Articles

Sharia and Shah Bano: Multiculturalism and Women's Rights

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Abstract: This article is a comparative examination of the 2005 sharia controversy surrounding the establishment of faith-based arbitration in Ontario, Canada, and a similar controversy in India after the 1985 Supreme Court Ruling favouring the claim of Shah Bano, a Muslim woman who challenged her husband in court for extended maintenance in contravention of Muslim Personal Law. I use the two controversies to interrogate the contentious issue of group rights and women's rights with particular reference to religious-based personal laws. The two cases demonstrate the patriarchal aspects of personal laws in the private and public realms and their politicization in the public realm. They also underscore the limits of multiculturalism in its potential to deal with the impacts of multicultural accommodation of group rights on the equality rights of women within these groups. My paper emphasizes the need to move beyond multiculturalism and highlights the strategic importance of mainstreaming feminist citizenship and human rights discourses into legal norms and practices relating to family law issues in multicultural societies.

Keywords: multiculturalism, personal laws, women's rights, cultural rights

Résumé : Cet article fait un examen comparatif de la controverse de 2005 sur la charia, autour de la création de tribunaux religieux d'arbitrage familial, en Ontario, au Canada, et une controverse similaire en Inde, suite à la décision de 1985 de la Cour Suprême qui donnait raison à la revendication de Shah Bano, une femme musulmane qui poursuivait son mari pour l'avoir maintenue pour une longue période de temps en contravention avec la Muslim Personal Law (c.-à-d. la charia). J'utilise les deux controverses pour interroger la question litigieuse des droits collectifs et des droits des femmes en référant particulièrement aux lois sur les personnes à fondement religieux. Les deux exemples démontrent les aspects patriarcaux des lois sur les personnes dans les domaines privé et public, et leur politisation dans le domaine public. Ils soulignent aussi les limites du multiculturalisme dans son potentiel à gérer les impacts de l'accommodement multiculturel des droits collectifs sur le droit à l'égalité des femmes au sein de ces groupes. Mon article souligne le besoin d'aller au-delà du multiculturalisme et met en lumière l'importance stratégique d'intégrer les discours féministes sur la citoyenneté et les droits humains dans les normes et pratiques juridiques relatives aux enjeux de loi familiale dans les sociétés multiculturelles.

Mots-Clés : multiculturalisme, lois sur les personnes, droits des femmes, droits culturels

Introduction

This article traces the unfolding and outcome of the sharia controversy in Ontario, Canada and the Shah Bano conflict in India to discuss their similarities and differences in relation to the key issues of women's rights, cultural rights and identity politics in multicultural settings. Specifically, I draw insights from the two cases to examine their implications for multiculturalism and women's rights as equal citizens.

The rights of cultural minorities and the ideals and values of democratic citizenship are two areas that have received considerable attention in recent times (Kymlicka and Norman 2000). They are also the areas that have caused the most tension in Canada and countries such as France, England and Germany with a significant number of immigrants. In these countries, personal laws and other cultural symbols (e.g., veiling) have become the battleground for the defense of purportedly "authentic" religious and ethnic traditions and identities, with gender often being the focal point in these battles. Multiculturalism has provided a context for groups to negotiate their collective cultural rights and citizenship rights as part of multicultural accommodation and equality of citizenship (see Asad 2006; Kepel 2004; Soysal 2001; Turner 1993; Wilson 1997; Yuval-Davis 1997). "Culture" is also becoming a "ubiquitous synonym for identity" (Benhabib 2002:1; Sahlins 1999), and the "claims of cultures" for recognition and protection (Kymlicka 1996) have transformed the "political" and "public" arenas into sites of conflict and contestation. These developments have brought into sharp relief the tension between the rights of religious minorities and the equality rights of women in multicultural societies.

A dramatic manifestation of these tensions occurred on 8 September 2005, when several cities in Canada and across Europe held mass protests against a proposal to establish sharia courts in the Province of Ontario, Canada. Similar tensions have arisen in the multicultural societies

of South Asia with plural legal systems governing the public and private realms. A highly publicized instance is the Shah Bano case in India, where the Supreme Court, in 1985, ruled in favour of Shah Bano, a divorced Muslim woman who challenged her husband for extended maintenance in contravention of Muslim Personal Law. The opposition of Muslim groups to the court ruling forced the Government of India to override the Supreme Court's decision and enact the Muslim Women's Protection of Rights on Divorce law, which entrenched Muslim personal law and placed the responsibility for protecting divorced women after the *iddat*[1] period on their natal families and not their husbands. In Canada, protests against sharia courts resulted in the government of Ontario moving away from religious arbitration in family disputes, previously permitted under an arbitration law of the province.

I use the sharia and Shah Bano cases as comparative sites to interrogate the contentious issue of group rights and women's citizenship rights with particular reference to religious-based personal laws. My paper falls within the tradition of the comparative approach in anthropology, and is in keeping with critical legal anthropological (Moore 2001; Wilson 1997) and feminist discourses on citizenship in national and transnational settings (McCain and Grossman 2009; Merry 2006; Mukhopadhyay 1994; Sweetman 2004). My interest in personal laws partly stems from my research on personal law disputes involving Christian women in the southern Indian state of Kerala. My purpose in comparing Canada and India, however, needs elaboration.

Multiculturalism emerged in Canada as the "official doctrine and corresponding practices" (Fleras and Elliott 1992:22) to manage (Bannerji 2000) and accommodate the cultural diversity of immigrants, Aboriginal communities and French and English groups (Fleras and Elliott 1992). Charles Taylor (1992:25) characterizes the "politics of multiculturalism" as "politics of recognition," with two distinct components. The first relates to the equal rights of citizens regardless of their religious or cultural affiliations; the second is the recognition given to unique identities of groups, as a basis for positively differential treatment (such as native self-government and protective discrimination favouring minority groups). The rationale for multicultural citizenship in Canada, according to Kymlicka (1996), is "compensatory," as in the case of First Nations, and "inclusive," as it applies to new immigrants.

Historically, Canadian secular laws emerged from within a largely Christian ethos which influenced Anglo-French common law and still shapes public articulation of moral views or opinions on many social issues (see Chaterjee 2006:61; Kymlicka 1996). When the rights of cultural communities began to be recognized, a uniform code of social and civil laws had already been established (Mahajan 1998). However, religious minorities in Ontario (e.g., Jews and Mennonites) have been availing themselves of the provincial arbitration laws to resolve family disputes and personal law matters using religious laws outside the formal Canadian court system (Kymlicka 1996). Federal and provincial governments also encourage private arbitration of disputes under arbitration laws in Canada, as Alternative Dispute Resolution (ADR) mechanisms to provide speed and efficiency in resolving disputes, and to off-load cases from the overloaded Canadian courts. In the case of personal laws and private arbitrations, ADR mechanisms would offer religious and cultural minorities autonomy over family law, and would be consistent with Canada's policy on multicultural accommodation of immigrant minorities.

India has no official "multicultural policy," perhaps given its evolution as a "historical society" (like other South Asian countries) with different groups co-existing for long periods of time, in contrast to the primarily immigrant societies of Canada and the United States (for a discussion of this distinction and its implications, see McGarry 1998:215). Nonetheless, India is a hugely diverse and plural society, and the Indian state is constitutionally entrusted with the task of guaranteeing equal citizenship rights to religious, linguistic and cultural minorities based on political secularism and fundamental rights in the constitution. Specifically, Article 44 of the constitution enshrines the directive principle for creating a uniform civil code (UCC) based on gender equality for all religious communities in personal and family law matters. This has become a huge challenge and a political nightmare in light of the colonial practice of codifying separate personal laws for different religious communities. This legacy of legal pluralism has been criticized for institutionalizing personal laws that were previously flexible with myriads of local variations within each religion into rigid religious categories to be administered by religious authorities (Kishwar 1994). Shah Bano's case became the most publicized case in the history of personal law litigation in India, ultimately pitting Indian secularism against Muslim religious authorities, with the latter prevailing in the end.

Personal laws are specific to different religious communities and govern such areas as marriage, guardianship, divorce, adoption, inheritance, succession and maintenance. They have two distinct but interconnected functions: as cultural identity and boundary markers on the one hand, and as a distributive instrument for the differential allocation of rights and entitlements among

group members, on the other (Shachar 2000:203). Personal law is invariably one of the areas affected by the multicultural accommodation of minority groups and their claim for recognition as distinct identities (see Shachar 2000). It is also yet another instance of the near universal incongruity between citizenship rights and entitlements, on the one hand, and their non-realization for women living under plural legal systems, on the other (see Philips 2003/04:88). Personal laws are generally discriminatory to women in many parts of the world regardless of their religious, secular or theocratic orientations (see Abou-Habib 2004 on Arab countries; AN-Naim 1990 and Souaiaia 2008 on Muslim Law; and Jaising 2005 on South Asia). Prevailing systems of unequal dowry endowments, male-biased inheritance practices and discriminatory divorce, maintenance, adultery and child custody laws provide ample evidence of the entrenchment of unequal gender entitlements within personal laws.[2] Personal laws also function as "gatekeepers" for the moral control of women within the family and community and are predicated on essentializing cultural ideologies that construct women as economic dependents, chaste wives, good mothers and obedient daughters (Kapur and Cossman 1996). The defence of culture and religion often surfaces around the private realms of family and kinship and the preservation of patriarchal privileges and unequal gender entitlements (see Philips 2003). For these reasons, personal law has been an important focus of women's groups challenging gender discrimination in India, Sri Lanka and other South Asian countries.

Gender discriminatory personal laws often coexist with constitutional guarantees for the equal rights of women as citizens, and the governments of many South Asian countries are reluctant to enforce these guarantees particularly in the case of the personal laws of minority groups. For example, despite resistance among sections of the Hindu majority, the Indian government undertook the reform of Hindu law to conform to gender equality provisions in the constitution. On the other hand, minority Muslim leaders have thwarted similar efforts to reform Muslim law.

One of the arguments offered in support of religious-based personal laws among immigrant communities in Canada is their assumed rootedness in the traditions and cultures from which immigrants come (see Boyd 2004). This rationale for continuing such "traditions" comes dangerously close to "ethnic essentialism" (Perry 1992) and "cultural fundamentalism" (Stolcke 1995), and to reinforcing difference between mainstream Canadians and immigrant groups (Grillo 2003; also see Kamlani and Keung 2004). Legal pluralism in religious-based personal laws in India, as previously mentioned, is a legacy of British colonialism. Customary and religious personal laws in much of South Asia also evolved and incorporated concepts and principles from colonial legal systems and from the personal laws of other religious communities (see Goonesekere 2005:220 on Sri Lanka). Thus, Engineer (1992:6) warns against seeing the sharia as "totally divine or immutable"; and others have traced the evolution of sharia as the "canon law of Islam" through the dynamics of interpretation and historical circumstances (see Hurst 2008). The commonly labelled "sharia" law in many parts of the Muslim world contains a great deal of variation in both principles and practices. The reform of Muslim Law in some countries coexists with hard-line interpretations of sharia in others (see Van Engeland-Nourai 2009). It is important, therefore, to acknowledge the evolutionary history, diversity, mutability and flexibility of personal laws of immigrant communities to avoid multicultural accommodation becoming a vehicle for cultural relativism. In these contexts, perceptions of "immutable" and "static" culture as applied to immigrant groups are both unfounded and inimical to women's claims to justice and equal citizenship (see Herskovitz 1972; Markowitz 2004; Merry 2006; Perry 1992 for their critiques of the culture concept).

It is misleading as well, to consider gender discriminatory practices as part of the fixed traditions of "other cultures" and religions (Volpp 2001; see also Modood 1998; Narayan 1997). It would be equally problematic to support the continuation of gender oppressive practices in the name of multiculturalism. Multiculturalism has come to include more than the aesthetics and rituals of custom, worship rights and tolerance for religious symbols (see Stein 2007:27). There are instances where it even involves contentious practices such as polygyny, the forced marriage of minors, honour killings, exclusionary gender traditions within places of worship and religious schools, and state-sanctioned private arbitration forums run by gender-biased male religious leaders (Bakht 2004; Jiménez 2005a; Reddy 2008; Stein 2007). Recognizing this reality, the United Nations Human Development Program Report (2004:58) has asserted that: "The accommodation of customary law cannot be seen as an entitlement to maintain practices that violate human rights no matter how 'traditional' or 'authentic' they may claim to be."

The question of group rights is a contentious one (Warren 2006). Critics of liberalism contend that the liberal focus on individualism is incompatible with the protection and special rights that minority cultures require (Kymlicka 1992), while its advocates question the claim of ethnic and religious minorities for special status

(Kulkathas 1992). Multiculturalism has also become the scapegoat for the fault lines of race (Khan 1993), gender and ethnicity with Moller-Okin (1999) taking the extreme position of declaring that multiculturalism is bad for women. As Volpp (2001) observes, the multiculturalism-versus-feminism dichotomy is a flawed dichotomy for a number of reasons. It ignores intra-cultural contestation and victimizes minority women by denying them agency. It deflects attention away from patriarchy and other structural inequalities, such as race and class, that shape cultural practices and their expressions in different contexts. Multiculturalism is also problematic insofar as it is used as an instrument to maintain the patriarchal status quo (Khan 1995; Razack 1991), and for managing diversity by transferring the state's responsibility for its citizens well being—in this case women—to their communities. Criminal trials in the United States, where crimes against women have been judged using the "culture as defence" argument, which gives more significance to women's membership within their cultural groups than their status and rights as American citizens, best exemplify this point (Benhabib 2002; Donovan 2003). While women are by no means a unitary category and part of their identity and rights come from group membership, cultural groups are also not unitary groups and internal dissent and divisions exist among all groups (Kulkathas 1992). Sex equality, meaning non-subordination to men (MacKinnon 2006), and preserving religious or cultural identity and integrity need not be mutually exclusive ideals (MacKinnon 2005:277). This is also the argument used by "intersectional feminists" to critique the secular–religious dichotomy (see Baines 2009; Kortweig 2008).

However, the experiences of religious minorities and Aboriginal groups in India and Canada, respectively, prove that cultural and religious sensitivity often takes priority over women's rights. For example, cultural identity may be intertwined with patriarchal privileges in the areas of descent, inheritance, citizenship and child custody rights. This is the case in many Arab states, among Aboriginal communities in Canada, and religious minorities in India (see Curry 2007; Razack 1991; West 2002 on Canada; Nathani 1996 on India; and Abou-Habib 2004 on Arab countries). The challenge for feminists, activists and anthropologists writing on and working for women's equality in South Asian societies, has been to maintain a fine balance between supporting the integrity and cohesiveness of cultural minorities on the one hand, and women's individual rights on the other.

Women's groups in many multicultural societies of South Asia are increasingly turning their attention to the global languages of citizenship and human rights (Coomeraswamy 2005; Kymlicka 1996; McClain and Grossman 2009; Reddy 2008). The discourses around citizenship and human rights have also acquired culture specific meanings in keeping with local contexts and traditions (Merry 2003, 2006). A number of South Asian countries (including Muslim majority countries) are also signatories to international conventions on gender equality and human rights. Public discussions of multiculturalism in Canada and Europe seldom capture these discursive shifts in the source countries of new immigrants. Western commentaries are often oblivious to the role of agentic "third world" women who use the law to challenge discrimination within the family or participate in local movements to make formal gender equality a reality.

The challenge multiculturalism faces in addressing minority women's citizenship rights in countries such as Canada, has led to calls for a new multicultural paradigm that would move beyond the group-versus-individual dichotomy (see Bakht 2005; Reddy 2008). The anthropologist, Terence Turner (1993) suggests that the revolutionary potential of multiculturalism in contemporary societies lies in fostering shared and flexible values, and generating self-consciously formed groups and networks around collective struggles for universal human rights. The question raised in this paper is how we may harness such a democratic culture to serve the interests of substantive gender equality, since Turner himself does not suggest an answer. Multiculturalism, in my view, has become a sterile discourse since it offers little by way of a framework for balancing the issue of group rights and women's rights.

The sharia and Shah Bano cases underscore the strategic importance of mainstreaming minority women's voices and experiences and incorporating feminist citizenship and human rights discourses into legal norms and practices. Equal citizenship, or fulfilling the ideals of "inclusion, membership, and belonging" (McCain and Grossman 2009:1), is as important an ideal for women in cultural groups, as multiculturalism is for enabling the rights of the same groups in the wider society. Feminist theorizing of citizenship has moved beyond the liberal notion of gender-neutral citizenship to emphasize the status, entitlements, responsibilities, identity and agency aspects involving both individuals and their communities (Agacinski 1998; Lister 2001; Meer and Sever 2004; Sen 1994). The Gender-Differentiated Citizenship model advocated by both Lister (2001) and Agacinski (1998) calls for the inclusion of sexual differentiation into the very definition of citizenship without, however, disintegrating into sexual segregation or sexual essentialism. The Gender-Pluralist Model of citizenship goes further by calling

women to engage in "struggles against the multiple forms in which the category 'woman' is constructed and subordinated" (Mouffe 1992:337), since sex inequality is only one among other interrelated modes of oppressions emerging from racial, ethnic and class locations. Citizenship has also become an important political tool for feminists to challenge the public–private divide, for bringing gender inequalities within marriage and family into the public realm and for negotiating between the citizenship rights of cultural communities and women's right as equal citizens (Philips 2003/2004). As the National Association of Women and the Law (NAWL) in Canada has noted, the public–private dichotomy invariably disadvantages women based on a narrow conception of citizenship as entailing public issues and not private experiences (Boyd 2004:33).

In the next two sections, I describe the salient aspects of the sharia and Shah Bano controversies. I then compare the two conflicts in terms of multiculturalism, women's rights, the role of the state and cultural identity politics. Lastly, I discuss the implications of the two controversies for interrogating the relationship between cultural rights and women's citizenship rights in multicultural contexts. I examine some of the recommendations of Canadian and Indian feminists for resolving the dilemma of group rights and women's rights with regard to personal laws. I also undertake a critical evaluation of the safeguards proposed by Marion Boyd (2004) in her report to the Ontario government on the feasibility of using religious laws in family disputes. In my concluding remarks, I emphasize the importance of citizenship and the legal domain in addressing the issue of women's rights with respect to family law issues in multicultural contexts.

The Sharia Controversy in Ontario

The sharia controversy in Ontario began in 2003 with the announcement by Syed Mumtaz Ali, an Ontario lawyer and President of the Canadian Society of Muslims, that a new organization called the Islamic Institute of Civil Justice (IICJ) has been established to conduct arbitration of family disputes among Canadian Muslims according to sharia law under Ontario's arbitration laws (Boyd 2004:3). Arbitration practices are well established in Ontario as a form of resolving disputes, with decisions subject to appeals in the Canadian courts. As noted previously, some religious minority groups in Ontario were already using the arbitration system to resolve family disputes in religious courts. The Arbitration Act of 1991gave a higher profile and legitimacy to arbitration and reduced the discretion of the court in supervising arbitrations (Boyd 2004:11).

It was perfectly appropriate for the IICJ, or any other organization[3] to consider arbitration mechanisms as a means of resolving family disputes according to Muslim religious laws. However, the IICJ failed to communicate its intentions properly, and perhaps it may have not thought through the full implications of what it was proposing to carry out. Syed Ali announced that Muslim arbitration would be the only option open to "good Muslims" and that the decisions taken in arbitration hearings would be final and binding on the parties involved in the arbitration process without appeal to Canadian courts (Ali 1994; Boyd 2004; Hurst 2004, May 22:A01). These statements turned out to be both overreaching and misleading, and led to comments and criticisms among Muslims and non-Muslims in Ontario.

Faced with rising controversy, the Government of Ontario invited Marion Boyd, a former Attorney General, to undertake a review of Ontario's arbitration process dealing with family disputes and specifically in regard to the impact that the use of arbitration might have on vulnerable individuals, namely "women, persons with disabilities and elderly persons" (Boyd 2004:143). In December 2004, Boyd submitted her findings in a comprehensive report leadingly titled, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion." Her principal finding, despite evidence to the contrary submitted to the review process by various organizations, was that there was no evidence of systematic discrimination in private arbitration around family law issues. She recommended that arbitration should be allowed to continue as an alternative dispute resolution option, even using religious laws under the Arbitration Act, subject to safeguards recommended in her report[4] (Boyd 2004:133). For Boyd (2007:465), "family law" is "a litmus test for how a jurisdiction interprets multiculturalism," and defines a community's sense of belonging according to "its own norms."

The Boyd review and report generated public and media discussions on the core issues of Canadian multiculturalism, women's rights and Muslim identity. I have summarized public discussions of these issues from several articles, commentaries, opinion pieces and exchanges that appeared in the *Globe and Mail* (Canada's national newspaper), the *Toronto Star* (the most widely circulated newspaper in Ontario), and the internet between 2003 and 2006. I attended a public meeting in Kitchener, Ontario, on the day of the sharia protest on 8 September 2005, and participated in a workshop on sharia law at Wilfrid Laurier University in Waterloo later that year. I also draw extensively from the Boyd Report (2004) that contained representations from at least 50 organizations including several women's groups and as many as 250 individuals (Boyd 2007).

In general, the opponents of religious arbitration regarded the introduction of sharia courts as a threat to the gender equality of Muslim women, while the supporters of sharia courts considered the mainstreaming of religious arbitration as the best means of securing the rights of Muslim women within a multicultural Canada. What was at stake in this debate, for sharia supporters, was Canada's reputation as a tolerant and accommodating society (Kitchener meeting, 8 September 2005).

Homo Arjomand, the Iranian-born leader of the anti-sharia movement in Ontario, captured the sentiments of the opposition to sharia courts when she observed that "multiculturalism was never meant to take away the equality rights of a group, in this case Muslim women" (Hurst 2004). She also added that multiculturalism has now "become a barrier to women's rights (Wente 2004). Ayaan Hirsi Ali, who was an outspoken critique of both multiculturalism and sharia law, blamed Western multiculturalism for giving "more importance to community rights than to the individual rights of women" (Wente 2005; see also Mallan 2004). The Canadian Muslim Congress regarded the use of religious law in a secular society as both "racist and unconstitutional" (Kamlani and Keung 2004).[5] There were also concerns that it would lead to the "ghettoization" of Muslim women within a multicultural Canada (Valpy and Howlett 2005; Wente 2004).

The supporters of sharia courts took the opposite position that denying Muslims their right to religious arbitration went against the tenets of Canadian multicultural policy, with its emphasis on integration, respect for diversity and group rights (Fahmy 2005; Globe and Mail 2005). Successful integration meant accommodating religious arbitration and protecting Muslim women from an adversarial, racially biased and discriminatory secular Canadian court system.

On the question of women's rights, sharia supporters believed that arbitration according to Muslim law would increase women's status since the Quran gives more protection to women than is usually understood (Kitchener meeting, 8 September 2005; see also Baqi 2005; Muhaseen and Haque 2004). Muslim arbitrators also tend to favour women in granting arbitral awards in private arbitration courts (Qaiser 2004). Sharia supporters argued that family disputes are often dealt with in informal and unregulated settings, and bringing them under a formal arbitration process was necessary to ensure the protection of Muslim women's interests and rights (Campbell 2005). They contended that the safeguards proposed by the Boyd report would be the best means of constraining private arbitration decisions in cases where such decisions were inconsistent with the Canadian Charter (Kutty 2004; Siddiqui 2004).

Sharia opponents, however, considered the introduction of sharia law as a "betrayal of women" (Mallan 2004) that would "lead to injustices of the most vulnerable" (Hurst 2004). Several Muslim women and men at the public meeting in Kitchener provided personal and anecdotal accounts of the injustices meted out to women by patriarchal Imams of sharia hearings (see also Boyd 2004:46-55; Jiménez 2005a). Homa Arjamond, who was one of the main speakers at this meeting, recounted cases she was involved in where women were virtually absent from the arbitration hearings which were comprised solely of male representatives. Thus, Muslim "women's agency" was clearly an issue in the controversy with supporters and detractors disagreeing as to whether women's agency could be best served in the secular Canadian courts or in Muslim religious courts (Korteweg 2008).

Another focus in the debate was Muslim identity. The Boyd report (2004:89) had acknowledged the policing function of personal laws for preserving group boundaries and for separating "outsiders" and "insiders." Syed Mumtaz Ali, in his report, the "Review of the Ontario Civil Justice System" (1994:13), had already established this Muslim identity as including diverse ethnic groups from many Islamic sects who "follow the Islamic religious tradition." Private arbitration under Muslim law would also facilitate Muslim youth to establish their identity as a minority within a larger hostile community (Boyd 2004).

Opponents to sharia courts considered efforts to construct such an overarching Muslim identity as deeply problematic. Similar efforts by the Canadian Society of Muslims (Ali and Whitehouse 1991) several years before the controversy led Shahnaz Khan (1993:54-55) to comment that such efforts were essentially reifying concepts such as "Muslim People" and "Muslim personal status law" in a rather overarching simplistic response to the racial characterization of Muslim immigrants in Canada. Hogben (2004; see also Wente 2005) dismissed the use of the term *sharia* to describe the proposed tribunal as a way of giving them "Islamic" legitimacy and "play(ing) into the fears of us, newer Canadians, arguing that we need identity markers to remain Canadian." For Homa Arjomand (Boyd 2004:47), "the issue of political identity is at the root of the demand for a Muslim arbitration process," since "sharia is not only a religion; it is intrinsically connected with the state" in Muslim societies where "it controls every aspect of an individual's life." Several Muslim speakers at the Kitchener meeting echoed similar concerns and highlighted the link between political Islam, Muslim identity in transnational societies, and the demand for faith-based arbitration of family conflicts (Boyd 2004:54; Resnick 2007; Simpson 2005).

Canadian organizations, like the women's Legal Education Action Fund (LEAF), in their submissions to the Boyd review (2004:8) emphasized that the demand for religious arbitration was not just a case of identity assertion but it supported the maintenance of a male status quo within a patriarchal family system. They were concerned that the "ideas put to rest through family law reform which were originally grounded in religious [Christian] precept" were resurfacing in the name of multiculturalism and religious freedom.

Public discussion around faith-based arbitration and opposition to establishing "sharia courts," persuaded the Ontario government to change course with regard to expanding the practice of religious arbitrations. Instead, the government of Ontario chose to disallow faith-based arbitration altogether and "to ensure all family law arbitrations are conducted only under Canadian law, which includes all provincial statutes" (Boyd 2007:472). Ontario also passed the Family Law Statute Amendment Act in 2006, to bring all matters concerning arbitration of family disputes under government authority (see Resnick 2007). Similarly, the amendment of the *Children's Law Reform Act* sought to address issues related to the custody of children (Boyd 2007). The decision of the Ontario government to abolish religious arbitration in the wake of opposition to sharia courts illustrates concerns surrounding what Ayelet Shachar (1998:289) describes as the "paradox of multicultural vulnerability" (i.e., the impacts of multicultural accommodation of group rights on the equality rights of women members within the group).

The Shah Bano Controversy in India

The Shah Bano case involved the hijacking of a Muslim woman's claim for extended maintenance by Muslim leaders in India to make identity claims in the context of increasing political tensions between right wing Hindu fundamentalists and their Muslim counterparts. It also highlighted the issue of how minority fears of assimilation and social marginalization can have detrimental effects on women's quest for equal entitlements within marriage and the family.

Shah Bano and her first cousin, Ahmed Khan, a Lawyer by profession, were married for 43 years and the couple lived in the State of Madhya Pradesh in India. In 1975, Khan separated from Shah Bano after taking a second wife and stopped maintenance payments after two years of separation. Shah Bano, then 75 years old, filed for maintenance under the Indian Criminal Procedure Code, which deals with the destitution of widows, children and parents. In retaliation, Khan ended their marriage by pronouncing the triple talaq (unilateral divorce) and returning a sum of Rs.3000 ($60) as the *mahr* (bride-wealth) that was due to his divorced wife under Muslim personal law. Khan argued that he had more than fulfilled his obligation by returning the mahr, and paying a maintenance fee of Rs.200 ($4) per month for two years above the period of iddat stipulated by Muslim personal law. The lower courts held against Khan and asked him to pay a paltry sum of Rs.25 per month. The High Court of Madhya Pradesh increased the payment to Rs.179.20, and Khan appealed to the Supreme Court (Kumar 1993:161).

In April 1985, ten years after their separation, the Supreme Court of India held with Shah Bano, rejected Khan's appeal and ordered him to continue paying maintenance under Section 125 of the Code of Criminal Procedure, which applied to all citizens regardless of religious affiliation. The Court held that as mahr was not a divorce payment but a marriage payment, its return did not absolve Khan from his obligation to pay maintenance to his divorced wife. The Court also affirmed that the application of Article 125 of the Criminal Code was consistent with the directive principle of Article 44 of the Constitution that committed the Indian State to secure a Uniform Civil Code (UCC) for all its citizens. The Court's judgement appeared to bypass the gender equality issue by focusing on the enactment of a common civil code (Hasan 2005: 361; also see Das 1994). But the Court went on to observe that its ruling was consistent with Muslim religious principles, even quoting the Quran that making a fair and reasonable provision for women who are divorced is an obligation of god-fearing people (Engineer 1987: 28-30, 1992:129).

The Supreme Court ruling became the lightning rod for the protagonists of Muslim religious law who argued that the sharia could not be altered or abrogated. It was divinely inspired and derived from revealed sources (Engineer 1987). It was also binding on all Muslims in both the public and the private spheres of human relations. The Supreme Court ruling was merely part of an effort to "assimilate Muslims into a broader and predominantly Hindu culture" (Awn 1994:66; Kapur and Cossman 1996). Muslim opponents warned that the sanctity of Islamic law, the survival of the Muslim community and the very integrity of the Indian nation as a multicultural society were being threatened (Parashar 1992:187). Muslim leaders further claimed that the Supreme Court had usurped the interpretive authority of Muslim theologians (Kapur and Cossman 1996:63). The All India Muslim Personal Law Board that had an intervener status in the Supreme Court appeal, became the official agency of protests against the court ruling (Engineer 1987:149), organizing

sharia protests and making political claims on the Indian government (Hansen 1999:149).

The Board sent a message to the Congress government under then Prime Minister Rajiv Gandhi by turning the Muslim vote against the ruling party in a series of by-elections that came after the Court ruling (Pathak and Sunder-Rajan 1989:161). The government that initially supported the ruling changed its position and voted in parliament to pass into law the Muslim Women's Protection of Rights on Divorce Bill, introduced by an independent Muslim Member of Parliament. The new law absolved the Muslim husband of all legal responsibility toward his wife after the expiry of the iddat period. Beyond this, if she still needed support, the law laid the responsibility to support her on her natal family. In effect, the new law took away even the privileges women enjoyed under the Quran (Chhachhi 1994; Kishwar 1987). According to many Islamic commentators, the Quran prescribes fair and adequate maintenance, does not stipulate the amount during the period of payment, and places the responsibility of maintenance solely on the shoulders of the husband (Engineer 1987:15).

The Shah Bano case divided the Muslim community at the beginning, further polarized Hindus and Muslims, and created strange alliances separately within the two groups. Muslim women's groups who came out in support of Shah Bano were overwhelmed by the political clout of the All India Muslim Personal Law Board. Even the supposedly secular Congress government of Prime Minister Rajiv Gandhi abandoned secularism and the commitment to establishing a Uniform Civil Code in the face of the Board's opposition to the Supreme Court ruling. On the other hand, the traditionally anti-Muslim and fundamentalist Hindu organizations found in the Shah Bano case a convenient cudgel to attack the "secular" Congress government and Muslim leaders. Overnight, they became the champions of gender equality for Muslim women and their liberation from oppressive Muslim men (Bacchetta 1994:188). Indian feminist groups, who were opposed to the new law and critical of the Congress government for its act of political expediency, found themselves falling into strange alignment with fundamentalist Hindu groups (Kapur and Cossman 1996). Finally, the demonizing of Islamic religion and culture by Hindu fundamentalists drove a number of Muslim women's groups into silence; some even became the reluctant supporters of Muslim religious leaders. Shah Bano herself came out to reject the Supreme Court ruling in public and to affirm the traditions of her community, blaming her ignorance for the litigation: "Most of us read the Koran but do not understand it. I was ignorant when I fought the case all these years. The *maulvis* have now told us that it would be un-Islamic if I accepted the judgement" (Naqvi1987:68).

Comparing the Sharia and Shah Bano Controversies

The sharia and Shah Bano controversies exposed the patriarchal aspects of personal laws in private and public realms and their politicization in the public realm. They raised questions of identity, and implicated the two governments in Ontario and in India in diametrically opposite ways. In both cases, conservative male leaders took upon themselves the task of representing their communities in a matter that deeply implicated women. The Muslim Personal Law Board in India, and the Institute of Islamic Code of Justice in Ontario, hardly showed any sensitivity to issues of gender equality in the private realm and with regard to personal and family law matters. In their view, minority groups were entitled to differential citizenship within a multicultural mosaic, regardless of the implications for women in those groups. Their view of citizenship also limited family disputes and women's experiences to the private realm and ruled them out of bounds for public purview.

On the other hand, the two organizations were not averse to politicizing the issue of personal laws and family law matters in spite of their insistence that they belong to the private realm. The politicization of personal laws tends to acquire more urgency in situations of heightened religious and ethnic tensions. For instance, Hindu-Muslim tensions in North India led to the enactment of the Shariat Law in India in 1937. Similarly, Punjabi Sikhs' demand for a separate Sikh customary law (Sikhs traditionally come under Hindu law), took place at the height of the Khalistan agitation of the 1980s. Shah Bano's challenge also emerged in a politically charged environment involving Hindu and Muslim fundamentalists. Since the 1970s, the rise of Hindu fundamentalism along with anti-Muslim violence (Chhachhi 1994:84; Parashar 1992), and relative economic marginalization of Indian Muslims have created a volatile political situation between Indian Muslims and Hindus (Hansen 1999). Although Muslims in Canada do not have similar experiences, sharia supporters in Canada considered public opposition to sharia courts as "sharia phobia" or "Islamaphobia" (Hurst 2005; Khan 2005). Even moderate groups of Canadian Muslims who were opposed to sharia courts were provoked to dismiss media and public opposition as anti-Muslim frenzy brought on by world political events. The public outcry against sharia courts was one manifestation of these global tensions in Canada (Jiménez 2005b; Siddiqui 2005).

In both cases, Muslim women were under pressure to choose between loyalty to their religious communities and their own equality rights as women. For instance, the insistence of Indian Muslim leaders that religious identity was in danger of obliteration through the subjugation of Muslims to a Unitary Civil Code forced Shah Bano to subject her gendered identity and maintenance needs to the religious claims of the community (Menon 1994). The hijacking of the Shah Bano issue by Hindu fundamentalists also led many Indian feminists to rethink their position on the UCC (Kapur and Cossman 1996; Menon 1998). Alia Hogben, the Indo-Canadian President of the Canadian Council of Muslim Women, captured the dilemma facing many Canadian Muslim women when she noted that many pro-faith women of diverse Islamic sects were hesitant to speak out against their community for fear of providing "ammunition to those who malign them" (Hurst 2004; see Baines 2009 on this dilemma). The sharia issue was also a dilemma for Canadian feminists who are cognizant of the implications of the equality issues for women of faith among religious minorities (Cossman and Fudge 2002:405).

Perhaps the most significant difference between the sharia and Shah Bano examples is the directional changes in government policy in Ontario and India, respectively. The Shah Bano case illustrates the weakness of India's constitutional secularism without a corresponding social ethos (Brass 1998). It demonstrates the power of a religious community and its patriarchal spokespersons to shape the direction and content of law-making and enforcement (Das 1994). Ontario avoided such an outcome by enacting the Ontario Family Law Status Amendment Act (2006), consolidating and strengthening the authority of the secular legal system and its control over personal and family law. As Jeffrey Simpson of the *Globe and Mail* noted, "the more multicultural Canada becomes, the less acceptance exists for group institutions to rub against prevailing secular norms...Public tolerance for deep multiculturalism is limited, if it means special rules for a particular group" (2005; for more discussion on multiculturalism and secularism, see Globe and Mail 2005; Goar 2005; Horton 1993:1-2).

The Shah Bano case may not have attracted international attention at the time, but its significance lies in demonstrating the challenges facing women in all multicultural contexts. Opposition to sharia Courts in Canada came from concerns about the general erosion of women's rights with the rise of the religious fundamentalists in many South Asian countries, home to the majority of Muslim immigrants in Canada. There were also concerns about the effects of sharia courts in Ontario on women who live in other Muslim countries (Gagnon 2005). Thus, Women Living Under Muslim Law (WLUML), an international rights group, warned that a secular state such as Canada should not "fall into the trap of not interfering in old-world traditions out of misguided sensitivity" (Hurst 2004).

Concluding Discussion

The sharia and Shah Bano controversies illustrate the tensions between "external legal protections" for eliminating inequalities between identity groups, on the one hand, and "internal restrictions" on the citizenship rights of women, on the other (Kymlicka 1996:35). Indian (see Menon 1998; Sunder-Rajan 2000) and North American feminists and legal scholars have put forward many proposals to reconcile group rights and women's rights with respect to personal laws. These proposals range from promoting complete autonomy for "cultural groups" to control their own personal laws, to demands for a feminist jurisprudence to escape the clutches of legal and kinship patriarchies (Jethmalani 1995; MacKinnon 1993, 2005). Other proposals include, providing women with the opportunity to choose between secular laws and religious laws (an option available to Indian women) (MacKinnon 2005; Shachar 1998), a "joint-governance" approach involving the state and cultural communities, "multicultural interlegality" (or hybridity), and personal law reform through defensive litigation by women.

The two main areas of concern with respect to family disputes are the gender-discriminatory religious laws for settling disputes and the gender power imbalances in religious courts. On the question of laws, Shachar (1998) has suggested an "intersectionist joint-governance" approach to accommodate multicultural groups by allowing communities to use family law to preserve group boundaries while permitting the state to intervene to protect intragroup members from family law-related discrimination. However, as Schachar (1998:290) has also acknowledged, all religious laws contain inbuilt inequalities that function to preserve the gender status quo. These inbuilt inequalities may conform to religious traditions and requirements (An-Na'im 1990 on sharia; Bakht 2004:16) or operate to maintain the cultural integrity and identity of groups, particularly where group membership and patrilineal privileges within the family are inextricably linked, as in the case of Aboriginal groups and religious communities that privilege the patrilineal line. There are also practical and legal problems in instituting a "joint-governance approach" among immigrant groups, who are differentiated by their countries of origin, language and customary versions of sharia law. The proposal to introduce sharia law was problematic from the start because

it tried to compress diverse Muslim groups into a single Islamic identity.

In England, "multicultural interlegality"—a system of legal pluralism combining religious and secular laws—functions as a hybrid system of law, wherein English law operates within Muslim law and is applied together based on negotiation and accommodation (Banu 2009; Blacksone 2005; Menski 1997). This system of multicultural legal pluralism has some value in terms of accommodation, religious law reform and integration of secular and religious principles. However, this system has also produced a two-tier legal system operating at official (English) and "unofficial" (termed *Angrezi Sharia*) levels, and has resulted in a myriad of practices such as multiple civil and religious marriages and divorces to satisfy the requirements of both English and religious laws (Banu 2009:421). Since there may be more acceptance of religious divorce within the community, a Muslim woman may be compelled to go to a religious tribunal to seek divorce if a husband rejects the civil divorce obtained from an English court (Fournier 2004).

In Canada, the courts would likely strike down any section of religious law that is inconsistent with the Canadian Charter of Rights and Freedoms (Resnick 2007; Bakht 2004). The Charter is clear on the point of the limits of multiculturalism, since Section 28 of the Charter privileges the sex equality protections already contained in Section 15(1) and overrides Section 27 which deals with multicultural rights (Resnick 2007). There is also evidence of the influence of the Charter in judicial rulings in Canadian family law cases (Bakht 2004:fn. 33). Canadian Charter challenges on sexual equality issues (Razack 1991:134) have been few but invoking the Charter is one avenue for pursuing gender equality for women as Canadian citizens.

There has been much progress in Canadian family law since the 19th century, which incorporates women's rights, even as "family law matters have become a matter of public law and policy" (Bakht 2004:26). Thus, until and unless minority religious laws are reformed and can stand the test of constitutionality and gender equality principles, Canadian Family Law provides the best safeguard for women from minority and immigrant communities.

The other area of concern for women is the gender power dynamic within religious arbitration processes. A criticism of multicultural interlegality in Britain is that it serves to obscure these power dynamics and the conflicting interests among community members involved in arbitrations (Banu 2009; Galanter 1981; Menski 2002). The Boyd review (2004:107) acknowledged the "intersectionality of vulnerabilities" that women from immigrant communities might be exposed to due to immigration, sponsorship, debt, class and other factors that may compromise women's hope for justice in religious courts (or secular courts for that matter). Many commentators have described the safeguards proposed by the Boyd Report to address these issues as inadequate. In particular, private arbitration in Canada, despite some merits (i.e., language, privacy, speed etc.), is not as transparent as the Canadian Court system, and contains fewer safeguards and supports for vulnerable citizens in the form of legal aid and information on citizens' rights and Canadian laws (Bakht 2004). Many of the Report's recommendations, particularly a woman's right to waive independent legal advice, ignore the fact that women may be in a weaker bargaining position vis-à-vis other family members and may be forced to waive their right to legal advice. Women have the right to appeal arbitration decisions that are against them, but since the main objective of private arbitration is to avoid the courts, it is unlikely that women will use the appeal process (Bakht 2004:6). Furthermore, a ruling may be binding within the cultural community even when it is not upheld by a Canadian court. Bakht (2004:7) who has reviewed a number of private arbitration cases in Canada concluded that for the most part, the courts have "an interest in upholding parties' private bargains" without interference and are more reluctant to do so if the arbitration awards are informed by religious laws.

Other safeguards contained in the Boyd Report, such as screening for family violence do not take into account forms of abuse other than physical violence (e.g., mental abuse, restriction of movement, ostracism and cultural restrictions). Evidence from Britain suggests that private tribunals may legitimize the authority of religious leaders and community spokespersons and operate as private sites of power and privilege where family law is subjected to "extra-legal" regulation based on beliefs about privacy and principles of "honour and shame" (Banu 2009:425). Thus, while private arbitration may be an effective and efficient dispute settlement forum for disputants operating within a "level playing field" as in commercial disputes, it is unlikely to be the case involving religious arbitration of family disputes where women may not have equal bargaining powers with men (Resnick 2007).

Feminists and legal scholars have been skeptical about the "protective" and "liberating" potential of law and legal discourses to secure women's equal rights. This is understandable in light of the enormous challenges that women from all walks of life face in dealing with family conflicts including the biases of the mainstream judicial system and its representatives (see Mackinnon 1993, Razack 1991 and Smart 1989 on Canadian cases; and Cossman and Fudge 2002 and Jethmalani 1995 on India). Cultural pres-

sures and family power dynamics are also factors that impede defensive litigation by women in secular courts (see Philips 2003 on Kerala, India). Shah Bano's experience is an apt illustration of Indian women's predicaments. For women to take the route of defensive litigation or to choose secular courts over private tribunals, the state would have to undertake other policy actions such as reforming the court system to create a women-friendly atmosphere and sensitizing legal service providers to gender equality issues.

A related area of focus should be women's citizenship rights. The mobilizing factor must be the pursuit of the common goal of ending gender-based discrimination regardless of its social, economic or cultural location. This intersectionist perspective (Kapur and Cossman 1996) is also the viewpoint taken by those who advocate a gender-pluralist model of citizenship, legal and political theorists writing on questions of Aboriginal women's rights in North America (Shachar 1998), Muslim organizations such as Women Living Under Muslim Law (MLUML), and legal feminists' writing on Muslim law (see Hirsch 2006). The Shah Bano case has proven to be a landmark case for women fighting for the implementation of their constitutional, legal and citizenship rights in India and other South Asian countries and has been an exemplifier of how cultural and religious claims and identity politics can undermine women's rights to equality. The sharia controversy in Canada led to successful mobilization and resistance at the local and international levels, and the resistance included women from minority cultures who were concerned that religious courts would undermine their equal rights as citizens. Creating consensus among women about multiple discriminations, finding appropriate legal strategies, and providing economic and institutional supports and entitlements can advance women's movement towards substantive gender equality. Without such a moral vision and common understanding, legal citizenship for minority women in multicultural and transnational societies will only be a formal recognition and not an active status.

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Notes

1 The term *iddat* refers to the waiting period for divorced or widowed women before remarriage can take place. The period covers three menstrual periods, or three lunar months in the case of women who have passed the period of menopause.

2 For more discussion on this point, see Hasan 2005, Kishwar 1994 and MacKinnon 2005 on India; Basu 2005, Redding 2005 and Zia 1994 on Pakistan; Pereira 2005 on Bangladesh; Muttettuwegama 2005 and Jayawardena and Kodikara 2003 on Sri Lanka.

3 The Canadian Islamic Congress (CIC) was one of the most prominent supporters of the IICJ's proposals to establish sharia tribunals in Ontario. Its leader, Dr. Mohamed Elmasry, promotes the Congress as a non-sectarian organization whose purpose is "smart integration" and civic participation along with the preservation of a distinct Muslim identity within a multicultural Canada. The Canadian media has also tended to portray the CIC as the voice of conservative Canadian Muslims in contrast to the Muslim Canadian Congress (MCC) that is represented as the voice of liberal, progressive and moderate Muslims (see Sharify-Funk 2009:78).

4 The Boyd Report recommended adding arbitration agreements and protection to the Ontario Family Law Act. In addition, both the agreement to arbitrate and the religious law to be used in arbitration had to be confirmed before the arbitration process. Furthermore, the parties to a dispute had to review the statement of principles of faith-based arbitration. The agreements of the parties involved in arbitration were also required to contain a certificate of independent legal advice or a waiver of it based on individual choice. Arbitrators should be voluntary members of professional organizations who should screen the parties for power imbalances and domestic violence. Boyd further recommended "public education and training of lawyers and arbitrators, record keeping procedures, community involvement, and policy analysis of the legality of providing a higher level of court oversight to family and inheritance cases based on religious principles" (Baines 2009:88).

5 Mr. Tarek Fatah, the former leader of the Muslim Canadian Congress, has been an outspoken critic of sharia law. The MCC, under his leadership, projected itself as the voice of progressive and moderate Muslims and as the champion of gender equality; it advocated the separation of state and religion, rejected the practice of hijab (Muslim women's dress) and promoted human rights and citizenship and not just multiculturalism (Hurst 2005).

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