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Collaborator

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My past work relating to the theme of ethnicity and democratic governance has been in the field of public international law, specifically on core concepts that structure the international community and national communities. These concepts include sovereignty, the right of self-determination of peoples, and nationality. In each case, my interest has been in how to address the gender and culture biases inherent in the traditional conceptions.

I have recently begun a new project that I anticipate will form the basis for my contribution to the theme of ethnicity and democratic governance. This project, provisionally entitled "Private Membership," is the result of my recent branching-out into the field of private international law (also known as "conflict of laws"). Because the project is at an early stage, the following is only a preliminary account of how it relates to our collaborative investigation.

Overview: Why private international law should be seen as relevant to ethnicity and democratic governance

The meanings of citizenship are many and varied, but it is fairly safe to say that they revolve around the state, even if only to reject its normative significance, as in ideas of cosmopolitan citizenship. Citizenship literature tends to begin with the picture of the sovereign state found in public international law. That is, each state has exclusive control over its territory, and the people of the state are joined to it by nationality. Paradigmatically, the state's laws operate within its borders, and its nationals live within its borders.

From this picture of the state, the literature often moves to the breakdown of the picture caused by economic globalization, supra- and sub-national institutions, mass migration, refugee flows and other phenomena of interdependence that challenge citizenship theorists to think differently about the boundaries of community and membership. Accordingly, we next find explorations of overlapping identities (dual nationality), a spectrum of membership (rights of non-citizens, including basic human rights and those rights specific to refugees, migrant workers, residents *etc.*), lived membership (right to naturalization of non-citizens born and raised in the state), the appropriate recognition for immigrant ways of life (rights to religion and culture), questions of respectful engagement with the "other" (judging and speaking across cultural divides) and how to do justice to hybrid identities (intersectionality).

Private international law is no less state-centered than public international law. However, it starts with a different set of assumptions about the interaction of states. Private international law begins with the idea that there will be individual comings and goings across borders and that this will necessarily draw states into a relationship with one another. Moreover, these individuals may be regulated by the laws of more than one state and they thus belong to more than one state. The business of private international law is to work out how individuals can work out these collisions between laws. Hence globalization and mass migration, for example, are not phenomena that disturb the private international law paradigm; they are built into private international law and are chiefly a matter of intensification.

Similarly, overlapping identities, a spectrum of membership and lived membership are all familiar to common-law private international law, which operates on the notion of domicile as distinct from nationality. An individual can be a national of one state and domiciled in another. Domicile determines issues ranging from an individual's access to the courts, to the courts' jurisdiction over the individual, to the law that governs matters of personal status. Moreover, domicile is based on the individual's day-to-

day actions and intention in a more on-the-ground, flexible and less state-focused way than the formal link of citizenship.

As well, the question of choice of law is precisely about the role to be played by the laws of the immigrant's state of origin. To what extent do these laws govern the validity of her marriage, for example? And if they govern, when should an exception be made on the grounds of her new state's public policy? It is not enough that the laws differ from those of the new state – private international law is centrally concerned with respect or tolerance for the laws of other states – so the question becomes when the difference is simply too fundamental.

Private international law also has a technique for the respectful engagement of the "other," a subject that has concerned feminists, proponents of deliberative democracy, comparative lawyers and others in addition to citizenship theorists. Take the example of a marriage between two immigrants that occurs in their country of origin. (Private international law is concerned with the laws of other states, so this example will not correspond exactly to concerns with the norms of non-state communities, but my point here is about techniques for engagement.) If the case is heard in our own court, and our court uses the rule that the validity of the marriage is determined by the domicile of the parties prior to the marriage, then the law that applies is the foreign law. The parties must then prove that law as a fact through the introduction of expert testimony. If they do not want that law to apply, then they can simply not plead it, and the default assumption is that it is identical to our own. Hence, individuals are not without agency, they can choose not to be governed by their community's norms. Or, indeed, they might agree on the content of those norms, rather than dispute them. If there is a dispute over the import of the foreign law, then the court does not decide the law. Rather, it decides between expert testimony offered by the opposing sides. In this way, the court does not presume to know the norms of another community; it must listen to those from the community place them in context. Moreover, the competing expert testimony invites internal debate about the import of the community's norms. If the court does ultimately invoke its own public policy as an exception to the application of the foreign law, it is only after having heard what alternatives are available within the community. Finally, since the foreign law is treated as a fact, the court's decision has no precedential value either for the foreign jurisdiction or for the meaning of the foreign law in the court's jurisdiction. The encounter with the other community does not presume to change its norms; the only alternative is not to apply them.

Private international law is also adept at hybridity. Because the procedural norms are always those of the jurisdiction where the case is heard, the applicable law may be a hybrid of substantive norms from elsewhere and procedural norms from the local jurisdiction. In addition, a technique for choice of law known as depecage allows the court to divide the issues up and decide different issues under the laws of different jurisdictions.

Along the lines just sketched, my research aims to demonstrate the relevance of private international law for thinking about ethnicity and democratic governance. Private international law may be relevant because it applies directly, as in the case of immigrant communities, or because it offers an alternative model to for thinking about the legal regimes that might be designed for minority communities in multicultural democracies. Indeed, private international law can make some of the most controversial proposals for multiculturalism seem quite standard. In the debate over whether to add Sharia arbitration to the possibilities for faith-based family arbitration under Ontario's *Arbitration Act*, for example, proponents argued that no one is threatened by the Canadian private international law rules that require the recognition of a family law judgment from a Muslim state or the application of a Muslim state's law to a family law issue before a Canadian court.

Further, I intend to compare private international law and the model it offers to the more familiar alternatives, such as minority rights regimes, and to explore the interactions between the two.