The politics and risks of the new legal pluralism in the domain of intimacy

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This article offers a critique of the so called "new" legal pluralism within liberal constitutional democracies. It places the concept in historical perspective and analyzes arguments for the "transformative accommodation" of religious diversity in the form of status based legal pluralism in the domain of personal law. The author assesses the flaws of the legal pluralist approach with respect to gender equality and democratic legitimacy. She offers a different model of transformative accommodation that rests on a mix of legal approaches to the problems faced by religious women in constitutional democracies.

Debates over how gender should figure in the construction of equal citizenship have resurfaced in our epoch of mass migration and religious revival. Whether equality is best fostered by a focus on gender differences or a gender-blind approach, and whether it is possible to abstract from gendered perspectives are perennial questions. Today we face a new version of this conundrum: can we achieve gender equality by ignoring or recognizing gendered religious differences?[1]

Some argue that sensitivity to religious minorities living in western democracies requires dropping "abstract individualizing rights-based liberalism" along with the secular republican statist monopoly of law making as both tend to homogenize and level cultural/religious difference. New forms of religious pluralism and public religion challenge the old assimilationist models.[2] Legal uniformity is most contested in the domain of personal law. The old "wall of separation" model between church and state allegedly tied to the privatization of religion, and the secular state's monopoly on family law are deemed inadequate to the needs of a plural society with many religious

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1 *See* the debate around Susan Okin's posthumously published, *Multiculturalism and Feminism: No Simple Question, No Simple Answers*, *in* Minorities within Minorities 67 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

2 Jose Casanova, Public Religion in the Modern World (1994).

groups, multiple minorities and "minorities within minorities".[3] Indeed the secular character of state-based personal law in western democracies is itself contested, the claim being that although civil marriage law is formally secular and neutral, the influence of Christian norms remains palpable.[4] Now that all western societies are becoming more deeply diverse, fairness apparently requires a difference-sensitive "equality model" for the interface between religion and the state regarding personal law.[5]

The catchword today is "legal pluralism"—recognition by the state that there are a plurality of religious family norms that should be legally accommodated by delegating and/or sharing the power to make binding law in the domain of intimacy with religious authorities. Some feminists now argue that well-designed, "woman friendly" religious status-based legal pluralism can help resolve the gendered dilemmas of difference faced by religious women in our midst.

This issue recently gained traction partly thanks to high profile cases regarding Islamic faith-based family law arbitration in Canada and Archbishop of Canterbury's speech in 2008 advocating that in "some areas of the law" a "supplementary jurisdiction" deriving from religious law be recognized by the liberal state for minority religious communities.[6] Accordingly, the state should share its sovereignty through status-based legal pluralism when it deals with religious communities with strongly entrenched personal legal codes and comprehensive identities. While this argument was made with respect to Muslim minorities, it pertains to other religious minorities and potentially to religious majorities as well. Indeed, recently the discourse of legal pluralism was adopted by the Christian right in the U.S. arguing for "multi-tiered" marriage laws on the state level in a thinly veiled, religiously inspired effort to reinscribe the sanctity of marriage in the law (against easy and no-fault divorce). This movement succeeded in getting legal recognition for two-tiered marriage and divorce

[3] Avigail Eisenberg & Jeff Spinner-Halev eds., Minorities within Minorities (2005).

[4] John Witte, Jr., From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition (1997); Lee Teitelbaum, *Religion and Modernity in American Family Law*, *in* American Religions and the Family 227 (Don S. Browning & David A. Clairmont eds., 2007).

[5] Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution (2007) criticize separation analysis and replace it with equality analysis.

[6] Avigail Eisenberg, *The Debate over Sharia Law in Canada*, in Sexual/Cultural Justice 211 (Barbara Arneil, Monique Deveaux, Rita Dhamoon, & Avigail Eisenberg eds., 2006); Rowan Williams, *Civil and Religious Law in England: a Religious Perspective*, Lecture at the Royal Courts of Justice, London, England, February 7, 2008, *available at* http://www.archbishopofcanterfury.org/1575. To date no decisions by religious tribunals, be they Islamic, Catholic, or Jewish, have any legal value per se in Canadian, British, or American Courts.

[7] *See* Ariz. rev. stat. ann. ¶¶25-901–906 (2006); Ark. code ann. ¶¶9-11-801–811 (2006); LA. rev. stat. ann. ¶9:272 (2006). The purpose of covenant marriage is to make divorce harder and to involve religious authorities in preserving marriages. Louisiana's statute stipulates that only religious authorities can perform the required premarital counseling for those who opt into covenant marriage rules. *See* Joel A. Nichols, *Louisiana's Covenant Marriage Statute: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 Emory L. J. 929 (1998); Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 Vand. J. Transn'l L. 136 (2007) comparing New York Get statutes with covenant marriage.

laws via "covenant marriage" statutes in Arizona, Arkansas, and Louisiana.[7] While this does not quite amount to shared jurisdiction with religious authorities, advocates invoke the discourse of legal pluralism in the hopes of undoing the uniformity of secular law in this domain.[8]

I argue against introducing any version of religious status-based legal pluralism in the domain of personal law in established western constitutional democracies. I reject the "legal group-ism" behind such demands along with the reification of segmental pluralism, the fragmentation of citizenship and sovereignty and the threat to individual human rights and democratic principles that religious status-based legal pluralism would reinforce or create.[9] In those non-western constitutional democracies where status-based legal pluralism already exists, I regard it as a "faute-de-mieux" rather than a normatively compelling model.

I begin by (1) placing the concept of legal pluralism in historical perspective. (2) Analysis of feminist arguments for status-based legal pluralism comes next. (3) The third section offers a critique that takes seriously the underlying dilemmas of difference identified by those arguments while assessing the flaws of the legal pluralist solution.(4) I conclude with a model of transformative accommodation that rests on a different mix of legal approaches to the problems faced by women who try to reconcile their religion and their rights.

Given the disastrous privatization of so much of the state, locally and globally, and the dangers of the religious revival to democratic legitimacy and women's equality, now is not the time to get on the bandwagon of religious status-based legal pluralism. There are better ways to acknowledge gendered religious difference that do not reify the groups, entrench the authority of male elites within them, or freeze identities and adaptive preferences in the law.

1. What is legal pluralism?

Legal pluralism refers to the descriptive fact of a multiplicity of legal orders within the same social field.[10] As a description of multiple forms of normative ordering, legal pluralism is everywhere and unremarkable. Legal pluralism becomes interesting when it

[8] Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 63, 75 (1998) arguing that provisions stipulating premarital counseling by religious authorities aim to bring religion back into the public square to perform a function for which it is uniquely qualified: preserving marriages.

[9] Susanne Baer, *A Closer Look a Law: Human Rights as Multi-Level sites of struggle over Multi-Dimensional Equality*, 6 Utrecht L. Rev. 56 (2010).

[10] Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y. Rev. 207 (1988); Sally F. Moore, *Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & Soc'y. Rev. 719 (1973) arguing that law of the state is dependent on and interacts with other normative systems and as such is "embedded" in other normative fields; John Griffiths, *What is Legal Pluralism?*, 24 J. Legal Plur. Unoff. L. 1 (1986) provides a critical survey of existing theories of legal pluralism.

is designed as a strategy for the management of difference as it was in the case of overseas European colonial and many land-based empires.

Whatever one thinks of what Karen Barkey, in a recent book on the Ottoman empire's millet system, calls "this marvel of flexible control over complexity," one thing is clear: religious status-based legal pluralism put elite intermediaries in control over group membership and religious orthodoxy with a real stake in their now legally entrenched, and externally secured power to administer their semi-autonomous communities.[11] The codification and delegation of control over personal law to distinct religious group authorities did not simply involve accommodation to "difference." *It also helped construct and freeze that difference along with the framing of gendered hierarchy as religious*.

The demarcating function of personal family law (determining membership), framed as religious requirements interpreted by entrenched male elites, played a crucial role in perpetuating hierarchies, in subordinating women's sexuality to group reproduction, and in reproducing internal gendered distributional inequalities. The contexts in which these forms of status-based legal pluralism were designed were not republics, or constitutional democracies, but autocratic land-based empires and/or "salt-water" colonial settings. Yet wherever these systems have been retained or reintroduced in post-colonial or post-imperial democratic republics—India, South Africa, and Israel—the consequences for equal citizenship in general and women's equality in particular have not been reassuring.[12] Although the institutional arrangements differ, and religious status-based legal pluralism is, in each case, the result of pragmatic compromise at the time of state and nation building or constitution-making, they all are entrenched gendered social hierarchies within the relevant religious and/or tribal groups.[13] Suffice it to say that one should not make a normative virtue out of strategic necessity.[14] Moreover, we must understand religious (and other) status-based legal pluralism in the frame of jurisdictional politics and struggles over power rather than simply in terms of accommodating diverse normative orders.

[11] Karen Barkey, Empire of Difference 294 (2008). Barkey sees the Ottoman system as a marvel of flexibility and toleration. Non-Muslims were protected and could live under their own religious law if they recognized the superiority of the imperial state and the privileged place of Islam.

[12] Helen Irving, Gender and the Constitution 21 (2008); Shireen Hassim, Women's Organizations and Democracy in South Africa (Univ. of KwaZulu Natal Press, 2006); Martha C. Nussbaum, *India, Sex Equality and Constitutional Law, in* The Gender of Constitutional Jurisprudence 174 (Beverley Baines & Ruth Rubio-Marin eds., 2005); Sara Jagwanth & Christina Murray, *No Nation can be Free When One Half of it is Enslaved: Constitutional Equality for Women in South Africa, in* The Gender of Constitutional Jurisprudence, *id.* at 230; Flavia Agnes, Law and Gender Inequality (1999).

[13] This is so even where the constitution prioritizes gender equality and where a civil alternative exists. *See* Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 11 Utah L. Rev. 351 (2009); Yuksel Sezgin, *How to Integrate Universal Human Rights into Customary and Religious Legal Systems?*, 60 J. Legal Pluralism 5 (2010).

[14] As Ran Herschel does in Constitutional Theocracy (2010). In South Africa and India, strategic compromises were clearly made. It is a pity sunset clauses for religious or customary jurisdiction were not placed in the constitution. In Israel, the Millet system was revived to create a monolithic, dominant and privileged Jewish-Israeli identity.

2. The newest legal pluralism: transformative accommodation?

Today legal pluralists demand the recognition of different systems of personal law for religious communities in consolidated western constitutional democracies. The claim is that status-based legal pluralism would accommodate deeply held minority beliefs and practices in increasingly diverse societies and so is a desirable alternative to the homogenizing sovereign power and law of the secular state. The time has apparently come to acknowledge the plurality of family forms crucial to the many religious communities living among us and to provide for alternatives to the one model fits all system of "secular absolutist" state law that obtains in most western democracies.[15]

Indeed, due to its demarcating function, control over family law is central to a religious group's identity and perpetuation. Refusal to grant legal recognition for the religious groups' norms of marriage and divorce erodes the ". . . group's power to preserve their cultural distinctiveness through formal and autonomous demarcation of their membership boundaries."[16] Lack of legal accommodation allegedly puts minority religions at an unfair disadvantage since they either came to the game after it had already begun (immigrant groups) or had little input into the background culture that informed the standards of society's institutions even if they were present all along (minorities or indigenous groups). Certainly the role of the majority religion—Christianity—in shaping both the background culture and family law in the West is indisputable.[17] The de facto influence this background culture apparently continues to have on the now secularized state's monopoly over personal law allegedly means that it is not neutral in its effects. The remedy is demonopolization: on fairness and equality grounds, minority religious traditions should have legal effect for their members in the domain of intimacy.[18]

But such religious status-based legal pluralism could create a no-go area for constitutional and human rights that protect gender equality and women's personal autonomy.[19] Feminists have long been critical of the patriarchal structures pervasive in the personal law of all the major religions and the tribal law of indigenous populations.[20] Many have criticized group-based citizenship rights from the perspective of vulnerable members within these groups who are already relatively disempowered and at risk of being locked into patriarchal structures of rule.[21] It is thus surprising to see feminists promoting an allegedly women-friendly model of religious

[15] John Witte, Jr. & Joel A. Nichols, *Faith Based Family Laws in Western Democracies?*, Fides et Libertas, J. Int'l Religious Liberty Ass'n 119 (2010), *available at* http://ssrn.com/abstract=1805304.

[16] Ayelet Shachar, Multicultural Jurisdictions 72 (2001).

[17] *Id.* 73–74.

[18] *Id.* 73–76.

[19] Baer, *supra* note 9.

[20] The literature is vast. *See* Anne Phillips, Multiculturalism without Culture (2007), and Sarah Song, Justice, Gender and the Politics of Multiculturalism (2007).

[21] Susan Okin, *Is Multiculturalism Bad for Women?*, *in* Is Multiculturalism Bad for Women 7 (Joshua Cohen, Matthew Howard, & Martha C. Nussbaum eds., 1999).

status-based legal pluralism for liberal constitutional democracies where it does not yet exist.[22] Why would a feminist advocate any version of legal pluralism that gives the authority of public law to decisions made by private (typically male, typically unaccountable) authorities and tribunals in religious communities over an area so crucial to women? Here I can only address the arguments made by the most talented representative of this position.[23]

Sensitivity to the lives of religious women and acceptance of the importance of the demarcating function of family to the maintenance of religious communities seems to be the motivation. The claim is that, when appropriately configured, "multicultural jurisdiction"—to use Shachar's term—could help religious women escape the dilemma they face in secular constitutional democracies when it comes to family law, namely: "your religion or your rights."[24] A woman-friendly version of legal pluralism could resolve the "paradox of multicultural vulnerability"—which ensues when the liberal state erects a regime of group differentiated citizenship rights to accommodate religious differences but ends up permitting a degree of group control that can involve severe injustice for the most vulnerable members within the group. In such contexts of "privatized diversity," burdens of realizing gender justice fall entirely on the individual woman who risks ostracism from her identity group if she invokes her constitutional or human rights by going to civil court, thus flouting the communal authorities and religious "law."[25] The alternative is "transformative accommodation"—an arrangement that takes religious women's beliefs, their interest in communal membership and the importance of the demarcating function of family law to the group seriously, while providing incentives to religious authorities to make more egalitarian distributional decisions.[26]

Given these desiderata, it is unsurprising that the feminist version of legal pluralism rejects what it takes to be the two alternative approaches to the gendered dilemmas of religious citizenship. The first, dubbed the "secular absolutist" model, typical of most western liberal democracies, allows for the free exercise of religious normative pluralism and in some cases (the U.S.) lets religious leaders perform marriages as representatives of the state. But it reserves to the state decisions over the legal questions of who may marry whom, over divorce, over issues of child custody, financial settlements,

[22] In the U.S. the main exception to the states' monopoly on personal law pertains to native-Americans. This is due to the heritage of dependent or quasi-sovereignty ascribed to indigenous tribes since the mid-nineteenth century. The much discussed supreme court case Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) affirmed the tribe's jurisdiction over personal law pertaining to membership (allowing gender discriminatory rules whereby children of male but not female members who marry outside the tribe retain their membership regardless of where they are raised). *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

[23] Shachar, *supra* note 16. Other advocates include Linda McClain, *Marriage Pluralism in the Untied States: On Civil and Religious Jurisdiction" and the Demands of Equal Citizenship*, available at http://www.bu.edu/law/faculty/scholarship/workingpapers/2010/html, and Avigail Eisenberg, *Identity and Liberal Politics: the Problem of Minorities within Minorities*, *in* Minorities within Minorities, *supra* note 1, at 249.

[24] Shachar, *supra* note 16, at 1–10.

[25] The most notorious case is Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 S.C. 945.

[26] Shachar, *supra* note 16, at 117–145.

and so on. The secular democratic state maintains a monopoly on personal and family law. Its civil codes and secular courts set up an unmediated relationship with the individual citizen and thus provide an exit option from private religious group ordering of family norms (as well as a right to opt into it). The member of the religious community can escape the group's regulatory power but at the potential price of being shunned by the group. This approach thus does nothing to resolve the gendered dilemmas of multicultural vulnerability.[27] Worse, the "secular absolutist" model erodes religious groups' power to preserve their cultural distinctiveness.[28]

Hence the demands for religious status-based legal pluralism to correct for inequalities among dominant and minority religious groups. This "religious particularism" model of legal pluralism would involve delegation of sovereign powers to the respective religious authorities. Accordingly, the state accommodates diverse religious communities by giving legal force to the decisions of faith based private arbitration tribunals and/or religious authorities' decisions in matters of membership status and family law.[29] But the carte-blanche devolution of jurisdictional powers from the state to the status group also does nothing to meliorate the in-group gender inequality that is often encoded in the group's tradition and would now be reinforced by the state.[30] Moreover, it places women's hard-won individual rights as equal citizens at risk when they must come before religious tribunals that don't embrace the norms of gender equality. In some versions of the "privatized diversity model," the exit option evaporates entirely when there is no civil law alternative and, even if there is one, the burdens on the individual woman who "chooses" her rights over her culture are not alleviated. Nor is there any inducement from the wider (presumably more egalitarian and democratic) society for internal reform. Instead, this version makes the state complicit in the infringement of women's equal citizenship rights by reinforcing the private power of unaccountable typically male elites.

The alternative offered is an allegedly woman-friendly version of status-based legal pluralism, designed to create incentives for religious groups to respect a baseline of egalitarian gender norms of the wider society.[31] This model proposes conditional, shared jurisdiction between the state and religious authorities. The quid pro quo is this: the religious group's authorities get a slice of the state's public law-making power and the prestige that goes with it, conditioned on a pre-agreed form of partial exit for

[27] *Id.* 72–78.

[28] *Id.* 73.

[29] *Id.* 78–85 discusses this model as it functions in non-western countries. Advocates include Witte & Nichols, *supra* note 15; Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 Cardozo L. Rev. 1161 (2006), urging the state to shed its monopoly in favor of a marriage market in which civil marriage competes with other models offered by religious and other institutions; and Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 Cardozo L. Rev. 1221 (2006), urging that civil law permit couples to make civil contracts assigning jurisdiction over their marriage to religious authorities. Note that while Catholicism, Islam, and Judaism have their religious tribunals for resolving marital disputes, Protestantism does not.

[30] Shachar, *supra* note 16, at 61.

[31] *Id.* 117–145, and Shachar, *Faith in Law*, 36 Phil. Soc. Criticism 395, 405 (2010).

group members (their right to turn to state courts) should the group authorities fail to conform their decisions to minimal thresholds of gender equality in matters of post-divorce distribution of property, future matrimonial rights, custody, etc.[32] Communal decision-makers gain public legal recognition and enforcement of their decisions, while the state retains the power to issue a civil divorce and to exercise ex post review initiated by an individual complainant or a public interest group.

This form of legal pluralism entails regulated interaction and joint jurisdiction between religious authorities and civil courts. It gives the former legally sanctioned power over group members. In exchange, the group's authorities agree to a "no-monopoly" rule, accept prearranged forms of partial exit as well as a division of jurisdictional labor: the state would retain ultimate control over distributional matters while religious authorities get exclusive jurisdiction over status determination. The state thereby relinquishes its monopoly over personal law. Acknowledgment of a partial exit option by the group's authorities would allegedly enhance the voice of its least powerful members (women could try to hold their religious authorities to their public agreements). Joint jurisdiction presumably would create incentives to transform discriminatory distributional norms that breach women's basic equal citizenship rights in exchange for compulsory submission by members to the group's internal religiously regulated divorce proceedings. The enticement of law making and regulatory power would supposedly enhance the transformative aspects of exit: the threat that women would forum-shop and that the tribunal's rulings could be overturned would be incentive enough to undermine patriarchal norms within these groups.[33]

3. The pitfalls of status-based legal pluralism

Although these arguments for plural jurisdictions over personal law seem to have women's interests at heart, they are driven by contradictory imperatives that ultimately defeat their purpose. Worse, they deflect from other kinds of transformative accommodation that the state could facilitate that would respect religious free exercise and prioritize gender equality without risking the establishment of religion through the excessive entanglement with religious authorities and partial privatization that Shachar's proposals entail. I shall make three criticisms and suggest an alternative.

Firstly, the notion that religious leaders would reform the patriarchal aspects of their communities' rules to avoid mass exit or to get legal effect for their decisions is unconvincing. Orthodox or fundamentalist versions of religion tend to define themselves over and against feminism and reform break-away movements regardless of the cost in membership.[34] Faithfulness to what they deem to be fundamental constitutive norms take precedence over numbers for true believers. Moreover, religious officials could game the system: accede as a formal matter to a pre-agreed upon partial exit option (use of state courts) in exchange for its piece of the regulative pie

[32] Shachar, *supra* note 16, at 117–145.

[33] *Id.* 125.

[34] Oonagh Reitman, *On Exit*, *in* Minorities within Minorities, *supra* note 1, at 197.

while informally continuing to make exit very unattractive for women members of the group.[35] The state cannot outlaw shunning or ostracism. The particular strategy proposed by Schachar comes at "too great a price": compulsory submission to a patriarchal divorce system at least in the first round.[36]

Another feature of the transformative accommodation model of status-based legal pluralism is even more disturbing. It has a dual purpose: to enhance gender equality within the group (the transformative part) and to prevent erosion of the religious group's distinctiveness (the accommodation part).[37] Shachar wants to square the circle through a creative use of state law. But the means undermine the ends at least with respect to the former goal. Even if the incentive to create less gender discriminatory outcomes of religious personal law did have some effect, the core patriarchal structures of the religious groups would remain intact. It is noteworthy that nothing in the proposal would challenge the power imbalance inherent in the gendered division of hierocratic authority typical of many religious groups. In other words, the formal exclusion of women from the religious hierarchies and positions of authority in, say, orthodox Judaism, Islam, or Catholicism (women cannot be orthodox rabbis, imams, or priests, nor do they sit on arbitration tribunals) would be further entrenched once the religious authorities in question acquire the state's law-making power and have their decisions regarding family matters enforced by the state. Surely, enhancing the coercive power and prestige of male religious leaders would be counterproductive from a gender-equality perspective. It is hardly likely that existing religious authorities would buy into a joint jurisdiction scheme that would undermine their power. Indeed, the point is to entice them into making fairer distributional allocations in divorce by offering them even more jurisdictional power! Religious tribunals typically composed of men would have no incentive to challenge these structural features of gender hierarchy even if they tempered inequities say in divorce settlements. As in the case of other forms of status-group legal pluralism, by so delegating its law-making power the state would become complicit with the gendered hierarchies within religious groups. The symbolic spill-over effects within the wider society would not be trivial. No form of pre-agreed on exit formulae would be transformative enough to alleviate this problem.[38]

Nor is it the proper task of the secular state to ensure the survival of any religion by protecting it from the vicissitudes of the religious or secular value market.[39] This does

[35] *Id.* 203.

[36] *Id.* 204. Nor would it help regarding gender-discriminatory demarcation membership rules like those in the Martinez case. *See* Roland Pierik, *Review of Multicultural Jurisdictions*, 32 Pol. Theory 585 (2003).

[37] Shachar, *supra* note 16, at 73.

[38] This is why feminists in Ontario fought so hard against such proposals. *See* Eisenberg, *supra* note 6; Audrey Macklin, *Particularized Citizenship: Encultured Women and the Public Sphere*, *in* Migrations and Mobilities 276 (Seyla Benhabib & Judith Resnik eds., 2009); and Phillips, *supra* note 20, at 169–180 discussing the contestation in Canada and Britain.

[39] The exception in Supreme Court Jurisprudence is the reasoning in Wisconsin v. Yoder 406 U.S. 205 (1972) which exempted the Amish community on free exercise grounds from full compliance with a compulsory school attendance law, ultimately to ensure survival of the community. I believe this was wrongly decided. Douglas' dissent arguing that the interests of the pupils in developing their capacity for real choice, should have been taken into account is correct.

not mean that I endorse the tendentiously labeled "secular absolutist" model, for I do not think that the absolute separation of religion and the state is possible today if it ever was.[40] Interrelation between the differentiated spheres, along with some degree of regulation by the state of religious groups' self-regulation always was and remains indispensable. But the alternatives are not restricted to the "religious particularist" or "joint governance" models.

Before turning to the third set of critical arguments that draw on republican and democratic arguments, it is necessary to make some further conceptual distinctions.[41] As indicated, legal pluralism, in the diffuse sense of a multiplicity of normative orders coexisting in a social space, has always existed. But legal pluralism in the sense of a multiplicity of jurisdictional powers within a democratic constitutional sovereign state takes one of three ideal-typical forms: federal, con-sociational, or personal status-group jurisdiction over specified subject-matters.[42] It is important to grasp the difference among these forms.

4. Excursus: forms of internal legal pluralism

The federal principle accommodates local diversity by enabling territorially situated minorities to govern themselves in key respects while allowing majorities to be compounded in the center.[43] Federal arrangements may help protect minorities against local oppression if the federal constitution incorporates basic individual rights. Thus federal principles can militate against the tyranny of the simple majority (local or federal) while allowing for legal diversity and experimentation. If citizens' interests track territorial political subunits, then local government will enhance citizens' voice by accommodating locally varying preferences. Federal arrangements may track cleavages involving language, ethnicity, or religion, but a well-ordered federal system avoids reifying them because individuals can relocate across state lines, and basic constitutional rights are guaranteed to everyone at the federal level.[44] More importantly for my purposes, federal arrangements are about the *division of public jurisdictional power, not the mixing of public and private authorities*. Typically, in a democratic constitutional state, they stipulate the same form of government on all levels: democratic, constitutional, and republican. Territorial federalism is thus a form of legal pluralism that does not undermine basic constitutionalist and democratic principles: power on both levels is public, representative, and accountable; local and national

[40] Shachar, *supra* note 16, at 72, sees the "secular absolutist model" as ". . . based on a strict separation between church and state. Under this model, the state has the ultimate power to define legally what constitutes the family and to regulate its creation and dissolution." However, jurisdictional monopoly by the state does not entail strict separation.

[41] Cécile Laborde, Critical Republicanism (2008).

[42] I pass over jurisdictional divisions entailed in constitutional separation of powers.

[43] Daniel J. Elazar, Exploring Federalism, at 1–80, 263 (1987).

[44] This is true of the U.S. and the German models. I am not a fan of the asymmetrical federalism advocated by Alfred Stepan, Juan J. Linz, & Yogendra Yadav, Crafting State-Nations 201–276 (2011), because it tends to track and freeze territorially located ethnic, linguistic or religious identities.

public officials are responsible to the people who elected them; legal sovereignty is not parceled out to private groups organized on non-democratic bases; and equal individual constitutional rights limit all levels of government.

The same cannot be said of the other two alternatives for managing diversity: con-sociational democracy or religious status-based legal pluralism.[45] The former is also based on "compound majorities" in the center and devices to build more substantial consensus than simple majority systems while fostering the autonomy of self-governing units. Con-sociational democracy involves concurrent majorities that are a-territorial.[46] It is characterized by segmental group pluralism and grand coalitions often involving principles of proportionality and vetoes in national policy decisions and legislation.[47] Two features of these arrangements are distinctive. First, they emphasize (and reify) the existence of apparently permanent religious, ethnic, or cultural group identities and cleavages on the assumption that the society is so deeply divided that consent can be won no other way. Second, the power sharing among the segmentally differentiated autonomous groups is typically linked with elite control and bargaining.

Multicultural jurisdiction, like con-sociational arrangements, involves the granting of legal autonomy on the basis of personal status instead of territorial division. However, this way of accommodating diversity cedes public control of personal and family law to *non-public, and publically unaccountable, private authorities* often exempting their community members from the relevant general laws of the polity (civil codes and human rights).[48] What results is the reification of segmented identities coupled with the entrenchment of private hierarchies. Private religious authorities exercise public power but unlike federal subunits, their forms of organization typically are not required to be congruent with the republican or democratic principles that structure the overall constitutional democracy in which they are situated. Accordingly, from the democratic and republican standpoint, religious status-based jurisdiction (hybrid or total) over personal law is not normatively desirable. There are no normatively compelling reasons to introduce this form of jurisdiction within consolidated constitutional democracies. The costs are too high: fragmentation of the polity, privatization of key elements of public power, reification and further segmentation of group identities at the expense of overlapping multiple allegiances, entrenchment of religious hierarchies backed up by state power and diminishing of the sense of shared citizenship and belonging to the overarching polity that comes from participating in the political processes of deliberation and contestation that shape common civil laws affecting everyone.

[45] Arend Lijphart, *Consociational Democracy*, 21 World Politics 207 (1969) and Arend Lijphart, Democracy in Plural Societies (1977).

[46] The identity groups can also be concentrated territorially. This is thus a particular form of power-sharing arrangement. For a critical assessment, *see* Elazar, *supra* note 43, at 19–26.

[47] *Id.* 23

[48] This is true of the religious particularism and the joint jurisdiction models. Shachar, *supra* note 16, at 78–85, 88–140.

Although legal pluralists love to hate state sovereignty because they think it must be homogenizing domestically and bellicose internationally, demonopolization of the state's law-making competence through privatized or joint jurisdiction is hardly a desirable alternative. Given the risks of violent conflict and political fragmentation that politicized religious pluralism carries in every society, the secular state's control over legal and political sovereignty coupled with vigorous antiestablishment principles is the solution not the problem, as Hobbes showed long ago, although we hardly need to buy into his authoritarian political model to make this point. Instead, the American founders got it right when they created a democratic republic that protected religious diversity and freedom of individual conscience by constitutionally guaranteeing individual free exercise rights while rejecting religious establishment.

Accordingly, in the U.S., personal law has been exclusively in the public civil domain for more than three centuries. It is misleading to caricature this public monopoly as secular absolutism as if it is based on a comprehensive secularist doctrine and by implication is hostile to religion.[49] The opposite is true: coupled with the antiestablishment and free exercise clauses of the first amendment, the state's monopoly on law making is the sine qua non for equal liberty for the diverse religious and non-religious individuals and groups that make up our society. The antiestablishment principle provides the institutional basis for the principled shift from toleration by a politically established majority religion of (therefore) politically unequal religious minorities, to equal treatment of all religions and equal respect for the religions/moral conscience of all individuals. Free exercise on its own may secure toleration of minority religious groups but it does not protect against state entrenched privilege and inequality among or within them.[50]

Indeed, "secular absolutism," as a way to institutionalize the antiestablishment principle, has been insisted on in the U.S. for religion-friendly as well as republican and "enlightenment" liberal reasons. Many religious groups fear corruption or cooptation by the lure of state power and the coercive use of it by religious majorities. Republicans and liberal democrats seek to protect the common civil, political, and juridical public spheres of the polity and citizens' individual rights from the corrupting, divisive effects of politicized religious factions.[51] Both see antiestablishment as the sine qua non of a secular and impartial democratic constitutional state. For the former, antiestablishment is desired because the state is deemed incompetent in the religious/spiritual domain and a threat to the freedom of individual religious conscience. Antiestablishment requires distinguishing between temporal and spiritual institutional power and

[49] For a distinction between comprehensive religious worldviews and secular political principles as purposely incomplete and thus the frame within which common ground can be created, individuality and plurality accommodated, *see* Eisgruber & Sager, *supra* note 5. *See also* Laborde, *supra* note 41, at 85–98, arguing that republicanism need not entail "comprehensive" secularism.

[50] The multiple-establishment model entailed by multicultural jurisdiction would neither deliver on equality nor avoid the risks of fragmentation alluded to above. For a defense of multiple establishment, *see* Tariq Modood, Multiculturalism, Muslims and the British State 164 (2003). For a critique, *see* Laborde, *supra* note 41.

[51] John Witte, Jr., Religion and the American Constitutional Experiment 21–39 (2005).

the renunciation by the secular state of appeals to religious truth as a justification for its laws or policies—i.e. it entails an epistemological division of labor.[52]

For the latter, antiestablishment—epistemological and institutional differentiation between state and religion—is crucial precisely given the distinctiveness and importance of religion to believers. Religions are comprehensive webs of belief and conduct that speak to ultimate questions about life's meaning and value. Religious groups typically entail insider/outsider status. Participation in ritual and compliance with religious norms signify who is a member with great consequences for the believer. The insider/outsider status inherent in religion explains why religious difference is a prime target for invidious discrimination.[53] Due to its comprehensive character and the power that religious belief and organization can generate there is danger of social conflict in a religiously plural society if religions compete for state jurisdictional or political power or monies. From the perspective of a democratic constitutional *republic* the point of an antiestablishment principle is to marginalize the political threats to common citizenship and political unity posed by religious faction by locating the monopoly of the legitimate exercise of coercive public power and law making in the hands of the secular state and precluding the use of that power to privilege any religious doctrine or church. The premise of a constitutional *democracy* is that political legitimacy derives from immanent, incomplete, fallible social and political principles and from laws that we give ourselves, rather than transcendent religious truths or lawgivers.[54] No democratic state can delegate legal power over such a vital area as family law to religious authorities—i.e. competing sovereigns—without contradiction. A democratic citizen's status, rights, and entitlements cannot turn on the judgments of authorities that lack the due process and other procedural constraints of a state tribunal. Even if a religious group does not discriminate on the basis of gender, its legitimacy cannot be democratic because religion entails heteronomy regarding the source of religious norms and laws thus conflicting with democratic legitimacy that locates the source of law and norms in the people. The ideals of impartiality and equal citizenship require a politically *secular* republic that rejects ideological (justificatory) and excessive institutional entanglement of the state with religion.

Just which entanglements are excessive is debatable. But the principles of antiestablishment and democratic legitimacy preclude the hybrid jurisdiction between religious and secular authorities advocated by multiculturalists. Indeed, various

[52] Casanova, *supra* note 2, at 19–39, arguing that the differentiation between religion and the state remains the convincing element of the sociological secularization thesis.

[53] Eisgruber & Sager, *supra* note 5, at 208–211.

[54] *Id.* Eisgruber and Sager are right to insist on the qualitative distinction between incompleteness of secular political principles or worldviews and religion which must be comprehensive and does address issues of ultimate meaning and transcendent truths. Rawls' assumption that one can equate religions and secular "comprehensive doctrines" is therefore wrong. A secular doctrine can verge on the fully comprehensive but this is rare and not necessary. Democratic legitimacy, which they do not discuss, presumes that the citizenry is the source of law, and thus that public law and policy cannot be ascribed to divine will or seen as "given" natural laws established by a divinity.

attempts at merged jurisdiction have been successfully challenged in the U.S. courts on these grounds.[55]

The proper response to the charge that the neutrality of civil law regulating intimate association is a myth, because it has long been congruent with Christianity in the West, is to make that law more secular and more impartial. This has been the path of transformation of family law since the nineteenth century in the U.S. and elsewhere. Feminist and other challenges to rules regulating intimacy predicated on Christian and patriarchal premises have made state laws more secular and more just from a gender perspective.[56] One always starts in medias res. Unmasking the religious underpinning of a particular legal rule and challenging it as a violation of equal liberty does not impugn the ideal of impartial or secular standards but rather indicates that impartiality, justice, secularity are always a *vérité à faire*. Instead of calling for joint jurisdiction, demonopolization, and what amounts to multiple establishments to accommodate minority family law traditions that don't align with the religious practices of the majority, the proper response is to ensure that the domain of intimacy is regulated by laws that are congruent with constitutional protections of equal citizenship, antidiscrimination, human rights, personal liberty, and gender equality.[57]

5. Transformative accommodation without legal pluralism?

The flaw with the "secular absolutist model" is not the state's monopoly of law making or its secular character, but rather the accompanying myth of a "wall of separation" between church and state. If separation means untrammeled self-regulation, and if accommodation on the strict separationist model means exemption from the constitutional rules and statutes guaranteeing equal citizenship, then it is indeed a flawed metaphor. The right to exit linked to the strict separation model won't mitigate gender inequality within religious organizations and it doesn't relieve the individual from the burden of having to choose between her (orthodox) religion and her rights.

The solution is not to end the state's monopoly of legal sovereignty on the dubious assumption that the lure of public coercive jurisdictional power will incentivize male religious authorities to comply with gender equality norms. Instead, the remedy is to abandon the "wall of separation" metaphor because state regulation of religion is both unavoidable and desirable. I agree that transformative accommodation is needed to

[55] Larkin v. Grendel's Denn, 459 U.S. 116 (1982) striking down a state law granting veto power to churches over whether a liquor license will be granted to a facility within 500 feet from church property; Board of Education of Kiryas Joel Village School Discrict v. Grumet, 512 U.S. 687 (1994) striking down a state's creation of a single public school district within an exclusively Satmar Hasidic community as improper delegation of civil power violating the establishment clause.

[56] This does not involve a simple shift from status to contract but to different status regimes each of which entails its own form of gender inequality and challenges to it. *See* Riva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1116 (1997).

[57] The fact that these principles may be more in tune with a particular religion or that separation of church and state had its origin in one religious world-view is irrelevant. Genesis is not structure—if compelling non-religious reasons for legal norms can be provided, that suffices for their legitimacy.

supplement self-regulation cum exit with respect to gendered social hierarchies institutionalized in religious organization, but not in the form of legal pluralism or hybrid jurisdiction. It should instead be linked to a range of state incentives based on an equality analysis that focuses on the individual, rather than the group and which foregrounds democratic and antidiscrimination principles.

We know that the latter are interventionist: their enforcement requires state action to be effective.[58] On the other hand, top down regulation by the state to achieve full congruence of the governance structures and membership rules of religious groups with democratic and liberal norms would undermine constitutional principles of free exercise and voluntary association.[59] The question is what kinds of regulation and what mode of accommodation best reconcile the freedom of religious association with the public interest in equal liberty, antidiscrimination, and democratic citizenship while avoiding excessive entanglement that would amount to establishment.

We should think in terms of a three-pronged approach. A strong exit option of the sort that already exists in the U.S. and other western democracies based on locating enforceable family law exclusively in the hands of the state is the sine qua non for reconciling public principles of gender equality and equal citizenship with free exercise of religion and normative pluralism.[60] This fits the logic of separation and self-regulation.[61] There have also always been practices that, although religious, have been deemed incompatible with public purposes or constitutional principles and thus criminalized by constitutional democracies (e.g. human sacrifice, forced, child, or plural marriage). This entails top-down, direct, and coercive regulation. Any prohibition can be democratically contested, and public authorities must justify why deference to religious community norms is impossible given an overriding public interest and the preeminent criteria of equal liberty. A third approach involves the indirect regulation of self-regulation. This would entail incentives from the state and/or the withholding of public benefits to spur compliance with basic constitutional principles of equal citizenship.[62] Indirect regulation of self-regulation would involve neither sharing the coercive law-making power of the state with religious groups nor the abolition of their autonomy to create and live under their own religious norms. Normative pluralism in that sense can be acknowledged but legal pluralism in the sense of multicultural or hybrid jurisdiction must be avoided.

[58] Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835, 836–837 (1985). But this does not mean that family and state are not differentiated. *See* Jean L. Cohen, Regulating Intimacy 28–76 (2002).

[59] Nancy Rosenblum, Membership and Morals (1998).

[60] A robust exit option presupposes a democratic republic individual rights and regulation by the state of those subject to its law is not mediated by status groups. That really existing liberal constitutional democratic secular republics do take gender equality seriously is of course a rather heroic assumption. But democratic principles and constitutional anti-discrimination norms that rule out gender and sex based discrimination, together with human rights norms remain our best bet.

[61] Abandoning the "wall of separation" metaphor does not mean a democratic republic can do without a concept of separation altogether: it is entailed in the principle of antiestablishment.

[62] Cohen, *supra* note 58, at 151–179.

The third prong of indirect regulation would not be directly coercive. But it would supplement liberal strategies of choice and exit. The latter are indispensable yet insufficient when we are dealing with adaptive preferences of members and hierarchical organizations that discriminate along gender lines.[63] Why? Religious institutions, particularly schools, and the (religious) family, are agencies of primary socialization of children. Thus their internal, religiously grounded gender-based inequalities and norms perpetuate prejudices within and across generations. With regard to primary socialization, membership in religious associations is not voluntary but ascribed. Precisely because religions make claims on the whole lives of their members, precisely because religious primary socialization is so powerful, exit is costly and difficult. Indirect regulatory strategies by the democratic constitutional state that send a strong message regarding gender equality norms and which foster voice for disadvantaged members of such groups, particularly women, are thus needed.

This will involve some entanglement but it need not be excessive. I am not suggesting that government directly outlaw discriminatory hiring or membership practices in religious organizations or that it directly regulates the demarcating and distributional rules of religious marriage and divorce. I agree that "[t]he government cannot tell the Nation of Islam ('Black Muslims') to admit whites; it cannot tell a white supremacist church to admit blacks. It cannot tell the Roman Catholic church it must have women priests."[64] But there are other ways to send the equality message besides outright prohibition. American courts have withheld some public benefits provided by civil law in cases of severe gender discrimination caused by religious rules regarding divorce.[65] They have removed federal tax exempt status from a religious university that engaged in racial discrimination on the basis of religious convictions.[66] Thus the liberal democratic state does and should indirectly intervene to regulate the costs of exit as in the first case, and the costs of discriminatory exclusion as in the second, in accordance with principles of equal citizenship. While I cannot go into detail here, I would generalize to issues of gender equality, the indirect approach taken by the U.S.

[63] On adaptive preferences, *see* Jon Elster, Sour Grapes 123ff (1983). *See* Laborde, *supra* note 41, at 119–120, with respect to gendered adaptive preferences in religious socialization.

[64] Kent Greenawalt, Religion and the Constitution, 2 vols., 1:378–379 (2009). The Roman Catholic Church, orthodox Jews, and most Muslim groups do not permit co-religionist women to be clergy. Title VII of the Civil Rights Act barring employment discrimination exempts religious associations and education institutions with respect to religious activities. This was extended in 1972 to cover all activities. 42 U.S.C. & 2000e-1. *See* Greenawalt, *supra*, at 382–387.

[65] New York State passed laws to undo a perverse incentive stemming from the availability of civil divorce. The laws withhold the benefit of civil divorce from husbands who refuse to grant their wives a religious divorce while unless they consult a religious tribunal and unless a Rabbi certifies that the husband has taken the necessary steps to remove barriers to the wife's remarriage. Greenawalt, *supra* note 64, vol. 2. Greenawalt supports these laws but deems the delegation of civil authority to a Rabbi to block the civil divorce unconstitutional. This could be corrected by a court's giving the rabbi's certification presumptive weight but not final authority.

[66] Bob Jones University v. United States, 461 U.S. 574 (1983).

Supreme Court with respect to race in the case of *Bob Jones University v. United States*.[67] Accordingly, no corporate group that systematically discriminates against women in its internal hierarchies, employment decisions, family norms, etc., should enjoy tax exemptions, subsidies, or any other privileges granted by the state just because it is labeled religious.[68] Certainly, such groups should not be delegated law-making power. Yet their non-legally binding, internally coercive, norm-making power does require indirect intervention and regulation of self-regulation. This is desirable and preferable to a strict separationist approach and to multicultural jurisdiction.[69] The reasoning here is straightforward: state complicity with institutions that discriminate against women sends the wrong message and underestimates the corrosive effects of such discrimination on everyone, children and adults, within and outside the organization. Neither public power nor public funding should be available to those hierocratic organizations that flout the basic principles of equal citizenship.

We have to disaggregate the religious freedom of individuals and the freedom of religious association—basic *individual* rights protecting spiritual autonomy and self-determination—from entity privacy used as a tool to shield elites from compliance with basic rights standards. Feminists did a good job debunking entity privacy vis-à-vis the family.[70] It is time to do the same favor for religious legal groupism. As critics of multicultural discourse regarding non-state "juris"-generative "nomos" communities have argued, we must avoid assuming a unitary meaning of the relevant norms or the absence of conflicting interpretations and narratives.[71] The only way to find out whether there are dissident voices is to ensure all individuals have equal rights and to facilitate voice for non-elite members. None of this means that individuals would lose their freedom of religious association or that religious groups would lose their rights as self-governing normative communities: they would still enjoy the legal protections the state has to offer to all such collectives. What would be barred would be the state's complicity, through tax exemptions and other benefits,

[67] *Id.* The Court upheld an IRS decision to remove tax-exempt status from a religious university that engaged in racial discrimination on the basis of its religious convictions. Bob Jones University did not admit Blacks until 1971 and thereafter forbade interracial dating, marriage, and membership in groups advocating interracial marriage justifying these rules on its interpretation of the bible. Unlike Robert Cover and Paul Schiff Berman, I think the Court made its principled reasons for its decision clear—i.e. the government's commitment to eradicating racial discrimination and its refusal to be implicated in a private university's racist policy through granting it tax exemptions. I would like to see such an explicit commitment to eradicating gender injustice. *See* Robert Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 64 (1983); Paul Schiff Berman, *Towards a Jurisprudence of Hybridity*, 1 Utah L. Rev. 11 (2010).

[68] Ira Lupu, *Free Exercise Exemptions and Religious Institutions*, 67 B.U. L. Rev. 391, 395–399 (1987) arguing that once a religious institution admits individuals as members they must respect antidiscrimination laws regarding the treatment of their members.

[69] I concur with Okin and Reitman. Okin, *Is Multiculturalism Bad for Women?*, *supra* note 21; Okin, *Multiculturalism and Feminism: No Simple Question, No Simple Answers*, *supra* note 1, at 87–89; Reitman, *supra* note 34, at 189–208.

[70] Beginning with critiques of the doctrine of coverture. For a discussion, *see* Cohen, *supra* note 58, at 22–78.

[71] Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover*, 17 Yale J.L. & Human. 17, 27 (2005).

with gendered social hierarchies and discriminatory practices justified in the name of religion that the violate basic egalitarian premises of liberal constitutional democracies as well as the human rights of their members.[72]

The regulation of self-regulation must be nuanced and there are risks that the struggle against gender inequality could be conscripted by xenophobic or intolerant majorities disguising their real aims as concern for women's rights. It is also true that the state might get it wrong.[73] But fear of these risks is not sufficient reason to avoid the task of fashioning democratically justifiable indirectly interventionist laws and policies when basic constitutional principles and human rights are at stake. If the combination of these legal approaches undermines the patriarchal structures of religious groups that are, after all, based on contested religious narratives of orthodoxy, so much the better.

[72] The state should enhance religious women's voice by consulting not only with (male) authorities but also with ordinary women members of the group when making public policy that affects them. *See* Monique Deveaux, *A Deliberative Approach to Conflicts of Culture*, *in* MINORITIES WITHIN MINORITIES, *supra* note 1, at 340–362.

[73] Reitman, *supra* note 34, at 204–208.