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0521772095 - Multicultural Jurisdictions: Cultural Differences and Women's Rights

Ayelet Shachar

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Multicultural Jurisdictions

Cultural Differences and Women's Rights

Is it possible for the state simultaneously to respect deep cultural differences and to protect the hard-won citizenship rights of vulnerable group members, in particular women? This book argues that this is not only theoretically needed, but also institutionally feasible. Shachar's fresh approach proceeds from an acknowledgment of the potentially negative effects of well-intentioned multicultural accommodation, which often forces the most vulnerable constituents of cultural groups into an impossible choice: either an allegiance to their culture, or an exercise of their rights. Rejecting prevalent normative and legal solutions to this "paradox of multicultural vulnerability," *Multicultural Jurisdictions* develops a powerful argument for enhancing the jurisdictional autonomy of religious and cultural minorities while at the same time providing viable legal-institutional solutions to the problem of sanctioned intra-group rights violation. This new "joint governance" approach is guided by an ambitiously innovative principle: one that strives for the reduction of injustice between minority groups and the wider society, together with the enhancement of justice within them. Shachar applies this new approach to contested social arenas, such as family law, immigration policy, and criminal justice. She shows how individuals who view themselves as simultaneously belonging to more than one membership community and subject to more than one legal authority can be empowered by their multiple affiliations. Unique in its interdisciplinary and comparative approach, this book makes a timely intervention in current multiculturalist and feminist debates by offering an in-depth exploration of practical legal-institutional solutions to vital normative dilemmas that beset diverse societies around the globe. It will interest students of political and social theory, law, religion, institutional design, as well as cultural and gender studies.

AYELET SHACHAR is Assistant Professor of Law in the Faculty of Law, University of Toronto. She is also currently a Member at the Institute for Advanced Study, Princeton. She has written extensively on issues of contemporary political theory, group rights, and gender equality. Her most recent publications appear in the *Journal of Political Philosophy*, *Political Theory*, and the *Harvard Civil Rights–Civil Liberties Law Review*. She has also contributed to several edited volumes, including *Multicultural Questions* (1999); *Citizenship in Diverse Societies* (2000); and *From Migrants to Citizens* (2000).

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As the twenty-first century begins, major new political challenges have arisen at the same time as some of the most enduring dilemmas of political association remain unresolved. The collapse of communism and the end of the Cold War reflect a victory for democratic and liberal values, yet in many of the Western countries that nurtured those values there are severe problems of urban decay, class and racial conflict, and failing political legitimacy. Enduring global injustice and inequality seem compounded by environmental problems, disease, the oppression of women, racial, ethnic, and religious minorities, and the relentless growth of the world's population. In such circumstances, the need for creative thinking about the fundamentals of human political association is manifest. This new series in contemporary political theory is needed to foster such systematic normative reflection.

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Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;
Then took the other, as just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,

And both that morning equally lay
In leaves no step had trodden black.
On, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.

Robert Frost, "The Road Not Taken"

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Preface

Over the past few years while this book was taking shape, I have been living, studying, teaching, and moving between two countries: the United States and Canada. However, the true origins of this book date back to my childhood in Israel, particularly in the city of Jerusalem. For anyone skeptical about the value of cultural and religious diversity, or the need for the protection of individual rights, a quick visit to this multi-faith, multi-ethnic, and multi-national city soon dispels all grounds for such doubt. Schoolgirls wearing the hijab, the Muezzin's calls for prayer in the mosque, the bells of the Church of the Holy Sepulchre, the personal law tribunals of various Christian sects, the ancient ruins of the City of David, and debates over women's prayers at the Western Wall – these disparate sounds and images combine to form the richly complex cultural mosaic known as Jerusalem. Gender tensions and collective identity markers are part of everyday life here, but they are prevalent in many other parts of the world as well.

The first half of this study explores these complex relationships and critically assesses the potentially negative internal effects of well-meaning policies of multicultural accommodation. It is my belief that we cannot comprehend the ways to resolve these tensions (let alone begin to imagine them), if we do not step back and re-evaluate the inevitable interaction that has taken place between minority groups and the state ever since the inception of modern citizenship. With a view to explaining the dynamic, I address three types of group responses to assimilation pressures, with special attention to the third or “reactive culturalist” pattern of response.

I then examine how different countries have attempted to face the challenge of respecting cultural diversity and protecting individual rights. Since all current legal and theoretical models fall somewhat short of this challenge, the second half of the book offers an analysis of different institutional designs which seek a new and better way of accommodating difference: a reduction of inequality *between* minority groups and the wider society, as well as an enhancement of equality *within* them. In the final chapters of the book, I translate this normative commitment into a concrete set of principles underlying a new approach towards dividing and

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sharing authority in diverse societies, which I call *joint governance*. This approach takes as its starting point the assumption that some individuals belong to more than one community, and are loyal to more than one source of legal authority. Joint governance thus applies to the specific problem of sanctioned and systemic intra-group violations of group members' rights. But it also speaks to a broader set of contemporary theoretical and institutional challenges concerning the changing role and authority of the state, its relation to competing sources of jurisdiction from "above" and "below" the national level, and the emergence of new modes of governance.

Many people have contributed to the development of the ideas expressed in this work. Several of the arguments were developed through the process of writing my Yale doctoral dissertation. I was fortunate at that time to have benefited from the guidance and advice of Jack Balkin, Bruce Ackerman, and Reva Siegel, at Yale Law School. I am thankful for the opportunity that they gave me to think through these issues, and for their confidence all through the earliest and most tentative stages of that project. I also want to single out two of my teachers, Menachem Mautner and Joseph Weiler, in thanks for their enduring faith and uncompromising expectations.

Several individuals deserve special mention because they have influenced and inspired both my thinking and my writing. I am indebted to Ian Shapiro for his encouragement and trust. He believed in this project and gave it a chance long before it deserved such confidence. Rainer Bauböck provided detailed and insightful comments on an earlier version of this manuscript, which culminated in many improvements to the fifth and sixth chapters of this book. Bob Goodin engaged in a lively dialogue with me on several of the issues defined here when they were still evolving out of embryo; I am grateful for his ongoing support and advice. Finally, I wish to express my special thanks to Will Kymlicka. His inimitably articulate and elegant defense of multicultural accommodation first piqued my interest in this subject, and his pertinent and always graceful critiques have continued to enrich my engagement with the complex dilemmas addressed here.

But most of all, I owe my greatest debt of gratitude to Ran Hirschl, whose intellectual and critical acumen can be read like a fingerprint across the face of this text. Literally every idea in this book has grown out of our many hours of discussion together.

Other friends and colleagues who have provided helpful commentary on the manuscript (or earlier versions of some of its chapters) include Rosalie Abella, Seyla Benhabib, Joe Carens, Bruce Chapman, Nancy Cott, Rob Howse, Jay Katz, Karen Knop, Candran Kukathas, Patrick

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I also want to thank John Haslam at Cambridge University Press for his enthusiastic support of this project; Catherine Frost for judiciously assisting me in the decision of what to keep and what to drop from the manuscript based on her careful reading of several versions of this work; Samina Uddin for meticulously verifying the accuracy of each and every source in the bibliography; Dan Friedman for contributing his good judgment and sense of humor to the process of preparing this book for submission; and Maya Johnson for putting the final touches to the text, which lent some music to my voice.

While writing this book, I have been supported by a Fulbright Scholarship, the Lillian Goldman Scholarship for the Study of Women's Rights at Yale Law School, the W. M. Keck Fellowship in Legal Ethics and Professional Culture, the Cecil A. Wright Foundation for Legal Scholarship at the University of Toronto Faculty of Law, and a Member-in-Residence Fellowship at the Institute for Advanced Study, Princeton.

My work is inevitably influenced by the fact of my own personal history, which includes several simultaneous affiliations and movements between different cultural, national, and territorial borderlines. I owe this special range of experiences to my mother and father, Tmima and Arie Shachar, whose passion for wisdom and openness to adventure have spurred so many of my own inter-cultural travels. I thank them, as well as Naomi Ernst-Hirschl, Erez Shachar, and Tamar Shachar, for all their love and support.

I dedicate this book to the memory of my grandmothers, Esther-Etka Stock and Leah Schwartz. Unlike myself, they were forced to migrate from their home countries. Neither of them tended to talk much about the terrors that they had known while fleeing Europe, and only rarely did they permit any reminiscences of those whom they had lost there to become an aching, living memory. But their pain was often too heavy to conceal. We may now live in a new world order, but the dignity of individuals and of cultural minorities which were more than once brutally violated in the past may yet again stand to become perilously erased. It is with a view towards protecting the fragile structures of peaceful coexistence and

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establishing a just apportionment of the costs associated with preserving distinct cultural and religious identities, while still allowing women and other historically vulnerable persons a fair and full entitlement to certain basic freedoms, that I have written this book.

I am grateful to the following journals and publishers for permission to print in modified form several of the themes presented here: "Group Identity and Women's Rights in Family Law: the Perils of Multicultural Accommodation," *Journal of Political Philosophy*, vol. 6, no. 3, 1998, pp. 285–305, copyright by Blackwell Publishers; "On Citizenship and Multicultural Vulnerability," *Political Theory*, vol. 28, no. 1, 2000, pp. 64–89, copyright by Sage Publications; "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority," *Harvard Civil Rights–Civil Liberties Law Review*, vol. 35, no. 2, 2000, pp. 385–426, copyright by the President and Fellows of Harvard College; "Should Church and State be Joined at the Altar? Women's Rights and the Multicultural Dilemma," *Citizenship in Diverse Societies*, edited by Will Kymlicka and Wayne Norman, Oxford University Press, 2000, pp. 199–233. Robert Frost's poem "The Road Not Taken" is reprinted from *The Poetry of Robert Frost*, edited by Edward Connery Lathem, copyright and permission by Henry Holt and Company.