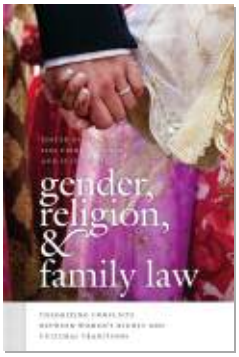
Gender, Religion, and Family Law

Joffe, Lisa Fishbayn



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AYELET SHACHAR

Chapter Two Privatizing Diversity A Cautionary Tale from Religious Arbitration in Family Law

Demands to accommodate religious diversity in the public sphere have recently intensified. The debates surrounding the Islamic headscarf (hijab) in Europe vividly illustrate this trend. We also find a new challenge on the horizon: namely, the request to "privatize diversity" through alternative dispute resolution processes that permit parties to move their disputes from public courthouses into the domain of religious or customary sources of law and authority. The recent controversies in Canada and England related to the so-called Sharia tribunals demonstrate the potential force of the storm to come. In this chapter, I offer an alternative to the presently popular vision of private diversity. This alternative is based on a deep commitment to women's identity and membership interests as well as their dignity and equality. Women's legal dilemmas often arise (at least in the family arena) from their allegiance to various overlapping systems of identification, authority, and belief — in this case, those arising from religious and secular law. I argue that only recognition of women's multiple affiliations, and the subtle interactions among them, can help resolve these dilemmas. The recognition of multiple legal affiliations does not sit well with the traditional view that a clear line can be drawn between public and private, official and unofficial, secular and religious, or positive law and traditional practice. Instead, to recognize multiple affiliations is to require greater access to and coordination among these once competing sources of law and identity. Once we conceive of citizenship more richly, it becomes apparent that individuals and families should not be forced to choose between the rights of citizenship and group membership; instead, they should be afforded the opportunity to express their commitment to both. I offer a vision of how such an alternative might be realized.

> The title of this series of lectures ["Civil and Religious Law in England"] signals the existence of what is very widely felt to be a growing challenge in our society — that is, the presence of communities which, while no less "law-abiding" than the rest of the population, relate to something other than the British legal system alone. — *The Archbishop of Canterbury (Feb. 7, 2008)*[1]

Introduction

In discussions about citizenship, we repeatedly come across the modernist schema of privatizing identities: we are expected to act as undifferentiated citizens in the public sphere but remain free to express our distinct cultural or religious identities in the private domain of family and communal life. Yet multiple tensions have exposed cracks in this privatizing identities formula; for instance, where precisely does the "private" end and the "public" begin?[2] What happens when cultural and religious customs extend beyond the home into the spaces of our shared citizenship, such as the school, the workplace, or the voting booth? The recent debates surrounding the hijab (the headscarf worn by some Muslim women), which have engulfed courts and legislatures from Germany to France to Turkey, vividly illustrate these tensions.[3]

We are also starting to see a new type of challenge on the horizon: namely, the request to "privatize diversity" through alternative dispute resolution processes that permit parties to move their disputes from public courthouses into the domain of religious or customary sources of law and authority. The recent controversies in Canada and England related to the so-called Sharia tribunals demonstrate the potential force of the storm to come. Acceptance of privatized diversity may indirectly make room for non-state norms to operate authoritatively within what are otherwise secular legal systems. It could also immunize such processes from the regulatory reach of statutory or constitutional norms of gender equality. These potentially far-reaching alterations to the legal system cannot be fully captured by the old and rigid vocabulary of "private" versus "public"; if anything, these changes challenge the very logic of this distinction. But what are the normative and prudential implications of this attempt to realign secular and religious law, public and private justice, citizenship and diversity? Who is likely to gain, and who may stand to lose from such changes? These are the questions that I will explore in the following pages.

In this chapter, I offer an alternative to the presently popular vision of "privatized diversity." Instead of resorting to a traditional public model, however, I explore the idea of permitting *regulated interaction* between religious and secular sources of law, so long as the baseline of citizenship-guaranteed rights remains firmly in place.[4] Unlike the strict separation model, which is willfully blind to the intersection of manifold affiliations in individuals' lives — to their state, religion, gender, and so on — I take this multiplicity as the point of departure for my analysis. These overlapping "belongings" offer religious women a significant source of meaning and value; at the same time, they may also make them vulnerable to a double or triple disadvantage, especially in a legal and governance system that categorically denies cooperation between their overlapping sources of obligation.

Although limiting intervention by the courts in cases where religious and civil worlds collide has had a long history, the urgency of my plea for rethinking this approach is informed by the contemporary revival of demands for privatized diversity in Canada, England, and elsewhere. The reincarnation of this debate raises a slew of important questions for our conception of citizenship in contemporary societies in the context of a wider trend toward the privatization of justice in family law. Consider the following examples: Should a court be permitted to enforce a civil divorce contract that also has a religious aspect — namely, a promise by a Jewish husband to remove all barriers to remarriage by granting his wife the religious *get* (Jewish divorce decree)? Is it legitimate to establish private religious tribunals — as alternative dispute resolution (ADR) forums — in which consenting adults arbitrate family law disputes according to the parties' religious personal laws in lieu of the state's secular family laws? And, is there room for considerations of culture, religion, national origin, or linguistic identity in determining a child's best interests in cases of custody, visitation, education, and so on? None of these examples are hypothetical. They represent real-life legal challenges raised in recent years by individuals and families who are seeking to redefine the place of culture and religion in their own private ordering and, indirectly, in the larger polity as well.[5]

Family law serves as a casebook illustration of these tensions. Take, for example, the situation of observant religious women who may wish — or feel bound — to follow the requirements of divorce according to their community of faith, in addition to the rules of the state, in order to remove barriers to

remarriage. Without the removal of such barriers, women's ability to build new families, if not their very membership status (or that of their children), may be adversely affected. This is particularly true for Muslim and Jewish women living in secular societies who have entered into the marital relationship through a religious ceremony — as permitted by law in many jurisdictions. For them, a civil divorce is merely part of the story; it does not, and cannot, dissolve the religious aspect of the relationship. Failure to recognize their "split status" position — namely, that of being legally divorced according to state law, though still married according to their faith — may leave these women prey to abuse by recalcitrant husbands who are well aware of the adverse effect this situation has on their wives, as they fall between the cracks of the civil and religious jurisdictions.[6]

Ignoring this multiplicity of affiliations may be compatible with an abstract public/private divide, but it misses the mark for these embedded individuals. Even the bulk of theoretical literature on multiculturalism seems to lose sight of this type of concerns, engaging instead in intricate attempts to delineate the boundaries of *public, state-sponsored accommodation of diversity*.[7] As if the public accommodation dilemma did not present enough of a hurdle for policymakers seeking to build a pluralist society, pressing at the edges is another, less easily categorized challenge, which I will here refer to, for the sake of clarity and simplicity, as *privatized diversity*. The main claim raised by advocates of privatized diversity is that what respect for religious freedom or cultural integrity requires is not inclusion in the public sphere, but exclusion from it. This leads to a demand that the state adopt a hands-off, noninterventionist approach, placing civil and family disputes with a religious or cultural aspect fully *outside* the official realm of equal citizenship.

To illustrate this growing trend, I focus on an acrimonious debate that recently broke out in Canada following a community-based proposal to establish a "Private Islamic Court of Justice" (*darul-qada*) to resolve family law disputes among consenting adults according to Sharia principles. This proposal didn't come to the fore in the usual way, through democratic deliberation, constitutional amendment, or a standard law-reform process. Instead, a small and relatively conservative nongovernmental organization, named the Canadian Society of Muslims, declared in a series of press releases its intention to establish the said *darul-qada*, or Sharia tribunal, as this proposal came to be known

in the ensuing debate.[8] In a nutshell, their idea was to rely upon a preexisting legal framework, the Arbitration Act, which (at the time) permitted a wide array of family-law disputes to be resolved under its extensively open-ended terms.[9] The envisioned tribunal would have permitted consenting parties not only to enter a less adversarial, out-of-court, dispute resolution process, but also to use the act's "choice of law" provisions to apply religious norms to resolve family disputes, according to the "laws (*fiqh*) of any [Islamic] school, e.g. Shiah or Sunni (Hanafi, Shafi'i, Hambali, or Maliki)."[10]

Instead of debating in the abstract whether to permit or prohibit the tribunal, I approach this privatized diversity challenge from a different angle. My point of departure is a grounded commitment toward respecting women's identity and membership interests as well as their dignity and equality.[11] I then ask what is owed to those women whose legal dilemmas (at least in the family arena) often arise from the fact that their lives are *already* affected by the interplay between overlapping systems of identification, authority, and belief. I suggest that only recognition of their multiple legal affiliations, and the subtle interactions among them, can help resolve these dilemmas. The idea of recognizing the multiplicity of individuals' legal affiliations does not sit well with the traditional view of hermetically separated spheres divided along the presumably clear-cut axes of public/private, official/unofficial, secular/religious, positive law / traditional practice. Instead, recognition calls for greater access to and coordination between these multiple sources of law and identity. In this richer conception of citizenship, individuals and families should be afforded greater options to express both their citizenship and group membership, rather than be forced to sacrifice one for the sake of the other.

The discussion proceeds in four parts. It opens with a typology of the "privatized diversity" family of claims, explaining why the Sharia tribunal's proposal represents a new phase in the debate about relations between secular and religious jurisdictions. This is precisely because of the tribunal's advocates' reliance on a positive law conception of "private ordering" through alternative dispute resolution (ADR). Identifying and assessing the implications of this "intermingling" of secular ADR mechanisms with religious privatized-diversity claims lies at the heart of my discussion. This fast-emerging set of challenges adds a whole new dimension to debates over multicultural or "differentiated" citizenship, placing them in the context of a broader trend that could see the

ceding of state power in the sphere of marriage in favor of increased private ordering through contract and arbitration.

Turning to the Sharia tribunal example, in part 2 I use this particular narrative as a means to explore deeper concerns about the interrelationship between the privatization of justice, religious family law, and gender equality. I will elucidate three possible sources of feminist concerns that arise from the tribunal's proponents' espoused variant of privatized diversity: consent, inter- and intra-communal pressures, and the inadequacy of the exit option. I then explain how the Sharia tribunal debate revealed a slippage from a critique of privatization of justice per se (the legal framework allowing consenting parties to remove family disputes from the courts to ADR forums, or what I call "phase 1") to opposition to privatized diversity, which goes beyond phase 1 by calling for the introduction of customary or religious principles as relevant sources for family arbitration (phase 2). The convergence of these two strands of critique galvanized opposition to the tribunal, in the process concealing the validity of concerns expressed by religious women whose legal situation cuts across the idealized civil/religious divide.

In part 3 I argue that what is called for is a more context-sensitive analysis that sees women's freedom and equality as partly *promoted* (rather than inhibited) by recognition of their "communal" identity. Such a vision can help inform creative paths for cooperation that begin to match the actual complexity of lived experience in our diverse societies. I demonstrate the possibility of implementing such a vision by reference to a recent decision by the Supreme Court of Canada, *Bruker v. Marcovitz.* Finally, in revisiting the Sharia tribunal example in the last part of the chapter, I distinguish between ex ante and ex post regulatory oversight mechanisms, explaining why the former is preferable to the latter in the context of family arbitration. I close by reflecting on the government's chosen policy to *ban* any type of family arbitration by faith-based tribunals, thus reaffirming the classic public/private divide. While this decision is politically and symbolically astute, it does not necessarily provide protection for those individuals most vulnerable to their community's formal and informal pressures to turn to "unofficial" dispute-resolution forums in resolving marital issues. The decision may instead push these non-state tribunals underground where no state regulation, coordination, or legal recourse is made available to those who may need it most.

I. Privatized Diversity in Context

Here's a stark "privatized diversity" dilemma: how should a secular state respond to claims by members of religious minority groups seeking to establish private arbitration tribunals in which consenting members of the group will have their legal disputes resolved in a binding fashion — according to religious principles — under the procedural umbrella of ADR? To those seeking to establish a radically pluralistic legal system in which claims of culture or religion always trump other considerations or those endorsing a fully privatized regulation of our social interactions (permitting little if any room for government-created and government-enforced law), this strong vision of privatized diversity may appear quite attractive.[12] Yet for others who endorse a strict separationist approach, or "blindness" toward religious or cultural affiliation, the idea that we might find unregulated "religious islands of binding jurisdiction" mushrooming on the terrain of state law is seen as evidence of the dangers of accommodating diversity, potentially chipping away, however slightly, at the foundational, modernist citizenship formula of "one law for all."[13] Add to the mix two inflammatory components in today's political environment — religion and gender — and the stirrings of disagreement, likely followed by polarization, will soon be heard.[14]

This is what recently happened in Canada, with the debate over the so-called Sharia tribunal. This tale will serve as the basis for my analysis of the surprising lacuna that lies at the heart of multicultural theory: the manner in which we should deal with demands for respecting diversity, which are not raised as calls for fair and just *inclusion* in the public sphere — the latter vividly captured by Iris Young's image of a "heterogeneous public, in which persons stand forth with their differences acknowledged and respected."[15] Rather, what we are dealing with here is a different category of claims for *opting out of*, or seceding from, the effects of the polity's public laws and norms. Let us call the former pattern of multicultural inclusion *public accommodation*, and the latter, *privatized diversity*. My particular interest lies in exploring the scope and limits of privatized diversity, especially in those situations where claims for religious-based arbitration intersect and interact with concerns about power disparities between men and women in the resolution of family-law disputes.

A. FROM PUBLIC ACCOMMODATION TO PRIVATIZED DIVERSITY

To understand the significance of the privatized diversity claim, we must place it in a broader context. To begin with, as just mentioned, it is clearly distinguishable from the vision of public accommodation, which is "intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society."[16] Privatized diversity, by contrast, is not designed to ensure greater inclusion in the dominant society's institutions; instead, it offers an *alternative* to these institutions. This vision is also different from state-accommodationist legal structures that we find in countries like Israel, Kenya, or India, which publically and officially recognize and facilitate a degree of diversity in the regulation of the family.[17] In these countries the legislature vests recognized customary and religious communities with legal powers over certain matters of personal status; in the privatized diversity model, individuals *contract out* of the secular regime by turning to a private (i.e., non-state) dispute-resolution forum. Contrast this with the situation in Israel, for example, where judges sitting in Rabbinical or Sharia courts are appointed according to a state-defined selection process and are thus subject to closer scrutiny than any out-of-court third-party arbitrator chosen by the parties to resolve their legal disputes.[18] What is more, even in these more pluralistic family law regimes, the government does not leave the field of family regulation unchecked; it typically sets in motion a set of universally applied statutory limits (e.g., minimal age restrictions or equitable property-division presumptions) that apply across the board, effectively limiting the forms of marriage and divorce agreements that can be lawfully solemnized by representatives of the various identity communities.[19]

Neither is the privatized diversity model analogous to the situation found in many Arab and Muslim countries, where the Sharia informs *national* family-law legislation: this typically involves a process of codification of Islamic sources by a secular legislature in the post-independence period, which has in some places led to the adoption of more gender-equitable readings of the religious tradition, as manifested in the recent family-law reforms in Egypt and Morocco.[20] These liberalizing reforms have been advocated by a nontraditional alliance of feminist organizations, civil court functionaries, and moderate religious authorities.[21] This kind of coalition building on the

ground has permitted the reshaping of a (state-codified) Islamic family-law framework from *within* the religious tradition as it interacts with national and transnational claims for justice and human dignity — in lieu of asserting a rigid opposition between Islamic texts and feminist demands for greater equality and fairness in the family.[22]

B. THE NEW TERRAIN: DIVERSITY AND THE PRIVATIZATION OF JUSTICE IN FAMILY LAW

One final distinction is appropriate as we identify the distinct features of the privatized diversity family of claims: standard notions of ADR, which often refer to business or commercial disputes, typically emphasize the values of autonomy, agency, and consent in selecting a non-adversarial forum. Some of these assumptions become increasingly tenuous when we shift our gaze to the family-law arena, with its specific baggage of charged gendered power relations. To this we must add, in the debate over the Sharia tribunal, the array of concerns associated with defining an alternative source of *substantive* law drawn from religious texts and their various schools of interpretation. Importantly, the turn to privatized diversity of this kind does not by itself provide a conclusive answer to determining how secular and religious norms should interact in governing the family; they may stand in tension with one another, point in different directions, or lead to broadly similar results.

But this sterile description conceals the actual political issue at hand: the Sharia tribunal proposal was seen as challenging the normative and juridical authority, not to mention 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, irrespective of communal affiliation.[23] It was therefore seen by some as a foundational debate about some of the most basic questions concerning hierarchy and lexical order in the contexts of law and citizenship: which norms *should* prevail, and who, or what entity, ought to have the final word in resolving value conflicts between equality and diversity, if they arise. The vision of privatized diversity, in its full-fledged "unregulated islands of jurisdiction" variant, thus poses a challenge to the superiority of secular family law by its old adversary — religion.

Indeed, the prospect of tension, if not a direct clash, between religious

and secular norms governing the family — and the fear that women's hard-won equal rights would be the main casualties of such a showdown — largely informed the opposition to the Sharia tribunal variant of privatized diversity. Add to that the charged political environment surrounding Muslim minorities in North America and Europe in the post-9/11 era, and we can easily understand why this tribunal initiative became a lightning rod for the much larger debate about what unites us as citizens and what may divide us. And were this not enough to create an explosive situation on its own, we must take account of the fact that once these charged gender and religious questions caught the attention of the mass media, they quickly fell prey to reified notions of the inherent contrast between (idealized) secular norms and (vilified) religious traditions. The recent storm in the United Kingdom that followed the "civil and religious law" speech by the archbishop of Canterbury (quoted at the beginning of this chapter) exhibits the same pattern at work.[24] In this war of images, secular family laws were automatically presented as unqualified protectors of equality as well as the deterrents to destitution or dependency (though they may leave women and children in a far poorer state than divorced husbands, for example); by contrast, religious principles were uncritically defined as inherently reinforcing inequality and as the source of disempowerment for women (although certain interpretations could lead to results that are equitable and respectful to the divorcing spouses).[25] Eventually, the Sharia tribunal came to represent a polarized oppositional dichotomy that allows *either* protecting women's rights *or* promoting religious extremism. Under these conditions, it is not surprising that the government chose the former over the latter. But were there other, less oppositional, alternatives that were missed in this politicized debate, alternatives that might better have responded to devout women's multiple affiliations and identities as group members and citizens of the larger polity? I return to this question in the final part of my discussion.

C. SETTING STRAIGHT MISGUIDED "EITHER/OR" CHOICES IN LAW AND IDENTITY

For the tribunal's principal advocates, the Canadian Society of Muslims, what seemed to matter most was not so much the theoretical ingenuity of privatized diversity's intermingling with the larger trend of "private justice" as it was the

pragmatic bottom-line result that this permitted: in their words, it would allow Muslims living in a non-Muslim country to "live our faith to the best of our ability."[26] But the tribunal's advocates further argued (alarming many critics in the process) that once the possibility of turning to a Sharia tribunal becomes readily available, it *should* represent a clear choice for Muslim Canadians: "Do you want to govern yourself by the personal laws of your religion, or do you prefer governance by secular Canadian family law?"[27] It is here that the difficulty lies with the envisioned tribunal: it quickly came to represent an "either/or" choice for group members, dividing them between loyalty to the faith and governance by the state. This is an artificially constructed dichotomy, however, which in many ways replicates the logic of a rigid public/private divide. Let me provide two quick illustrations of the "cracks" in this "either/or" vision. For one, the advocates of the tribunal argued that any arbitral awards rendered by their proposed religious tribunal would be enforceable by the *secular* court system.[28] Though described as a selling point to its potential users,[29] this partial reliance on (or interaction with) the state and its legal system to enforce the tribunal's legal "product" created much public confusion on the ground. It also revealed the tribunal's selective, if not opportunistic, "disengagement" with state institutions. While they sought to escape the normative order of the state, the tribunal's advocates at the same time wanted to procedurally rely on Canada's (public) court system to enforce their "private" tribunal's awards. This is a shaky proposition: using state law inevitably brings with it certain public values of fairness and accountability; it is not an empty vessel to be used as dictated by convenience. Furthermore, the expectation that parties will turn to the private arbitration tribunal (in lieu of the state's public system) as an expression of *their* loyalty to the community, as implicitly and explicitly asserted by the tribunal's advocates, itself relies on an over-unified vision of the "Muslim community" in Canada. This community consists of members who hold different degrees of identification with religiosity, subscribe to a range of linguistic and cultural traditions, and originate from a wide variety of countries. Instead of recognizing multiplicity of affiliation, the tribunal's variant of privatized diversity, by posing a dichotomous choice — "Do you want to govern yourself by the personal laws of your religion, or do you prefer governance by the secular state's family laws?" — contributed to creating a presumably unbridgeable chasm between one's identity as citizen and as group member.

These issues become even more charged when the gendered dimension is added. The main concern here is that the push toward privatized diversity places disproportionate pressure on women to prioritize their communal loyalty over and above shared citizenship, given their often heightened responsibility as emblems of culture and "bearers" of tradition.[30] This last point is intensified by the fact that we are focusing on the family, a site that has become deeply intertwined with struggles over communal identity and expressions of "loyalty."[31] A central concern thus lies in the interplay between unequal power relations within the community and the tribunal's self-proclaimed mandate to represent the path that a "good Muslim" ought to choose.[32] It is here that the question of whether and how the state responds to such claims becomes crucial. The tribunal's opponents were rightly alarmed by the risk that once a privatized diversity route is recognized or permitted by the state, women who fail to agree to adjudicate family-law matters according to the norms of their own religious traditions (or those who reject the tribunal's authority to arbitrate their family disputes) may increasingly be portrayed by the more conservative elements in their communities as somehow lacking loyalty to their religious tradition or its localized manifestation.[33]

II. Women, ADR, and Privatized Diversity in the Family Arena

Concerns about pressure to enter into religious family arbitration processes are part of a larger story. As just mentioned, the most controversial claim raised by the tribunal's advocates was the suggestion that once Sharia family arbitration services become available, "any Muslims who continued to opt for civil law procedures should be regarded as failing in their religious duties [or communal obligations]."[34] The danger here is that arguments in favor of privatized diversity, especially when advanced by self-appointed "guardians of the faith," may all too quickly become intertwined with idealized images of gender and the family, as well as "loyalty" and "authenticity."[35] Under such conditions, feminist scholars and activists have ample reasons for concern. I wish to highlight here three of these major sources of concern: consent; inter- and intra-communal pressures (and their tendency to fossilize a living tradition under conditions of "reactive culturalism"); and the inappropriateness of the "exit" option as a magic-bullet answer. I do not claim that these

are the sole pivotal issues that need to be taken into account; rather, they are used here as examples to illustrate the potential dangers associated with the privatized diversity route.

A. CONSENT

First, we must tackle the question of consent. It is well-known that the issue of consent — as expressed, for example, by signing an agreement to enter into an arbitration procedure — serves as the core legitimizing principle for contracts and other private justice mechanisms.[36]

The debate here turns on whether subjection to a religious arbitration forum can indeed be characterized as an act freely chosen or is an end result of complex and subtle social processes of coercion that eventually restrict the agent's free will — especially for those who are in more marginalized or subordinated positions within the group.[37] The problem of consent and coercion is one of the oldest on the books, though it is not unique to religious arbitration. However, religious arbitration involves both removing the case from the public courtroom and permitting choice-of-law provisions that introduce religious principles as the relevant authorities for resolving family-law disputes. Clearly, the concern about free choice can also arise simply when we shift from a public arena to an area of *private* dispute resolution.[38] This I will label "phase 1," which involves the choice of forum. But debates about free choice typically become more pronounced when we enter "phase 2," which involves the double layers of choice of forum *and* choice of law.

In the Canadian Sharia arbitration debate, these two choices were often challenged together by various women's advocacy groups, adding fuel to an already explosive controversy. Indeed, the tribunal's leading opponents argued against *any* type of privatization of justice in the family-law context. In this respect, a proposal raised by a minority community (or certain sectors thereof) as a way to address what they saw as the unmet demands of religious diversity (by utilizing phase 2) soon became a spur to resistance by those who saw *any* turn away from the courts (within the parameters of phase 1) as, by definition, eroding the very protections to which women should have access if they undergo a divorce proceeding. In other words, the tribunal debate served as an opportunity to reopen and invigorate opposition to phase 1 — allowing parties the freedom to turn to an out-of-court dispute-resolution mechanism,

even if they still remain bound by the *secular* statutory regime governing family relations. Thus, even without adding religious or cultural factors to the mix, the very idea of "privatizing" dispute resolution in the family-law context raised the ire of the tribunal's opponents. They proposed an alternative model: to re-"universalize" the authority of the public courts as the only legitimate adjudicators of *any* family-law dispute. The inspiration for this particular demand, which we might call a return to "phase 0" — prohibiting *both* choice of forum and choice of law — came from Québec's Civil Code. Here, Article 2369 provides that "disputes over the status and capacity of persons, family law matters or other matters of public order may *not* be submitted to arbitration."[39]

The rationale for imposing this public-policy exception is a concern with power inequalities and information asymmetries in families, which, on this account, may become exacerbated in private dispute resolution that requires unequal parties to bargain. This approach stands in contrast to court-based proceedings where a sitting judge has the public authority to make final (and, ideally, fair and just) determinations in shaping the post-divorce rights and obligations of the parties. The counterresponse here, vigorously articulated by members of the family-law bar, is that channeling every family-law dispute through the courts (even where the parties have no difficulty reaching a balanced settlement) is both paternalistic and inefficient. It is estimated that the vast majority of divorce cases are resolved through *secular* ADR mechanisms that operate in the "shadow of the law."[40] At least in theory, this means that both parties bargain in the *same* shadow; they are equally informed by the state's defined legislative benchmarks, such as the commitment to equitable division, which then serves as the starting point that informs their respective "bargaining" positions and ultimate compromises, formalized in a separation agreement or arbitral awards.[41] This reality on the ground made the phase 0 option a moot response to the challenge posed by the proponents of the Sharia tribunal.

B. INTER- AND INTRA-COMMUNAL TENSIONS

This leads to a second set of concerns, which relate to the charged and often complex interactions between inter- and intra-communal pressures. Most relevant to our discussion is the recognition that a growing level of inter-communal tension and lack of mutual trust may contribute to renewed pres-

sures on women in their intragroup relations, a phenomenon I have elsewhere called "reactive culturalism."[42] This may translate into a chorus of voices recommending the adoption of stricter and more rigid interpretations of shared religious norms and practices — a call that is justified internally in the name of upholding the autonomy and "authenticity" of the minority community vis-à-vis an externally hostile majority in situations of deep inter-communal tensions. In this scenario, immense pressure is likely to be imposed on women to turn to community-based tribunals, as a way of expressing their "loyalty" to the group. (This is yet another reason why reliance on the notion of nominal, free consent has become ever more contested by the critics of the tribunal.)

For a complex set of reasons, women and the family often serve a crucial symbolic role in constructing group solidarity vis-à-vis society at large.[43] Under such conditions, women's indispensable contribution in transmitting and manifesting a group's collective identity is coded as both an instrument and symbol of group integrity. As a result, idealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of "authentic" group identity. These carefully crafted, gendered images of devout religiosity then become cultural markers that help erase internal diversity and disagreement, while at the same time allowing both minority and majority leaders to politicize selective and often invented boundaries between the "self" and the "other."[44]

Such hardening of the borders of inclusion and exclusion may unfortunately serve as a ready-made rationale for conservative group leaders to impose further restrictions on women; this may occur in the name of the collective effort to preserve the group's distinct identity in the face of (real or imagined) external threats. It may also motivate aggressive responses by the majority community, which may feel threatened by the resurgence and radicalization of religious minority-group identity. In this way, the conflation of increasingly "revivalist" claims of culture, involving gendered images of idealized womanhood, becomes a focal point for an unprecedented spate of state versus religion conflicts over foundational collective identity and basic citizenship questions.

C. THE INADEQUACY OF "EXIT"

The third area of potential trouble, which I will only flag here, is that the concerns surrounding the degree of freedom that individuals experience as

a result of inter- and intra-communal tensions and power relations become more pronounced in the context of religious or other *nomoi* groups — precisely because the group member may *wish to remain within the group* (rather than utilizing the "exit" option favored by some).[45] Those with limited desire or ability to leave may feel that the spectrum of options that are realistically available to them is restricted not only by familiar factors such as economic or informational asymmetry (which inform those favoring phase 0 — namely, banning any forum of private dispute resolution in the family), but also by distinctive identity-based or communal pressures.

Therefore, even if arbitration in family-law disputes may be relevant and legitimate in the purely secular context where the pressures are more individualized (phase 1), the tripartite set of concerns that I have just presented — consent, inter- and intra-communal tensions, and the failure of the exit option — become even more pronounced in phase 2. This involves not only a move away from the public courts, but also a demand to enforce in the alternative forum an alternative body of law, which is itself derived from religious sources.

III. The (Lost) Non-dichotomous Route

With this background in mind, I now turn to consider whether the challenges presented by the Sharia tribunal proposal could have been resolved in ways that address these feminist concerns without necessarily leading to the conclusion — eventually adopted by the government — that the answer to such complex law and identity challenges lies in relegating these religious traditions to the margins, labeled as unofficial, exotic, or even dangerous (unrecognized) law. My objective in doing this is motivated by the desire to provide alternatives for devout women within religious communities who may find little solace in the "exit" option — women who are simultaneously culture-bearers *and* rights-bearers.[46] For them, the almost automatic rejection of the tribunal's proposal may respond to the protection-of-rights dimension of their lives but does little to address the cultural/religious affiliation issue. The latter may well be better addressed by a non-state tribunal. This is particularly true for observant women who have solemnized their marriage relationship according to the requirements of their religious tradition and who may now wish —

or feel bound — to receive the blessing of this tradition for the dissolution of that relationship. In the Canadian debate, this constituency also inserted a transnational element, suggesting that in families with roots in more than one country, a divorce agreement that complies with the demands of the faith (as a non-territorial identity community), in addition to those of the state of residence, is somehow more "transferable" across different Muslim jurisdictions.[47] In technical terms, this need not be the case — private international law norms are based on the laws of states, not of religions.[48] But what matters here is the perception that a faith-based tribunal may provide a valuable legal service to its potential clientele, a service that the secular state — by virtue of its formal divorce from religiosity — simply cannot provide.

The traditional legal approach is to turn a blind eye to these intersections, in line with the idealized public/private divide. Relegating family disputes with certain religious aspects beyond the reach of the secular courts need not, however, be the sole or even primary response to such dilemmas, especially when "non-intervention" effectively translates into immunizing wrongful behavior by more powerful parties. These parties may refuse to remove barriers to religious remarriage (as in the Jewish *get* situation, discussed below), to pronounce a *talaq* after the wife obtains a civil divorce, or fail to honor a commitment to pay a woman her *mahr*, thus impairing the woman's ability to build a new family or establish financial independence after divorce (which is the case in some Islamic matrimonial disputes and divorce proceedings).[49]

Instead of ignoring these gendered disadvantages, in *Bruker v. Marcovitz,* the Supreme Court of Canada has recently shown itself willing to break old habits.[50] The basic facts are as follows: a divorce proceeding between Stephanie Bruker and Jessel Marcovitz, a Jewish couple, was commenced by the wife before a civil court. A settlement agreement was negotiated and signed by the parties. It included various terms and trade-offs regarding custody, support payments, and so on. Most importantly for our discussion, this separation agreement also included a commitment by both parties to appear before a Jewish *beth din* (a three-member rabbinical panel) in order to obtain a religious divorce decree (the *get*). According to Canada's Divorce Act and Ontario's Family Law Act, the secular side of divorce can only be affirmed by the civil court, as the court did in this case, incorporating the terms of the settlement agreement between the parties into the final divorce decree. The obligation to turn to the rabbinical authorities thus became part of the terms that *enabled* the civil divorce by a

public, state entity. Once the husband had the secular divorce decree in hand, however, he failed to honor the agreement he had signed to remove religious barriers to his wife's remarriage. For fifteen long years, Mr. Marcovitz *refused* to appear before the rabbinical authorities, leaving Ms. Bruker in the situation known as the *agunah*, or "chained wife." The consequences of this legal situation are severe. Despite being civilly divorced, the woman is unable to remarry or have children that are recognized as members of the faith.[51]

This was the sad situation in which Ms. Bruker found herself. For a decade and a half, the ex-husband refused to issue her the *get*, knowingly preventing her from availing herself of a crucial term of the agreement that had facilitated the issuance of the civil divorce decree in the first place. After nine years of waiting in vain, the wife decided to sue her husband. She turned to the court system in Québec, claiming damages in compensation for the husband's noncompliance (namely, the breach of contractual obligation to appear before the *beth din*). Whereas in New York the courts have recognized the *ketubah* (or prenuptial agreement) as requiring the husband to grant the wife a Jewish divorce in addition to a civil divorce and have intervened to grant specific performance of such agreements, in this case Ms. Bruker did not ask the secular court system to use its powers to compel the husband to appear before the *beth din*.[52] Her legal claim was more minimalist; it focused instead on a standard civil-damages claim for breach of contract.[53]

What is a court to do under such circumstances? The hands-off approach demands nonintervention, suggesting that the problem lies in the religious, not the secular sphere. The trial judge did not take this approach. After hearing the evidence, he ruled that the civil contract entered into by the parties was valid and binding, notwithstanding the fact that it had a religious aspect to it. As the trial judge succinctly put it, "The pith and essence of what is being asked for in this case is not religious."[54] This analysis permitted the wife to get her day in court, utilizing the "naming, claiming, blaming" mechanisms of civil litigation against the wrongful party (the husband). To reach this conclusion, the trial judge had to engage in the familiar tango of *delineating* the secular from the religious, a dance that had significant implications in favor of Ms. Bruker in this case. Recognizing the harm and suffering caused to her by the husband's refusal to fulfill his *civil* commitment to remove the religious barriers to remarriage, the trial judge ordered him to pay the sum of $47,500 in damages.

The husband appealed. He argued that *his* right to exercise his religious belief and freedom had been breached by the secular court's intervention in his allegedly private dispute with his wife over the religious divorce decree. He saw himself exonerated from liability for this reason. Mr. Marcovitz further argued that the promise he had made in the contract was merely moral, not legal, and therefore could not serve as the basis for a damages claim for breach of contract. The Court of Appeal accepted the husband's position. It held that "the substance of the . . . obligation is religious in nature, irrespective of the form in which the obligation is stated,"[55] consequently ruling that the contract was unenforceable. Judicial intervention under such circumstances, the Québec Court of Appeal continued, would be inconsistent with recognition of the husband's right to freely exercise his religious beliefs as he saw fit. Any harm suffered by the wife as a result of the husband's (in)action here was "private"; it was not a matter for public law to address.

The final twist in this saga occurred when Ms. Bruker turned to the Supreme Court of Canada. The substance of her argument was that nonintervention in the name of her ex-husband's freedom of religion under these circumstances amounted to a license to deny her, and similarly situated women, the right to *their* religious freedom (to comply with what they perceive as obligations of their faith) and to equality in family life. The husband's promise to remove the barriers to religious remarriage affected the trade-offs agreed to by the parties during the divorce negotiations. Immunizing the husband (the contract breacher) ex post from the legal consequences of his harmful act was tantamount to injustice, allowing him an unwarranted advantage to achieve concessions at the divorce (in exchange for the promise to remove barriers to religious remarriage) and then renege on his commitment while causing severe and gendered harms to his wife. The court, in a majority opinion, accepted these arguments. It held that the fact that a dispute had a religious aspect did not by itself make it nonjusticiable. Equally important for our discussion, the court rejected the simplistic "privatizing identities" formula. Instead, it ruled in favor of "[r]ecognizing the enforceability by civil courts of agreements to discourage religious barriers to remarriage, [addressing] the gender discrimination those barriers may represent and [alleviating] the effects they may have on extracting unfair concessions in a civil divorce."[56]

The significance of the *Marcovitz* decision for our discussion thus lies in its recognition that *both* the secular *and* the religious aspects of divorce matter

greatly to observant women if they are to enjoy gender equality, articulate their religious identity, enter new families after divorce, or rely on contractual private ordering just like any other citizen.[57] This "intersectionist" or joint-governance framework offers us a vision in which the secular system may be called upon to provide remedies in order to protect religious women from husbands who might otherwise cherry-pick their religious and secular obligations as they see fit. This is a clear rejection of the simplistic either-your-culture-or-your-rights approach, offering instead a more nuanced and context-sensitive analysis that begins from the ground up. This requires identifying who is harmed, and why, and then proceeding to find a remedy that matches, as much as possible, the need to recognize the (indirect) intersection of law and religion that contributed in the first place to the creation of the harm for which legal recourse is now sought.

Achieving such a balance does not mean that the state must — or indeed may — rule on matters of religious doctrine or precept. In this example, the husband had freely agreed to turn to the rabbinical *beth din*. The Supreme Court was not in a position to order specific performance ("forcing" the husband to implement his promise); instead, it merely imposed monetary damages for the *breach* of the contractual promise in ways that harmed the wife personally and affected the public interest generally. What *Marcovitz* demonstrates is the possibility of employing a standard legal recourse (damages for breach of contract, in this example) in response to specifically gendered harms that arise out of the *intersection* between multiple sources of authority and identity in the actual lives of women who are members of religious minority communities and larger, secular states as well.

What conclusions can be drawn from the *Marcovitz* case, with its focus on a civil contract with a religious aspect, in relation to the Sharia tribunal debate? I shall briefly identify a few of the possible implications, referring to the distinctions between entry into a contractual agreement (with a religious aspect) as affirmed by a secular court and entry into a binding non-state arbitration forum; between ex post judicial review and ex ante regulatory oversight; and between self-restraint exercised by non-state religious tribunals and government-imposed statutory restrictions. Each of these distinctions has its own theoretical significance, though they may overlap and crosscut in practice. I discuss each in turn.

(i) Entry into a secular agreement (with a religious aspect) versus entry into a community-based, semi-private tribunal with binding authority over consenting members: Both of these situations involve the intersection of law and religion to some degree, but the former appears to offer more protections to women (or other potentially vulnerable parties) because of the publicity and legal advice that are part and parcel of the affirmation of the contract. This ensures more veto points as well as review options. Furthermore, unlike the religious tribunal arbitration award, the court-affirmed contract is negotiated in the shadow of the state's family laws.[58] At least in principle, the state's family laws are committed to equitable norms at divorce; in contrast, this is true for some (but not all) interpretations of religious personal law traditions. Cumulatively, then, the tribunal's privatized-diversity formula appears to offer fewer protections for women than entry into a civil contract with a religious aspect to it. The tribunal's provision of actual protections that respond to the concerns identified earlier relating to consent, intra- and inter-communal pressure, and the inadequacy of "exit" leave much to be desired.

(ii) Ex post judicial review versus ex ante regulatory control: The literature on institutional design distinguishes between different forms or techniques of oversight. In the context of congressional oversight of executive-agency activities, for example, Mathew McCubbins and Thomas Schwarz famously argued that we must distinguish between what they label *police patrol* oversight (involving centralized, active and direct oversight) and *fire alarm* oversight, which is less centralized and involves less active or direct oversight.[59] Instead of actively and directly monitoring administrative agencies (a costly and complex "police patrol" process), the fire-alarm oversight technique decentralizes regulation. It does so by enabling individual citizens and stakeholders, as well as organized interest groups, to examine administrative decisions, to charge executive agencies with violating stated goals, and to seek review or remedy (where relevant) by turning to the courts or the legislature.[60] In the context of our discussion, once the hands-off approach is rejected (as I think it should be), we can identify a related set of choices regarding regulatory oversight that need to be made.

The classic approach in arbitration is to allow *minimal* oversight; the idea is that the consenting parties intentionally removed their dispute from the public system, preferring instead an out-of-court process. In the case of severe breaches

of procedural justice, however, most arbitration laws (including Ontario's Arbitration Act that was so central to the Sharia tribunal debate) permit the arbitrating parties to seek judicial review.[61] This represents a classic "fire alarm" procedure. Instead of having the courts or legislatures actively monitor the arbitration process, the burden of identifying alleged violations is passed on to those who are best informed about the process and who possess the strongest interest in identifying and reporting such breaches: the parties themselves. While the fire-alarm model, which in this context is better described as "ex post judicial review," might in theory fit the realm of commercial or civil arbitration with its strong emphasis on party autonomy, agency, and parity, it may fail miserably in the family arbitration context. Here, there is a serious concern about power and representation inequities, which disrupt the ex post judicial review model's basic assumption about both parties being equally positioned to "pull" the fire alarm and call attention to potential breaches in the arbitration process. (We earlier encountered similar concerns raised by those advocating the phase 0 response.) Given the gendered concerns identified in part 2 above, the idea of placing the burden of initiating the process of ex post review on the more vulnerable parties, which may have been semi-coerced in the first place into consenting to the tribunal's authority, is implausible. If anything, it provides an (unintended) guarantee that very few, if any, of the most serious violations will ever be reported. This result stands in direct contravention of the logic of active agency that lies at the basis of this oversight mechanism, making it a less attractive option to respond to the complex gendered and communal pressures at issue. Instead of merely relying on ex post judicial review, it appears that a complementary technique of regular oversight is required once we move to the realm of family arbitration.

This indeed was the conclusion reached by a major governmental review committee (the "Boyd Report"), which was set up to examine the interrelationships between private arbitration, religion, and protection of women's rights.[62] While the Boyd Report received criticism for a host of reasons, including its unhelpful "murkiness" in defining the appropriate conditions for intervention by secular courts in response to religious arbitral awards that appear to breach the reasonable margins of interpretation of family law statutory provisions (as would have been permitted in the secular system), it is important to note that this line of criticism *assumes* that oversight must reside primarily in the ex post judicial review model. A more charitable reading of the report's recommendations illuminates another pattern at work. Although the ex post model

remains viable, the report initiates a conceptual shift toward the adoption of extensive ex ante oversight in family arbitration (responding to the phase 1 critique), thus moving to a more active and centralized "police patrol" regulatory model.[63]

Evidence for this shift is plentiful; indeed, it informed many of the procedural legislative amendments to the Arbitration Act (the government response to the tribunal debate), which were adopted in 2006, and was articulated through the Family Arbitration Regulation of 2007. Examples of the shift toward ex ante oversight include a mandatory training and licensing program for arbitrators; the requirements that any party entering a family arbitration process must receive counsel by an independent legal advisor before entering the arbitration; that files be kept by the arbitrator, containing both the evidence presented and notes taken during the hearings; and that separate screening of the parties to detect signs of domestic violence must take place, any such concerns categorically prohibiting the use of arbitration.[64]

These various reforms demonstrate an important organizing principle: instead of placing the burden of initiating the ex post judicial review on those who may be least able to challenge their family or community's norms or pressures (by turning to a secular court for judicial review), it is preferable under these circumstances of unequal power relations to adopt across-the-board, ex ante oversight techniques. While not without its shortcomings, I believe this is a wise move in this context. It places the burden on the arbitrators themselves to show that they have complied with the government's predefined standard rules and procedures, rather than placing the responsibility of taking action on a particular individual who may already be experiencing heightened vulnerability. Notably, this shift in regulatory emphasis does not require or entail total abandonment of the ex post review model. The two models can live happily side by side.

In Canada, the option of judicial review of arbitration remains open for those who wish — or feel sufficiently empowered — to utilize it. On this score, we can imagine additional reforms as well (assuming that family arbitration continues to exist — namely, rejecting the phase 0 option). For instance, instead of applying the hands-off approach typically adopted by the courts when asked to intervene in legal matters resolved through arbitration, we can envisage a relaxing of the standing requirement for such court review, allowing

amicus or interveners to pursue the legal challenge in those instances where the affected party wants to challenge a religious arbitral award but fears that challenging the tribunal directly, in her own name, would expose her to intense pressure to withdraw the claim.

(iii) Voluntary agreement by faith-based tribunals to comply with statutory restrictions ("self-restraint") versus imposition by state fiat: The last set of issues that I wish to address here relates to the thorny challenge of tackling the potential for conflict between secular and religious norms governing family disputes. Recall that a significant part of the anxiety that surrounded the Sharia tribunal debate was the fact that its advocates never fully clarified what would happen if their interpretation of customary or religious personal laws provided women with less equitable divorce settlements than those that could have been obtained under the state's secular family laws. According to the tribunal's opponents, nothing less than an attempt to use a technique of "privatized diversity" to redefine the relationship between state and religion in regulating the family was under way. This is an "existential" threat that no secular state authority is likely to accept with indifference, not even in tolerant, multicultural Canada. And so, after much contemplation, the response chosen to the challenge presented by the proposed tribunal was to quash it with all the legal force the authorities could muster. This took the shape of an absolutist solution: prohibiting by decree the operation of *any* religious arbitration process in the family law arena. Such a response, which relies on imposition by state fiat, sends a strong symbolic message of unity, albeit a unity that is manufactured by ensuring compliance with a single monopolistic jurisdictional power holder.

A less heavy-handed approach might have required religious tribunals themselves to determine, through their actions and deeds, whether to enjoy the benefits of binding arbitration — including the boon of public enforcement of their awards — if they *voluntarily* agreed to comply with statutory thresholds and default rules defined in general family legislation. These safeguards typically establish a "floor" of protection, above which significant room for variation is permitted. These basic protections were designed in the first place to address concerns about power and gender inequities in family relations, concerns that are not typically absent from religious communities, either. If anything, they probably apply with equal force in the communal context as in

the individualized, secular case. Under this "self-restraint" scenario — which offers an alternative to the top-down prohibition model that was eventually chosen by the government — if a resolution by a religious tribunal falls within the margin of discretion that any secular family-law judge or arbitrator would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision maker used a different tradition to reach a permissible resolution. Put differently, the operative assumption here is that, in a diverse society, we can safely assume that at least some individuals might prefer to turn to their "communal" institutions, knowing that their basic state-backed rights are protected by these alternative forums. Add to this the guarantee that any solution reached through a dispute resolution process that was the result of duress, coercion, or violence will automatically be invalidated as a matter of law. Against this backdrop, permitting community members to turn to a faith-based tribunal may, perhaps paradoxically, provide the conditions for promoting a moderate interpretation of the tradition, as authorized by religious arbitrators themselves. The prospect for such "change from within" — or what I have elsewhere labeled *transformative accommodation*[65] — in this context may translate into a recognition by the tribunal's arbitrators themselves that if they wish to issue final and binding decisions (which permit parties to turn to the state for enforcement where needed), they cannot breach the basic protections to which each woman is entitled by virtue of her equal citizenship status. To ignore these entitlements is to lose the ability to provide relevant legal services to members of the community.[66] Counterintuitively, the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, noncoercive encouragement of egalitarian and reformist change from within the religious tradition itself. The state system, too, is transformed from strict separation to regulated interaction. In this way, the "multilayered" or intersectionist identity of the individuals involved may be fostered. This approach also discourages an underworld of unregulated religious tribunals and offers a path to transcend the "either/or" choice between culture and rights, family and state, citizenship and islands of privatized diversity.

A final observation is warranted before I conclude my discussion. In the midst of the explosive tribunal debate, it was repeatedly argued that if the Jewish *beth din* or the Catholic or Ismaili community can set up arbitration panels

to regulate certain aspects of family affairs, then, mutatis mutandis, so should members of the Muslim community be permitted to set up the Sharia tribunal. This is a potent claim of formal equality among religions. What often gets lost in the discussion is the recognition that formal equality among religions is only part of the picture. It doesn't tell us how the potential value conflicts between these non-state actors and secular norms are to be resolved. It is, however, worth mentioning that the Orthodox Jewish Beis Din of Toronto, which had operated for a number of years in compliance with the Arbitration Act's requirements (before its amendment in 2006), voluntarily self-restricted its jurisdictional mandate by asking the parties that sought its advice in family matters to sign a binding agreement that held that any religious divorce (*get*) settlement or award by the tribunal must be made in accordance with the civil requirements of Canada's national and provincial family legislation.[67] This solution effectively means that beyond the removal of barriers to remarriage, which must comply with the parties' personal laws (assuming that a civil divorce has already been, or is about to be, obtained), general family law norms take priority over matters of property decisions and related material disputes. This self-restriction route permits the religious community to protect its most cherished *identity* (or demarcating) aspects of family law, while complying with state norms in divorce-related matters of distribution of assets, obligations, and responsibilities.[68] This approach is obviously less intrusive than a government-issued order that compels non-state tribunals to comply with secular family law provisions, or an all-out ban that prohibits their official operations altogether. In order to stand a fighting chance of success, this voluntary compliance model must espouse a considerable degree of trust and a desire to avoid dangerous clashes. Both of these conditions were in short supply in the highly politicized debate surrounding the Sharia tribunal proposal.

IV. Banning Privatized Diversity: Future Trajectories

The government ultimately decided to respond to the Sharia tribunal challenge by barring the operation of *any* faith-based family arbitration process. Such a universal ban ensures that Islam is not singled out as being more (or less) friendly to women's interests than any other religious or customary tradition. It further aims to realign the regulation of the family exclusively within the

state, leaving no room (except for informal religious mediation, which has no legal effect in the eyes of civil courts or legislatures) for communities' own institutions and authorities to exercise any formal role in defining the parties' marriage and divorce status. In effect, this resolution reasserts a strict public/private divide, thus shutting down — rather than encouraging — coordination or dialogue between civil and religious jurisdictions. The government's legislative response thus stands in tension with the *Marcovitz* decision, which did not take the route of recommending that the wife's damages claim be dropped simply because the operation of the *beth din* (the only authority that can supervise the granting of a Jewish *get* decree) is not recognized in the eyes of state law.

In the Sharia-arbitration saga, the attempt to find creative, non-dichotomous solutions initially gained momentum. This became fruitless, however, once the public debate over the tribunal became highly politicized and polarized. Under these conditions, there was little room left for nuance or even open dialogue. It was at this moment that the government reinstated its sole authority to govern these disputes, to the exclusion of any potentially overlapping or competing (here, religious) sources of law.[69] The chosen alternative of legally *banning* the operation of religious tribunals by secular decree may turn out to be a wise political decision, but it is not an ideal normative and jurisprudential solution. Even though they are officially nonexistent, these faith-based institutions can unofficially operate as providers of mediated (rather than arbitrated) solutions, which may never be subject to regulation by state norms if they remain unchallenged by the parties. This may lead to an unintended consequence, leaving precisely those group members who may be most in need of the protections offered by joint-governance resolutions in an extremely vulnerable position — namely women, who for familial, cultural, religious, economic, political, or related reasons might feel obliged to have at least some aspects of their marriage and divorce regulated by religious principles and communal institutions.

A cynic might add that the government's decision to explicitly reassert the authority of the state over any potential competition can also be seen as a calculated attempt to inhibit diversity when it becomes too costly — not necessarily to women's rights, but to social peace. The government response can plausibly be explained along these lines: once the "difference" matter had been perceived (politically) as being too dangerous and disruptive to social

peace and stability, the subsequent move was to reinstate the classic liberal divide between the *public* realm of citizenship and the *private* realm of group membership. This may look like a magic-bullet solution at first blush. It also sends a strong symbolic equality message: there is "one law for all" in the context of family disputes. Yet the problem is that this approach assumes that women are not bearers of culture or religion and that these identities are not worthy of public recognition. It also ignores the significant variation in actual agreements that is permitted and upheld under the growing trend of standard (i.e., secular) "private ordering" of the family.[70] This line of thinking leads to realignment of the "alternative" jurisdiction (here, religious-based arbitration) within the realm of an exotic non-law or unrecognized tradition. But this has not necessarily been the feminist inclination on these matters; many advocates share the concern that the most penetrating violations, if not outright abuses, of women's rights will occur precisely in artificially shielded "private" domains. A resolution of the tribunal debate that merely sweeps the problem of intersectional identities under the rug may satisfy some as a neat solution. But beneath the surface, for the most vulnerable group members, the re-crowning of the civil justice system as the sole regulator of family law — coupled with the relegation of group-based dispute-resolution processes to a no-man's land of shadowy, unofficial systems — may prove fatal. This "out of sight, out of mind" approach will probably not be of much assistance to vulnerable group members in blocking communal pressures to resolve family disputes by turning to "their" group's authorities, which, now legally unrecognized, remain free of any regulatory oversight, whether ex ante or ex post. The real concern here is that those most in need of the benefits of intercultural dialogues and pluralistic legal regimes — those whose lives genuinely manifest overlapping and potentially conflicting belongings — will become the "collateral" of a reasserted and rigid divide between (public) citizenship and (private) group membership.

Conclusion

Debates about the merits and pitfalls of what I have called "privatized diversity" may appear merely technical at first sight. However, they are anything but. Given the complex relationship between religion and state in almost

every country around the globe, these dilemmas have become a flashpoint for exploring deeper questions about the relationship between gender and culture, rights and responsibilities, law and tradition in an increasingly complex social reality where the "ties that bind" citizens are themselves at issue. What makes the Sharia tribunal proposal particularly interesting is that it foregrounds these ancient questions, bringing them into the heart of those contemporary political communities that have committed themselves to secular statehood. It is no surprise that the process of addressing these complex dilemmas of privatizing diversity has revealed many unresolved tensions. The unexpected result of the Canadian debate has not been the re-relegation of religious sources into the realm of the unofficial. This pattern fits well with the traditional "public/private" divide in the realm of citizenship and identity. But what nobody foresaw was the renewed interest that this debate has generated in the larger question of whether *any* type of private or alternative dispute resolution ought to govern the inevitably sensitive and semi-public dilemmas that surround the state's involvement in governing and dissolving families in a fair and just way. Here, concern about the place of religion has in fact led to a significant revision of the *secular*: in 2006, the ex ante safeguards recommended by the Boyd Report were incorporated as legislative amendments to the Arbitration Act, and they now affect all family arbitration processes, which must be governed by the secular laws of recognized Canadian jurisdictions.[71] This solution means that no religious authority is permitted to set up family arbitration tribunals, nor can any foreign (national) source of personal law be incorporated into an arbitration process that occurs in Canada.

Despite the resounding verdict against the religious tribunal, the attention it gained has ultimately, and perhaps unexpectedly, led to a reclaiming of the *public* aspect of family law — even in mere phase 1–type dispute resolution. The legislative revisions that were engendered by this debate have further (and unambiguously) clarified that certain provisions protecting a more equitable conception of marriage are nonnegotiable. In this schema, religion is not singled out; *no one* is permitted to extend their margins of choice of law or contractual freedom in a manner that would override core statutory provisions that shape the post-divorce relations between the parties or their obligations toward the children they conceived together. What remains to be seen, however, is whether these new mechanisms will stick. While the adoption of ex

ante oversight is an important and promising step that responds to potential inequalities in the process, the *tout court* relegation of religious divorce to the realm of the unregulated "private" sphere may prove problematic, rendering invisible precisely those power relations and informal legal agreements that occur under the shield of religious mediation. If comparative experience can teach us anything, it is that we may expect to see at least some devout women try to fulfill their obligations to both the secular and religious authorities, especially when creating (or dissolving) their families.[72] This effectively means that we might witness the operation of a dual-status system with no communication between the two branches. If this proves to be a correct assessment, then the debate over the Sharia tribunal is not truly over; we are merely witnessing a pause in an ongoing renegotiation.

Notes

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1. Rowan Williams, Archbishop of Canterbury, "Islam in English Law; Civil and Religious Law in England," February 2008, accessed August 23, 2011, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/07_02_08_islam.pdf.

2. This is one of the oldest questions on the books of contemporary feminism. See generally Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983): 1497.

3. For instance, the German Federal Constitutional Court addressed the hotly contested question of religious attire in public education in the *Ludin* case (2003). See BVerfG, I BvR 792/03, 30 July 2003. In the United Kingdom, the matter was addressed by the House of Lords in *Shabina Begum* (2006). See R. (Shabina Begum) v. Governors of Denbigh High School [2007] 1 A.C. 100 (H.L.). Even the European Court of Human Rights was reluctantly dragged into this matter in its *Leyla Sahin v. Turkey* decision (2006), in which it affirmed Turkey's ban on the wearing the hijab. See 19 BHRC 590 [2006] ELR 73 [European Court of Human Rights]). In France, the longstanding hijab drama culminated in 2004 with the introduction of a national law that banned the display of any "conspicuous religious symbols," including the Islamic headscarf, in public schools. See Law No. 2004–228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official

Gazette of France], Mar. 17, 2004, p. 5190. For an illuminating overview, see Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006).

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

5. I discuss the latter set of challenges in Ayelet Shachar, "Is There Room for 'Culture' in the Courtroom?" in *Criminal Law and Cultural Diversity*, ed. Will Kymlicka and Claes Lernestedt (Oxford: Oxford University Press, forthcoming 2012).

6. This "split status" problem was explicitly addressed by Canada's Parliament prior to the introduction of amendments to the Divorce Act, 1985 R.S.C., ch. 3 (Supp. II), amendments that were based on consultations with the leaders of fifty religious groups in Canada. See House of Commons Debates, vol. 6, 34th Parl., 2d Sess., Feb. 15, 1990, at 8375–77. See also J. David Bleich, "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement," *Connecticut Law Review* 16 (1984): 201; David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998): 78.

7. The major exception here is the work of feminist scholars engaged in the multiculturalism debate; for discussion of this fast-emerging body of scholarship, see Ayelet Shachar, "Feminism and Multiculturalism: Mapping the Terrain," in *Multiculturalism and Political Theory*, ed. Antony Simon Laden and David Owen (Cambridge, UK: Cambridge University Press, 2007): 115.

8. Syed Mumtaz Ali, "Establishing an Institute for Islamic Justice (*Darul Qada*)," Canadian Society of Muslims News Bulletin, Oct. 2002, accessed August 23, 2011 http://muslimcanada.org/news02.html.

9. Arbitration Act, 1991 S.O., ch. 17 (Ont.). The act "allows the parties to choose the law applicable to their disputes. . . . It does so by allowing the parties to vary or opt out of the applicability and choice of law sections." See John D. Gregory et al., "Faith-Based Arbitration" (paper presented at the Uniform Law Conference of Canada, Civil Section, August 21–25, 2005, St. John's, Newfoundland, Canada).

10. Ali, "Establishing an Institute for Islamic Justice."

11. For further elaboration, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, UK: Cambridge University Press, 2001): 1–62 (2001); Shachar, *Feminism and Multiculturalism.*

12. This position is lucidly expressed by Talia Fisher, Bryan Caplan and Edward Stringham, and John Hasnas: Talia Fisher, "Nomos without Narrative," *Theoretical Inquiries in Law* 9 (2008): 473; Bryan Caplan and Edward Stringham, "Privatizing the Adjudication of Dispute," *Theoretical Inquiries in* Law 9(2008):

503; John Hasnas, "The Depoliticization of Law," *Theoretical Inquiries in Law* 9 (2008): 529.

13. Brian M. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001); Jeremy Waldron, "One Law for All? The Logic of Cultural Accommodation," *Washington & Lee Law Review* 59 (2002): 3.

14. See Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," *McGill Law Journal* 50 (2005): 49.

15. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990): 119. An exception to the emphasis on public accommodation is found in the careful analysis of the claims of "reclusive" groups offered by Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (Baltimore: Johns Hopkins University Press, 2000). Another author who resists the notion of public accommodation is Chandran Kukathas, whose work challenges the legitimacy of the state's authority to grant group-differentiated rights in the first place. Instead, he envisions a libertarian-like "archipelago of different communities operating in a sea of mutual toleration." See Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003): 8.

16. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995): 31 (emphasis added). Kymlicka here refers to the category of "ethnic groups" rather than "national minorities." The tribunal's advocates would fit under the former rather than the latter definition in Kymlicka's typology.

17. This pattern I elsewhere call the "religious particularist" model. See Shachar, *Multicultural Jurisdictions.*

18. Arbitration typically does not require that the written records of the process be maintained, nor does it define the specific skills/training that arbitrators should possess. A law degree, for example, is not a prerequisite.

19. Israeli legislation and case law in family law, addressing issues such as the regulation of minimal age or equitable distribution, illustrate this point. See Marriage Age Law, 5710–1950, 4 LSI 158 (1950); Spouses (Property Relations) Law, 5733–1973, 27 LSI 31 (1972–73); HCJ 1000/92 Bavli v. High Rabbinical Court [1994] IsrSC 48(2) 221; HCJ 2222/99 Gabai v. High Rabbinical Court [2000] IsrSC 54(5) 401. The debate in these jurisdictions typically turns on whether the government's legislation is too intrusive or too deferential to the religious communities involved, as manifested in the *Shah Bano* saga in India and its

aftermath (i.e., legislative overturn of the court's decision, and then *Latifi* and more recent case law restoring much of the protection offered to Muslim women before the legislative overturn of *Shah Bano*). See Mohd. Amhed Khan v. Shao Bano Begum, A.I.R. 1985 S.C. 945; Danial Latifi v. Union of India, A.I.R. 2001 S.C. 3958.

20. Egypt's family-law reform took place in 2000; Morocco's in 2004. For commentary, see Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt," *Vanderbildt Journal of Transnational Law* 37 (2004): 1043; Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82 (2004): 1819; Leon Buskens, "Recent Debates on Family Law Reforms in Morocco: Islamic Law as Politics in an Emerging Public Sphere," Islamic Law and Society 10 (2003): 70; Laura A. Weingartner, "Family Law and Reform in Morocco — The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status," *University of Detroit Mercy Law Review* 82 (2004): 687. Obviously, not all countries follow this path of reform in family law. See, e.g., Saskia E. Wieringa, "Comparative Perspectives Symposium: Islamization," *Signs* 32 (2006): 1. Other countries have experienced, however, the opposite trend of restrictive interpretations of Sharia principles under national family-law legislation. The reasons for these different paths of modification versus radicalization lie beyond the scope of this chapter.

21. This coalition has been criticized by some as advancing women's rights in the family-law arena at the expensive "cost" of altogether weakening secularism. See, e.g., Lama Abu-Odeh, "Egyptian Feminism: Trapped in the Identity Debate," *Yale Law Journal* 16 (2004): 145.

22. See Ann Elizabeth Mayer, "The Islam and Human Rights Nexus: Shifting Dimensions," *Muslim World Journal of Human Rights* 4 (2007). Available online at http://www.bepress.com/mwjhr/v014/iss1/art4 (accessed August 23, 2011).

23. This position was best expressed by the Canadian Council of Muslim Women (CCMW), which stated that "CCMW sees no compelling reason to live under any other form of law in Canada, as we want the same laws to apply to [Muslim women] as to other Canadian women." See "Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada," Canadian Council of Muslim Women, revised May 25, 2004, accessed August 23, 2001, http://www.ccmw.com/activities/act_arb_muslimlaw_sharia.html. See also Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

24. Williams, "Islam in English Law."

25. These economic patterns of decline in the standard of living of women

and children after divorce in the United States, for example, and a correlated improvement in the standard of living for men are documented in many studies. See, e.g., Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985); Richard P. Peterson, "A Re-evaluation of the Economic Consequences of Divorce," *American Sociological Review* 61 (1996): 528. Similar patterns were found in other jurisdictions as well. See John Eekelaar and Mavis Maclean, *Maintenance after Divorce* (New York: Oxford University Press, 1986).

26. "Interview: A Review of the Muslim Personal/Family Law Campaign," Canadian Society of Muslims, written August, 1995, accessed August 23, 2011, http://muslimcanada.org/pfl (interview with Syed Mumtaz Ali, President of the Canadian Society of Muslims); see also "*Darul-Qada*: Beginnings of Muslim Civil Justice System in Canada," Canadian Society of Muslims News Bulletin, written April 2003, accessed August 23, 2011, http://muslimcanada.org/news03.html; Judy Van Rhijn, "First Steps Taken for Islamic Arbitration Board," *Law Times,* Nov. 24, 2003, accessed August 23, 2011, http://www.freerepublic.com/focus/f-news/1028843/posts; Syed Mumtaz Ali and Rabia Mills, "*Darul Qada* (The Beginnings of a Muslim Civil Justice System in Canada)," Canadian Society of Muslims, accessed August 23, 2011 http://muslimcanada.org/DARLQADAform2andhalf.

27. "Interview: A Review of the Muslim Personal/Family Law Campaign."

28. Ali, "Establishing an Institute for Islamic Justice."

29. See Van Rhijn, "First Steps Taken for Islamic Arbitration Board."

30. See notes 42–44; I briefly discuss the reasons for these concerns in Shachar, "Religion, State, and the Problem of Gender," 73–77.

31. See Syed Mumtaz Ali, "The Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law: A Submission to the Ontario Civil Justice Review Task Force," Canadian Society of Muslims, 1994, accessed August 23, 2011, http://muslimcanada.org/submission.pdf.

32. "Ali's Interview with 'The Ambition,'" May 23, 2004, accessed August 23, 2011, http://muslimcanada.org/ambitioninterview.html (interview with Syed Mumtaz Ali by *The Ambition*, a Canadian young Muslims' Journal).

33. See Shahnaz Khan, "Canadian Muslim Women and Shari'a Law: A Feminist Response to 'Oh! Canada!'" *Canadian Journal of Women and the Law* 60 (1993): 6 ("[N]o doubt [Muslim women] would experience a certain amount of pressure to conform. . . . [S]hould they decline to be governed by Muslim Personal Status Laws . . . [they could] find themselves ostracized by their families and their community"; responding to an earlier attempt to introduce Sharia principles to govern Canada's

Muslim population). See Syed Mumtaz Ali and Anab Whitehouse, "Oh! Canada: Whose Land? Whose Dream? Sovereignty, Social Contracts, and Participatory Democracy: An Exploration into Constitutional Arrangements," Canadian Society of Muslims, 1991, accessed August 23, 2011, http://muslimcanada.org/ocanada.pdf.

34. See Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007): 170 (citing Avigail Eisenberg, "Religious Arbitration and Multiculturalism: The Debate over Sharia Law in Canada," in *Sexual Justice/ Cultural Justice: Critical Perspectives in Political Theory and Practice*, ed. Barbara Arneil, Avigail Eisenberg, Monique Deaveux, and Rita Dhamoon [New York: Routledge, 2007]).

35. See Shachar, "Religion, State, and the Problem of Gender."

36. In Canada, this view was most strongly manifested in the legal discourse by the Supreme Court's 2004 *Hartshorne* decision, which emphasized the legitimacy of using secular contractual mechanisms (known as "domestic contracts") that allow parties to stray away from statutory equitable default rules found in governing family-law statutes. What was categorized as an unfair agreement was later reinstated by the Supreme Court, in part through reliance on the logic of consent. As the country's top justices ruled: the "courts should be reluctant to second-guess the arrangement on which [private parties, here the husband and wife] reasonably expected to rely. Individuals may *choose* to structure their affairs in a number of ways, and it is their prerogative to do so." Hartshorne v. Hartshorne, [2004] 1 S.C.R. 550, para. 36 (emphasis added).

37. This objection was put forth powerfully by the Canadian Council of Muslim Women, a national nongovernmental organization, which stated in their objection to the Sharia tribunal that "the 'voluntary' nature of the woman's agreement may be colored by the coercion put upon her that she is being a 'good' Muslim by following some arbitrator's interpretation of Sharia/Muslim family law." See "Position Statement on the Implementation of Sections of Muslim Law in Canada."

38. In Canada, leading women's organizations, such as NAWL, expressed the concern that *any* type of private dispute resolution in the family-law arena may undermine women's bargaining position or equality protection, since there are "no public records detailing the nature of the dispute or the terms of the agreement," and that family mediation or arbitration is "removed from state regulation and public scrutiny." See generally Sandra A. Goundy, Yvonne Peters, and Rosalind Currie, *Family Mediation in Canada: Implications for Women in Canada* (Ottawa: The Status of Women Canada, 1998). Others may see this position as paternalistic and lacking in respect for women's agency and their ability to make informed choices for themselves. See generally Linda R. Singer, *Settling Disputes: Conflict*

Resolution in Business, Families, and the Legal System (Boulder, CO: Westview Press, 1994) (emphasizing the importance of parties' agency in different "private ordering" contexts — rather than their caricatured representation as eternal victims).

39. Québec Civil Code, S.Q., ch. 64, art. 2369 (1991).

40. In this particular debate, the governing provincial legislation casting the "shadow" under which the parties bargain is the Family Law Act, R.S.O., ch. F-3 (1990) (Ont.). See Marion Boyd, "Religiously-Based Alternate Dispute Resolution: A Challenge to Multiculturalism," *Canadian Diversity* 4 (2005): 71.

41. See the now-classic contribution by Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979): 950.

42. On "reactive culturalism," see Shachar, *Multicultural Jurisdictions*, 35–37.

43. See, e.g., ibid., 45–62. My work is part of an emerging interdisciplinary body of literature now exploring the relationship between gender/sexuality and the construction of collective identity. See Nira Yuval-Davis, Floya Anthias, and Jo Campling, *Woman-Nation-State* (New York: St. Martin's Press, 1989); Hélie-Lucas, "The Preferential Symbol for Islamic Identity," in *Feminist Theory Reader: Local and Global Perspectives*, ed. Carole R. McCann and Seung-Kyung Kim (New York: Routledge Press, 2003); Deniz Kandiyoti, *Women, Islam and the State* (Philadelphia: Temple University Press, 1991); Inderpal Grewal and Caren Kaplan, eds., *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (Minneapolis: University of Minnesota Press, 1994); Vrinda Narain, *Gender and Community: Muslim Women's Rights in India* (Toronto: University of Toronto Press, 2001); Katherine Franke, "Sexual Tensions of Post-Empire," Columbia Law School Pub. Law Research Paper No. 04–62, 2004, accessed August 22, 2011 http://papers.ssrn.com/s013/papers.cfm?abstract_id=491205.

44. Ironically, such gendered constructions of group identity may be shared by representatives of both minority and majority communities, as is demonstrated by the current debate over the hijab in France. See Shachar, "Religion, State, and the Problem of Gender."

45. For a critical discussion of the exit option, see Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender and Realistic Rights of Exit," *Ethics* 112 (2002): 205; Phillips, *Multiculturalism without Culture*, 133–57.

46. Shachar, *Multicultural Jurisdictions*, 117–45.

47. A similar observation regarding the transnational aspects of these dilemmas is made by Anne Phillips. See Phillips, *Multiculturalism without Culture*, 173–75.

48. See, e.g., Ayesha Hasan, "Islamic Family Law in the English Courts," *Family*

Law 100 (Feb. 1998); Lucy Carroll, "Muslim Women and 'Islamic Divorce' in England," *Journal of Muslim Minority Affairs* 17 (1997): 97.

49. On the *mahr* situation in the United States, see generally Ghada G. Qaisi, "Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts," *Journal of Law and Religion* 15 (2001): 67; in comparative perspective, see generally Pascale Fournier, Canadian Council of Muslim Women Sharia/Muslim Law Project, "The Reception of Muslim Family Law in a Western Liberal State" (2004). On Islamic marriage and divorce, see generally Dawoud Sudqi El Alami, *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992); Jamal J. Nasir, *The Islamic Law of Personal Status* (New York: Kluwer Law International, 2002); John L. Esposito and Natana J. DeLong-Basic, *Women in Muslim Family Law* (Syracuse, NY: Syracuse University Press, 2001).

50. Bruker v. Marcovitz, [2007] S.C.C. 54.

51. *Id.* paras. 3–9.

52. *Id.* para. 12.

53. *Id.* In light of the decision's minority opinion, which did not even permit the damages remedy, it is fair to assess that any claim to make pronouncement on religious precepts or to appear before a religious authority would have likely been rendered by the court as an impermissible breach of the husband's constitutionally protected freedom of religion. See *id.* paras. 101–85 (Deschamps & Charron, JJ., dissenting).

54. [2003] R.J.Q. 1189, para. 30.

55. [2005] R.J.Q. 2482, para. 76.

56. *Marcovitz*, paras. 3, 92.

57. This is in line with national and provincial legislation that gives courts discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage. See Divorce Act, R.S.C., ch. 3, § 21(1) (Supp. II 1985) (Can.); Family Law Act, R.S.O., ch. F-3, §§ 2(4)-(7), 56(5)-(7) (1990) (Ont.). As the court notes in *Marcovitz*, these provisions were fully endorsed by the Jewish community's representatives, to discourage the serious harms caused to women by recalcitrant husbands. *Marcovitz,* paras. 8, 80, 92.

58. See generally Mnookin and Kornhauser, "Bargaining in the Shadow of the Law."

59. See Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms," *American Journal of Political Science* 28 (1984): 165.

60. Ibid., 165–67.

61. Arbitration Act, 1991 S.O., ch. 17, §§ 6, 19, 45–47.

62. See Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion," Ministry of the Attorney General of Ontario, December 20, 2004, accessed August 23, 2011, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf ("the Boyd Report").

63. The government's commissioned report held that beyond these recommended regulatory reforms, or what I have called the shift from ex post to ex ante regulation, as well as extensive educational outreach programs by the government, the Arbitration Act's status quo — namely, the *non*-prohibition of religious family dispute resolution — be left in place.

64. See Family Arbitration, R.O. 134/07. The regulation clarifies that, among other things, family arbitrators shall be subject to a licensing-like training process. This amounts to a much tighter regulation of phase 1 arbitration, making it conceptually closer to a standard, public-court-like proceeding, here responding to the claims of those who advocated a phase 0 type of resolution.

65. Shachar, *Multicultural Jurisdictions*, 117–45.

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

67. See "Review of the Arbitration Process in Ontario: Submission by B'nai Brith Canada to the Ontario Ministry of the Attorney General," B'nai Brith Canada, 2004, accessed August 23, 2011, http://www.bnaibrith.ca/briefs/sharia/sharia040908.pdf.

68. I discuss the distinction between family law's demarcating and distributive aspects in Shachar, *Multicultural Jurisdictions*, 49–55.

69. See Family Arbitration, R.O. 134/07.

70. The *Hartshorne* decision, which emphasized the legitimacy of using secular contractual mechanisms (known as "domestic contracts") to reach unequal separation agreements, is a case in point. See note 36.

71. See Arbitration Act, 2006 S.O., ch. 1, § 1(2) (incorporated into section 2.2 of the 1991 Arbitration Act).

72. England is a case in point: it is reported that the majority of requests for help to resolve matrimonial disputes received by the Muslim Law (Shariah) Council were made by Muslim women who applied for assistance in obtaining religious-sanctioned divorce — often after they had obtained a civil divorce in accordance with secular law. See Williams, "Islam in English Law."