When law meets diversity
Implications for women’s equal citizenship

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We live in an age of diversity, as Steven Vertovec eloquently articulates in the introduction to this Handbook (Vertovec, this volume) – but ours is also the age of equality. And both diversity and equality are open to multiple and potentially competing interpretations by those seeking social change. While it is now commonplace in the social sciences and humanities to emphasize the fluidity and malleability of collective identities, rejecting reified notions of culture and religion and instead placing a “cosmopolitanized” individual at the heart of the analysis (Beck 2006), the law has traditionally had a hard time dealing with intersectionist, dynamic identities (e.g. Nussbaum 2012). It tends to pin them into fixed boxes. This is true for individuals, and it is true for collectives such as religious, ethnic, or linguistic minorities. This raises several important questions: who can, and should, speak for a minority community in inter- and intra-communal legal disputes? How are we to define “culture” and “religion” for the purposes of crafting legal policies of reasonable accommodation or exemption, and according to what criteria? Who gets silenced when the state “takes sides” in disputes concerning membership demarcation or the distribution of rights and powers among group members?

In recent years, arguments over the recognition that ought to be afforded to religious faiths and practices have risen to the forefront of public debate. This is evidenced by the controversy in Europe about the issue of veiling, an issue that has been considered in the European Court of Human Rights several times over the last decade (Howard 2011; Laborde 2008), and we may well see a new wave of controversy and litigation with the coming into force of face-covering laws and regulations. As if these charged debates over the boundaries of recognition (or, increasingly, restriction) of the expression of religious-identity markers in the public sphere – what I shall refer to as the terms of fair inclusion – do not present enough of a challenge, we are also starting to see a second, related type of claim by advocates of privatized diversity (Shachar 2008, 2013). Unlike fair inclusion, privatized diversity captures the growing pressure exerted by the more conservative elements within religious minority communities to promote a whole new kind of politics, one that invites members of the faith community to turn to private, religious dispute-resolution processes in lieu of the ordinary institutions of the state with its human-enacted constitution (Hirschl and Shachar 2009). Privatized diversity, in its extreme variants, represents a call for insulation from the general law of the land, and possibly also from international human rights standards, in effect asking members of minority communities to engage in “private
ordering,” potentially at the risk of losing established protections under public law. This new trend raises weighty justice issues, such as whether reliance by individuals and communities on alternative dispute mechanisms established by contract and consent can absolve the state from responsibility if these non-state mechanisms breach an individual’s hard-earned rights and protections as an equal citizen. The jurisprudence on this question has been mixed, but recent years have seen a shift in both regional and international law jurisprudence toward a view that holds the state accountable for human rights violations even if they are perpetuated by non-state actors (Quane 2013: 682–3).

The situation is more ambiguous under domestic law, however. There is a wide spectrum of response to this issue across different countries, with their varying state–religion models and varying degrees of legal pluralism (Adhar and Leigh 2005; Barro and McCleary 2005; Shachar 2001; Stone 2008). That said, there are important dilemmas at play even under the most favorable conditions. The most difficult challenge for advocates of greater recognition of cultural diversity in societies committed to the separation of state from religion has always been that of line drawing. Clearly, not every claim that is grounded in “culture” or “religion” should be respected by the state and the wider society (Kymlicka 1995; Parekh 2002). But what precise set of principles or guidelines ought to be used to distinguish between those situations that merit recognition, exemption or accommodation from those that do not? When conflicts arise, for example, between group autonomy and individual rights, who, or what entity, should have the authority to determine how to resolve them – and on what basis? These hard questions evade any neat and simple answers. Indeed, they linger as a source of charged and ongoing debate in the world of scholarship and public policy making even among those committed to a multicultural vision of citizenship and human rights; among those who oppose and reject such a vision, they obviously provide ample fodder.

Addressing with a clear moral voice the actual cases where conflicts between claims for equality and of respect for diversity are concrete and proven is imperative in a just society. At the same time, it is equally important that new ways be crafted to identify those situations where diversity and equality can be seen as mutually reinforcing rather than conflicting and incompatible. The trickier task is that of finding ways to translate these values into applicable measures that make inclusive membership a reality that counters the marginalization of non-dominant minorities, both within and across different communities and affiliations. For women caught in the knots of secular and religious legal orders, especially in the context of marriage and divorce, such a new approach holds the promise of averting the “your culture or your rights” dilemma, instead giving them recognition and protection as both religious believers and equal citizens.

Exploring hot-button issues ranging from denial of access to citizenship, to niqab-wearing women, to the display of crucifixes in state-run public schools, to the rise of private religions arbitration tribunals, my discussion will draw upon comparative constitutional law and jurisprudence in order to elucidate some of the most pressing challenges and dilemmas we face today in our diverse societies. I will then offer several ideas about how it might be possible to mitigate the potential strains between diversity and equality, before turning to chart the still unresolved and puzzling dimensions of these dilemmas which are ripe for critical analysis and innovative multidisciplinary research.

The “cultural turn” in citizenship

The worldwide backlash against multiculturalism (Banting and Kymlicka 2013; Vertovec and Wessendorf 2010) gives new impetus to reflect on the relation between diversity and equality. This new political reality has placed female members of religious minorities at the epicenter of
larger debates about “civilization” and progress, membership and its “others.” A compelling contemporary example of this trend can be found in the fierce controversies surrounding legislation that bans the public wearing of head-to-toe veiling and particularly the more extensive forms of face covering (the niqab and burka). France was the first country in Europe to implement such a ban, which it did with legislation that prohibits the wearing of any clothing that conceals the face while in public spaces, except when worshipping in a religious place. A woman wearing a face veil in defiance of the law risks a fine; this can also be accompanied or replaced by compulsory citizenship classes. Such state action purports to advance the goals of gender equality, secularism and public order, but it may stand in tension with protected principles of religious freedom, as well as with individual choice and autonomy. Generalized bans of this nature, and their compatibility with constitutional principles and human rights norms, will surely occupy domestic and regional courts in the years to come. At present, it is undisputed that the relentless attention paid to Muslim women’s veiling has only further politicized the matter. In the current charged environment, every act of veiling (or refusing to veil) is interpreted by multiple actors as a statement about one’s “loyalty” and “belonging.” What is often lost in the discussion is a recognition that immigrant women who belong to minority or marginalized religious communities are constantly negotiating their multiple affiliations (to their gender, their faith, their families, their new and old home countries, and so on) while operating within a tight space for action. Nevertheless, these women and their attire have become visual markers of far broader struggles over power and identity, secularism and the expression of “difference,” the blurring of once-fixed lines distinguishing the metropolitan from the rest of the (once-colonized) world, and the ability to “speak” for oneself rather than being artificially placed in predefined boxes and categories. The situation has also reinforced the majority culture as the norm and thereby marked certain communities as implicitly “foreign.”

Many of these themes came to a head in the Faiza M. ruling. In Faiza M., the Conseil d’État upheld a decision to decline a naturalization request submitted by a Muslim female immigrant named Silmi, who was legally admitted to France, spoke fluent 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 essential values of the French communauté, especially the principle of equality between the sexes”. This decision was grounded in article 21–4 of the Civil Code as it applied in 2005, which states that “[b]y 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”.

The formal legal basis for the denial was not the religious attire per se, but rather the government’s conclusion that Silmi had shown “insufficient assimilation” into the French Republic. In reality, however, as one astute legal observer noted, it remains uncertain whether Silmi was denied citizenship due to “her beliefs, or her conduct, or both” (Orgad 2010: 64). If we think of a country’s immigration and citizenship law and policy as a porous membrane that reflects and discloses the qualities it values in its members-to-be, then the Faiza M. decision tells us something important about the state of citizenship today and the direction in which we may be heading. By denying an immigrant woman access to citizenship, the Conseil d’État left her in a dependent position vis-à-vis her husband, who already had a secure legal status in the state, and 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 (Nussbaum 2012; Volpp 2007).

This logic of incompatibility relies on an inflated dichotomy between culture (“them”) and citizenship (“us”), and between symbols of subordination (“veiling”) and of emancipation (the “naked face”), paradoxically reflecting a secular-absolutist vision of feminism that may end up
leaving precisely those individuals it purports to defend in a vulnerable and dependent position, giving them only restricted access to the settlement and governmental services that new immigrants need most. A related debate, this one about the wearing of visible religious symbols – crosses, veils, turbans, and yarmulkes – during the provision or receipt of government services, is now brewing in Quebec. The view of those in favor of such a ban is informed by a particular vision of state neutrality that is then translated into a governmental prohibition of the personal display of religiosity in the public sphere. This vision rallies the identitarian claims of many members of the majority, while at the same time disproportionately burdening the religious freedoms of minorities and ignoring the intersection of overlapping affiliations in individuals’ lives.

Is there a more fruitful approach that overcomes this predicament? I believe the answer is in the affirmative, although reaching it will require a healthy dose of hard-nosed imagination as well as innovative strategies for building the political will required to address the momentous challenge we face – namely, the challenge of determining how to nourish pathways to membership in both minority communities and the larger societies to which individuals belong in ways that will allow women, sexual minorities, and other historically vulnerable individuals to enjoy full and equal protection of their rights to cultural expression and substantive equality (Henrard, forthcoming; Shachar 2013). There are already promising developments that can guide us in thinking about how to get from here to there, but elaborating and fleshing these out is a task for the next generation of scholars and jurists.

**Fair inclusion in the public sphere**

No state is an island. And no state can be regarded as a tabula rasa. Each society makes collective choices about its official language(s), public holidays, and national symbols, choices that lead to some members feeling more welcome than others. Claims of fair inclusion are designed to overcome the “burdens, barriers, stigmatizations, and exclusions” that occur under laws and institutions that “purport to be neutral . . . [but] are in fact implicitly tilted towards the needs, interests, and identities of the majority group” (Kymlicka and Norman 2000: 4). These are claims for equal respect and equal opportunity for members of non-dominant minority cultures in a diverse society, as well as calls to renegotiate the tripartite relationship between the state, the group, and the individual.

In the legal arena, fair inclusion refers to a wide range of exemption or accommodation measures which are designed to make it possible for religious and other minorities, if they so wish, to “express their cultural [or religious] particularity and pride without it hampering their success in the economic and political institutions of the dominant society” (Ryder 2008: 87). In the American tradition, the US Supreme Court’s decision in *Sherbert*, termed a “high water mark” in the constitutional protection of minority religions, provides a textbook example. In that case, the Court held that a Seventh-day Adventist who was fired for refusing to work on her Sabbath could not be denied unemployment compensation. Under the *Sherbert* approach, religious freedoms may only be curtailed to further a compelling state interest, and only as a last resort. Even in last resort situations, the least restrictive means must be adopted.

Another illustration of fair inclusion is drawn from Canada, from a Supreme Court of Canada (2006) case called *Multani*. This case involved an 11-year-old Sikh immigrant, Gurjab Singh Multani, who was enrolled in a public school in Quebec. The Court considered whether the boy should be allowed to carry a *kirpan* (a ceremonial dagger) in accordance with his beliefs, even though his doing so created potential safety hazards and led to an apparent conflict with the school board’s prohibition on weapons and dangerous objects. Indeed, the categorization of the
Kirpan as either a prohibited weapon (as the school board claimed) or an important religious symbol (the position of the pupil, his parents, and the interveners on behalf of the Sikh community) was at the heart of the dispute. In Canada, judges addressing a constitutional case of this nature will look to whether the state body being challenged curtailed the plaintiff’s religious freedom in the “least drastic” way possible. A decision to ban the kirpan universally, the Court ruled, was not the least drastic means to address the rather limited potential of harm, especially considering the sincerity of the pupil’s religious beliefs. The Court thus held in favor of Multani, the pupil, and in the process provided a resounding articulation of the fair inclusion vision of human rights and equal citizenship:

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

(Multani, para. 71)

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

Many other distinguished courts (whether national or supranational) have taken a less favorable view to minority-based fair inclusion claims than the Supreme Court of Canada, instead facilitating the “re-appropriation” of culture by members of dominant majorities. The Lautsi decision recently handed down by the Grand Chamber of the European Court of Human Rights (ECtHR), which sits in Strasbourg at the apex of the European human rights system, offers a powerful illustration. In Lautsi, the Grand Chamber rejected the human rights claim of a Finnish-born mother residing in Italy who objected to the mandatory display of crucifixes in her sons’ public school. Using the “margin of appreciation” technique, the Court held that there is no consensus among the contracting parties on the issue of religious symbols in public space, so that it is up to individual signatory states to determine whether or not to display the crucifix in schools. The Strasbourg Court did clarify, however, that the Italian tradition of display “confer[s] on the country’s majority religion preponderant visibility in the school environment” (Lautsi, para. 71), though it held that such visibility did not reach the prohibited level of indoctrination of young pupils. In effect, this meant that non-Christian children and those professing no religion will continue to be educated under the cross – literally – in Italian state schools. In earlier stages of this legal dispute, Italy argued that in a non-religious context like a school, the crucifix carries a different meaning; it is not a religious emblem (as it would be in a place of worship) but a universal and inclusive symbol of tolerance. This reversal of meanings – a majoritarian religious icon being turned into a national symbol of tolerance and “the foundation of our civil life” (as Italy put it) – not only reaffirms the standing and privilege of the dominant majority, but also turns the minority claimants into the “intolerant” ones by implying that they have failed to understand the inclusive intent of the majority.
Law and women’s equal citizenship

Privatized diversity in family law

The bulk of the literature on citizenship, multiculturalism, and human rights has focused on the aspirations of fair inclusion, while almost completely ignoring the challenges raised by privatized diversity, which are most actually manifested in the fields of education and family law. A dramatic example of this trend is found in the acrimonious and globally important debates that broke out in Canada during the opening decade of the twenty-first century over the possibility of using faith-based principles to resolve, in a binding fashion, a range of family and inheritance disputes among consenting parties by turning to extralegal, alternative sources of authority and identity. In their most extreme variants, demands for privatized diversity amount to a call for the secular state (through its manifold institutions and agencies) to adopt a hands-off approach whereby private religious arbitration tribunals give parties an unrestrained choice of forum and choice of law, and operate, as it were, in a completely unregulated and parallel domain of service provision “untouched” by established legal norms and values. On this account, respect for religious freedom or cultural integrity does not require inclusion in the public sphere, but exclusion from it.

This potential storm-to-come must be addressed head on. Privatized diversity involves a mix of three inflammatory components of today’s political environment: religion, gender, and the rise of the neoliberal state. The volatility of these issues is undisputed; they require a mere spark to ignite. In England, a scholarly and nuanced lecture by none other than Rowan Williams, the former Archbishop of Canterbury (the head of the Church of England/Anglican Church), which explored the relations between civil and religious law and proposed further accommodation of the latter within the former (Williams 2008), has provoked zealous criticism from across the political spectrum. In the United States the debate has taken a different twist: recently, a slew of state legislatures passed amendments that “preempt” and prevent the use of religious principles in courts, arbitrations, or mediations, specifically singling out both Shari’a law and international law as competing normative orders that must be avoided (Helfand 2010).

With this background in mind, we can see why Rowan Williams’s lecture and the Shari’a tribunal debate in Canada provoked such uproar. These proposals were seen as challenging the normative and juridical authority, not to mention the legitimacy, of the 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 raises profound questions concerning hierarchy and lexical order in 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 regulatory state retains an interest in marriage and divorce for public policy reasons, including its interest in promoting gender equality and children’s welfare and in lessening the impact of family breakdown on third parties. But it is no longer, if it ever has been, the only force that matters. Historically, of the conflicting claimants to authority in family law, it is the state, not the church, that is the newcomer. Gaining the upper hand in regulating matters of the family has always been significant both politically and jurisdictionally. It represented the solidification of power in the hands of secular authorities, a symbol of modern state-building. As historian Nancy Cott observes, “For as long as the past millennium in the Christian West, the exercise of formal power over marriage has been a prime means of exerting and manifesting public authority” (Cott 1995: 108).

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

The contours of dynamic interaction

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 and its social imaginary (Vertovec 2012) 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 (e.g. the get, the Jewish divorce decree, or the khula, a divorce proceeding that can be initiated by the Muslim wife), while turning to a family judge or secular arbitrator to resolve any related property, child custody, or support obligations. 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. The next step in my analysis is to investigate whether a carefully regulated recognition of multiple legal affiliations – and the subtle interactions among them – can permit devout women to benefit from the protections offered by the secular order without abandoning the tenets of their faith.

The ambition, easier to define than to implement, is to find a more fruitful approach that overcomes the predicament 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.

In a world of increased mobility across borders, these pressures also acquire a transnational dimension. In Great 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 (Carrol 1997). 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.

These acute challenges cannot be fully captured 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 to those women whose legal dilemmas (at least in the family-law arena) arise from the fact that their lives have already been affected by the interplay between overlapping systems of identification, authority, and belief—in this case, religious and secular law. The Jewish test case of the agunah (pl. agunot), a woman whose marriage is functionally over but whose husband refuses to issue or grant a writ of Jewish divorce (a get), will serve as an illustrative example. In contrast with privatized diversity, the alternative I develop invites both the state and the faith community to accommodate individuals who are already entangled in both secular and religious bonds. Many jurisdictions permit the solemnization of marriage by recognized religious, tribal, or customary officials, and thereby allow a degree of regulated interaction between state and non-state traditions at the point of entry into marriage. At least in theory, there is no reason not to implement a similar kind of coordination at the point of exit from such a relationship. Indeed, this is already a reality in some jurisdictions.

English law, for example, now permits collaboration between family courts and Rabbinical tribunals (beth din, pl. battei din) to ensure the removal of religious barriers to remarriage, as does the famous New York “get law.” Such engagement and coordination across the secular–religious divide is informed by a commitment to substantive (rather than merely formal) equality. It is designed to allow individuals with multiple belongings the same freedoms as other citizens—in this context, the right to be released from a dead marriage and to build a new family if they so wish. Taken to its logical conclusion, engagement in dynamic interaction can be understood as a form of fair inclusion that tames and resists the opposing centrifugal and harmful tendencies of privatized diversity.

The motivation for this kind of interaction is the need to integrate diversity with equality. This is not a prescription likely to be favored by advocates of privatized diversity, who claim authority to define and enforce a “pure” or “authentic” manifestation of a distinct cultural or religious identity in the face of real or imagined threats. Such self-proclaimed “guardians of the faith” wish to impose rigid readings of what are arguably more flexible and malleable traditions, and threaten to stifle interpretative debates within the religious community itself about the potential adoption of more gender-friendly readings of sacred texts and the tradition that evolved from them. For those advocating variants of “retro-traditionalism” (Moghadam 1994), it is convenient to portray the constitutional state as an external “enemy,” a foreign intruder that has no interest in truly recognizing or accommodating the special needs of the faithful. Such hyperbolic arguments, whether falsifiable or not, then serve as a pretext for encouraging community
members to “contract out” of the kind of protections they are guaranteed as citizens and human-rights bearers, all as part of an agenda to establish unofficial and privatized “islands of jurisdictions” that lie outside the governance of such secular orders. No less significant, such pressures can also be utilized within minority communities to legitimize strict readings of traditional rules and practices that breach women’s hard-earned rights with respect to marriage, divorce, property, and a host of other issues. In the process, these pressures obscure a critical reality: traditions are always contested, but marginalized women rarely have a say in shaping them.

The alternative approach I propose can break the cycle of silencing and radicalization that privatized diversity facilitates. Adherents of the faith are simultaneously citizens of the state and members of the larger family of humanity. Even religious communities that seek to build walls around their members find that 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 (Benhabib 2002; Moghadam 1994; Shachar 2001; Song 2007). Assuming that such direct and indirect influences are ongoing, there is “no neutral position for the state here: action and inaction both have consequences for the distribution of power and [authority] inside the cultural community” (Williams 2011: 71). Given that cultural and religious traditions are never as uncontested or as inflexible as advocates of privatized diversity would like us to believe, there is, inevitably, a need for minority communities, as well as dominant majorities, to find creative answers to the ongoing challenges of interacting with the multiple pressures around them, whether above or below the state level. For those within the community who reject the wholesale option of privatized diversity but wish to uphold the most precious aspect of personal status law from the perspective of their faith (such as the ability to define the community’s membership boundaries and 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 “intersectionist” 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, not contrary to, public order. Moreover, it harmonizes with Canada’s approach to religious freedom, to equality rights, and to divorce and remarriage generally, and it has been judicially recognized internationally. In England, the recent decision in *AI* v. *MT* exhibits a similar logic and represents another step in the direction of finding compatibilities among different sources of law and identity that already intersect in women’s lived experience and that matter greatly for their sense of self and their membership in the multiple communities to which they are attached as rights and culture bearers.

Despite persistent, and at times oppressive, attempts by the modern state to monopolize the power to regulate law and identity, other relations and values have retained a hefty influence in this significant realm of life. The resulting issues are among the most complex and sensitive matters that need to be addressed in today’s diverse societies. Alas, the almost automatic response of insisting on the disentanglement of state and church (or mosque, synagogue, and so forth) in the regulation of 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 full inclusion in both the state and the group is grounded in their multilayered connections to both systems. Empowering the once voiceless has always been a central mission of human
rights. To reach this goal, we sometimes require fresh ideas and innovative institutional designs that challenge settled conventions. The assumption that it is impossible to grant consideration to religious diversity and gender equality at the same time is one convention that ought to be so challenged.

References


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