back on her feet. This approach discourages an underworld of unregulated religious dispute resolution and offers a path around the either/or choice between culture and rights, family and state, citizenship and group membership.

Given that cultural and religious traditions are never as uncontested or as inflexible as they are often presented, there is, inevitably, a need for minority communities, as well as dominant majorities, to find inventive responses to new challenges as they arise. For those within the community who reject the wholesale option of turning to binding faith-based tribunals in lieu of engagement with state institutions, but wish to uphold their rights as citizens while at the same time adhering to basic stipulations of entry into and exit from a marriage bond as a religious and moral obligation that is larger than oneself (such as the ability to define the community’s membership boundaries and to avoid a breach of a strict prohibition), a vision of dynamic interaction offers a viable alternative.

Entertaining just such possibilities, courts and legislatures have recently broken new ground by adopting what we might refer to as intersectional or joint governance remedies. One example is found in Bruker v. Marcovitz in which the Supreme Court of Canada explicitly rejected the simplistic your-culture-or-your-rights formula. Instead, the Court developed a nuanced and context-sensitive analysis, which begins from the ground up by seeking to identify who is harmed and why, and then proceeds to find a remedy that satisfies, as much as possible, the commitment to diversity and equality. Such an approach, the Court held, is consistent with,
specific performance, that is, to force the husband to implement a civil promise with a religious dimension. Instead, the judgment imposed monetary damages on the husband for the breach of his contractual commitment due to the harm it caused the wife personally and the public interest more generally. By taking into account these broader public policy considerations, which include gender equality and the ability of observant women to articulate their religious identity, as well as rely on contractual ordering just like any other citizen, this analysis demonstrates the possibility of employing a standard secular-legal recourse – damages for breach of contract, in this example – in response to specifically gendered harms that arise out of the intersection between multiple sources of authority and identity in the actual lived experiences of women who are both members of religious minority communities and of larger, secular states as well.

Those supporting a strong mono-legal regime will cry havoc, for dynamic interaction accepts the coexistence of different sources of law and identity in societies that formally adhere to the principle of strict separation. Seeking new pathways to incorporate certain aspects of religious law into domestic (state) legal orders, or at least creating a space for negotiating such intersections, is not a luxury reserved for academic musing but a pressing reality. It is an urgent political and juridical matter in light of the recurring tensions surrounding the appropriate scope of expression of religious identity in the public sphere, as we have seen in the discussion of veiling and regulation of the female body as a site of conflict. It is equally central in response to strong centripetal forces that threaten to pressure women who belong to non-dominant religious minorities to avoid any contact with or recourse to state laws and constitutional guarantees that are designed to overcome gender imbalances in power and bargaining positions, especially in the historically-gendered family law arena.

Despite the understandable desire to uphold a lexical priority or hierarchy of rights approaches, the reality is that in an age of constitutional pluralism the ideal of undivided authority is already blurred and contested. Dynamic interaction seeks to overcome the presumption against giving consideration to the choice of law expressed by a religious believer, so long as substantive equality rights and robust procedural protections remain the backdrop for such engagement with faith-based tribunals. Ideally, each community will shape its own unique variant of such a reconciliation, while upholding the tenets of its faith. This, again, is not merely a theoretical aspiration. There are countless examples of non-statist authorities crafting the terms of engagement with the laws of the state in ways that permit adherence to the hermeneutical tradition of the said community while at the same time complying with civil norms and responding to changed circumstances. Here, women’s burgeoning engagement in the revered

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15 [2013] EWHC 100 (Fam). In this decision, an English High Court referred the resolution of a contested divorce and child custody dispute to non-binding religious arbitration, which is how the parties chose to resolve their differences. However, the parties had to return to the court to gain its approval of the agreement reached under the consent order and were barred from offending any principle of English law or applicable international conventions. This negotiation process is a classic example of dynamic interaction in action. Once approved, it is the court’s civil order (not that of a religious arbitration proceeding) that has legal force and validity.

16 In Jewish law, for example, see Elon 2003. For further discussion, see Hirschl 2014.
task of reinterpreting the tradition can prove a key factor in bringing about such change and allowing voice for those who have been long silenced.

Even under the best of conditions, however, we cannot expect a linear narrative of emancipation and progress. Setbacks and counter-responses, including recoiling from engagement with if not outrightly discrediting the legitimacy of “unauthentic” agents of change, whether within or outside the tradition, is as predictable as it is inevitable. At stake is nothing less than the power to speak for a community and chart its future trajectory. This brings us back to responsibility of governmental and non-governmental actors embedded in local and transnational networks to monitor and improve the background conditions that are conducive to such participation and dynamic interaction. This requires the willingness to spend political capital on unpopular causes, a currency that, in today’s age of austerity and suspicion, is sorely lacking. If anything, the recent retreat from multiculturalism and rise of a restrictive turn (as manifested in the criminalization of face-veiling, for example) runs the risk of further marginalizing women who belong to non-dominant religious minorities, curbing their access to social services, public spaces, legal remedies, and economic opportunities. As such, it represents a failure of our commitment to enhancing both diversity and equality. To overcome this impasse, fresh ideas and new institutional designs that challenge settled conventions are required. Today, claims for full membership in the state and the group by the once voiceless are complemented by calls for change from within. In the intersecting worlds of gender, law and religion, sometimes the best way to make change is “not to debate endlessly whether or not such change is permissible but, after giving the matter due consideration, simply to act” (Ali 2004: 9; al-Hibri 2001; Biale 1984; Heschel 1995).

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Bibliography


Law, religion and gender


