Book Review
Co-ordinating family expectations

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In the third chapter of her book, *Legalized Families in the Era of Bordered Globalization*, Daphna Hacker addresses three challenges that emerge from the encounter between 'Eastern-religious and gender-specific' and 'Western-secular and formally gender-equal' family-law systems. The first arises when individuals ask that a legal act based on religious family law performed in one country be recognised in another country where secular family law is in effect. Hacker analyses this type of case through the prism of private international law. She notes the absence of a global system of international private legal rules as a main source of difficulty in matching the expectations of spouses in such cases. She addresses a particular difficulty related to the ethical reluctance of Western countries to recognise certain types of marriage and divorce practised in non-Western countries, such as polygamous marriages.

The second challenge arises when individuals ask a civil legal system of a Western country in which they live to recognise, or at least to consider, the validity of a religious act. With regard to this type of case, Hacker presents the attempts of Western countries, such as England, to help women in religious marriages not officially recognised by the state achieve a religious divorce, without which they find themselves bound in a religious marriage contracted according to their faith, even if they were divorced according to civil law. Hacker sees these cases as an example of the difficulty that secular Western legal systems face in creating 'monistic' systems of marriage and divorce law that ignore the significance of religious marriage for parts of the population. She concludes with a warning that attempts to preserve such uniformity, carried out primarily in the name of women's equal rights, may paradoxically harm women who find themselves subordinated to unrecognised, subnational family religious law enforced by unregulated religious bodies.

The third challenge emerges when a minority religious group demands, and asks for state recognition of, some kind of autonomous family-law system. Hacker analyses two examples where religious communities in Canada and England sought to use arbitration law to obtain jurisdiction for the religious tribunals they established. She describes civil secular opposition to the possibility of the civil system granting legal validity to referral to religious tribunals and a legislative amendment in Ontario, Canada, that ruled out the possibility of enforcing an arbitration agreement based on religious principles in the field of family law. A different attempt to handle the issue arose in England, where a proposed law allows disqualification of such arbitration clauses on the basis of gender inequality.

Based on Zee's (2014) early writing, Hacker presents various options the state has in the matter of religious legal regulation, which she classifies as *allowing*, *ignoring* and *prohibiting*. She analyses the meaning of each strategy pertaining to the relationship between the civil state and the religious tribunals. At the normative level, Hacker discusses the *transformative accommodation* developed by Shachar (2001). A model that seeks to avoid a dichotomous approach to the issue of judicial pluralism might allocate jurisdiction over the family matters of members of a minority community between the religious and state institutions based on the issue at hand. For example, it might refer marriage and divorce to religious tribunals and property relations to a secular civil court. As a precondition for a partial recognition of the judicial autonomy of the religious community, the model requires freedom of both spouses to choose between the religious and secular alternatives, and the commitment of the religious court to the principle of gender equality. Despite basic sympathy for the proposed model, Hacker doubts the ability to avoid the ambiguity stemming from the need to examine whether the

couple had a real choice, what is the commitment to equality and who represents the minority community.

Hacker discusses at length Shakargy's (2013) proposal to grant greater scope to contractual arrangements in family law in general and in the context of reaching agreed arrangements in private international legal issues in particular. Hacker strongly opposes the idea of basing the matching of expectations in the family on the contractual mechanism. Her objection is based both on positive law in practice and on a normative discussion focused on proper law. Regarding the positive-law aspect, Hacker analyses the wide variance between countries in the context of enforcing various prenuptial agreements, which at least currently does not allow matching expectations under the assumption that the agreements will be enforced. According to Hacker, in a global world, basing family law in general, and cases of religious-secular tensions in particular, on prior agreements is an especially bad idea, for several reasons. First, based on psychological studies, she concludes that people cannot think of divorce as a real possibility at the time of marriage. Second, significant gender disparities in power between the spouses could lead to a one-sided agreement. Third, agreements focused on spouses may harm children. Finally, partners are unable to anticipate the pitfalls and changes that will befall them in the course of their lives.

Throughout the chapter, Hacker's discussion is incisive and critical. She clearly maps out the myriad problems that the global reality in general, and the aspect of religion and state in particular, pose to couples seeking to co-ordinate their marital expectations and exposes the difficulties in the proposed solutions. Reading the chapter leaves the reader troubled because, for the most part, the chapter exposes the problems and Hacker, in her integrity, does not pretend to have a set of suitable solutions.

Within this limited space, I will address briefly several aspects that the chapter raises that, in my opinion, require additional thought and research. The first aspect has to do with the nature of the discussion of the multicultural debate taking place in the chapter. As noted, Hacker describes an encounter between 'Eastern-religious and gender-specific' and 'Western-secular and formally gender-equal' family-law systems. In practice, however, the encounters with which Hacker deals are not meetings between 'equals'. Rather, the point of departure of this discussion is that of a state ruled by a secular Western majority, which is debating to what degree a liberal state should recognise the religious activity of individuals belonging to a different group that has formed in their own country and whether to grant the minority community a certain type of judicial autonomy.

Elsewhere (Lifshitz, 2012b; 2016), I have argued that, when dealing with cases of this type, there are two kinds of justification typical of liberal recognition of religious actions and even a certain judicial autonomy for religious bodies. One approach involves individual rights and human afflictions of individuals, especially women belonging to minority groups who, ironically, as indicated by Hacker, may be harmed by a policy that ignores the validity of religious activities. The other is a pluralistic approach that, consistently with liberal and multicultural thinking, recognises within certain limits the need to encourage communal autonomy, because of the commitment to the right to culture and autonomy of individuals belonging to these groups. According to my analysis, in cases of this type, liberal recognition of religious activity and of communal autonomy is not a liberal compromise. Rather, it stems from the liberal values themselves, primarily the commitment to human rights, the protection of the weak, pluralism and autonomy.

Yet, in certain countries, including Israel, where Hacker lives and works, the encounter between the liberal and the non-liberal groups becomes less and less a meeting between a liberal 'landlord' who hosts the non-liberal minority group and is pondering the degree of tolerance towards the guests and more like a meeting between two groups of equal standing that fight over the shaping of the public sphere.

This type of encounter, which characterises Israeli society and may characterise European society in the future, requires a completely different type of liberal strategy. On the one hand, the type of tolerance and pluralism required of the landlord towards a group that wishes to conduct its life in a sequestered enclave is fundamentally different from the type of tolerance required of a liberal group defending itself that fears the price of concessions in the community domain for the public domain

as a whole. On the other hand, in this case, the liberal willingness to accept even the partial demands of the religious groups cannot be justified by liberal thinking proper, but is part of democratic negotiations. The understanding that these are negotiations between groups regarding the public sphere, and that democratic negotiations involve compromises and concessions, requires the development of a systematic liberal theory of political compromise. This theory must answer the question of what criteria should guide liberal groups that negotiate with non-liberal groups for the management of public space. Liberal and multicultural thinking does not address this issue and I fear that liberals will face this challenge in many places in future generations.

My second comment relates to Hacker's critique of the rise of contractual arrangements in family law. I have analysed the important changes that occurred during the liberal transformation of spousal law (Lifshitz, 2012a). These include: (1) reduction of restrictions on eligibility to marry; (2) narrowing of the gap between married and unmarried couples; (3) transition to the unilateral no-fault divorce; and (4) the decline of the concept of fault and of the moral discourse in family law and the rise of the clean-breach principle. I have shown how these changes, commonly referred to as 'liberalization', comprise three subprocesses: *privatisation*, which describes the transition from viewing marriage as a public institution to viewing it as a private relationship; *individualisation*, which describes the change in the legal attitude from the 'family-as-unit approach' to one that considers it as a collection of separate individuals (the 'individualistic approach'); and *equality*, which describes the shift from the non-egalitarian to the egalitarian approach, aspiring to design gender-blind spousal laws.

Following these processes produced the *liberal-contractual model*, which seeks to extend the modern revolution and base spousal law on private and individualistic approaches, and on the 'sameness' version of the egalitarian approach, which rejects any differences between men and women. This model aims at abolishing marriage as a legal institution. These approaches ultimately lead to a contractual regulation of the spousal relationship.

There is a deep connection between the contractual regulation of marital relations and the processes of privatisation, individualisation and commitment to formal equality. Therefore, those who are persuaded by Hacker's critique of the wide breadth for contractual arrangement in the family should ask themselves whether this critique should not be aimed, at a deeper level, at the guiding principles of the modern Western conception of marriage. One of the challenges facing modern family law is doing away with the dichotomy between the old world of public, unit- and gender-based perceptions and the new contractual world, private, individual and gender-blind, with new coalitions emerging and new meanings being added to the existing terms. Such a new world could provide richer tools for meeting the challenge posed in Chapter 3, and perhaps enable more complex use of the contractual instrument.

Finally, recognition of the shortcomings of the current liberal arrangement and the need to identify new conceptual frameworks opens the door for a renewed examination of the encounter between 'Eastern-religious and gender-specific' and 'Western-secular and formally gender-equal' family-law systems. Instead of a 'forceful' encounter, centred on a struggle between competing approaches that, in the best case, will reach a compromise stemming from negotiations based on the balance of power, it is also possible to think of dialogue and mutual enrichment.

According to this vision, a meeting and an in-depth acquaintance between cultures in general and legal cultures in particular, especially when conducted with mutual respect, are also likely to lead to the reciprocal permeation of norms and the possibility of each method using the other approach to improve and correct its various components. Thus, it will be possible to think how, as a result of such a dialogue, an internalisation of liberal values of autonomy and equality might happen within the religious systems that accept these values into their vocabulary and their existing mechanisms. At the same time, Western liberal law may also be able to employ the universe of content present in the law of minority communities to enrich itself and develop a more complex conception than that reflected in a private-individual and gender-blind arrangement.

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Book Review

Surrogacy: women's bodies between globalisation and national reform

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Borders have become a crucial variable shaping reproductive markets. Individuals cross borders to 'have' children (whether by giving birth, adopting or contracting surrogates); entrepreneurs organise and broker medical, legal, travel and gestational services; states make law and policy taking into account their comparative advantages in relation to the global supply and demand of child-making components and services. In the second part of Chapter 4, 'Transnational reproduction services', Daphna Hacker tracks these processes in relation to surrogacy, having already done so with respect to abortion with a focus on the Republic of Ireland and the UK. Cogently arguing that both procreation and abortion constitute aspects of reproduction, she notes that 'In both cases, the central moral issue is reproduction autonomy …. In both cases, women are at risk of being reduced to their wombs' (Hacker, 2017, p. 147). How, then, do women's rights as reproductive subjects come into play in the bordered globalisation of surrogacy?

The global surrogacy market, Hacker argues, illustrates three basic propositions. First, globalisation can engender 'the legal objectification of human beings' (Hacker, 2017, p. 133). Second, the lack of an overarching international legal framework can place individuals (and states) in untenable positions, caught between discordant national laws. Third, despite the advantages to be derived from selling global reproductive services, states may choose to enact restrictive legislation, closing rather than opening their markets to foreign demand. Hacker demonstrates these propositions by focusing on the interplay between Israeli demand for and Indian supply of surrogacy services.

Despite the pronatalism that led Israel to enact the first surrogacy legislation, Israeli citizens regularly resort to foreign surrogate markets. They do so in significant measure, Hacker argues, because of the restrictiveness of their national legislation, which limits both supply and demand. Israeli surrogates must be neither married nor related to the intended parents and their compensation is capped at a 'reasonable' level – provisions that depress the availability of surrogates. At the same time, for many years, only heterosexual couples could resort to surrogacy services; singles and homosexual couples could not access them. While the prohibition on single individuals has been revoked, those on gay