
Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies

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The use of gendered and idealized images of women as symbols of group identity is prevalent in modern conflicts between minority and majority cultures. As a result, the position of women within minority cultures may be particularly vulnerable. The internal feminist critique of multiculturalism offers the most promising framework for reducing tensions between religious accommodation and gender equality. Two topical examples are examined in this article: the controversy in France over whether Muslim girls have the right to wear traditional headscarves (hijab) in public schools, and the debate in Canada over the establishment of a private Islamic arbitration tribunal (Dar-ul-Qada). Both examples highlight the fact that minority group members may wish to benefit from affiliation with more than one legal and cultural system. The new jurisprudential approach promoted in this paper brings to light the false dichotomies that are often presented to vulnerable groups within a minority, such as the choice between adhering to the requirements of one's minority tradition or benefiting from those advantages offered to wider society (which include, for example, public education or egalitarian legal proceedings). This new approach seeks to align the benefits of enhancing justice between groups with reducing injustice within them. The author analyses the proposed Dar-ul-Qada and offers concrete suggestions on how the current proposal might be adapted to ensure both religious accommodation and sufficient protections of equality.

L'utilisation comme symboles identitaires pour décrire les femmes de références idéalisées et basées sur le sexe est courante dans les conflits actuels entre cultures minoritaires et majoritaires ; conséquemment, les femmes ont au sein de cultures minoritaires un statut particulièrement vulnérable. La critique féministe interne du multiculturalisme est celle qui offre le plus grand espoir de réduction des tensions entre valeurs religieuses et égalité des sexes. Deux exemples d'actualité sont étudiés : la controverse au sujet du port de voile (hijab) dans les écoles publiques par les jeunes filles musulmanes en France et le débat au sujet de l'institutionnalisation d'un tribunal d'arbitrage islamique privé (Dar-ul-Qada) au Canada. Ces deux cas illustrent la volonté éventuelle de membres de groupes minoritaires de bénéficier d'une affiliation à plus d'une tradition culturelle ou juridique. La nouvelle approche jurisprudentielle défendue dans cet article révèle les fausses dichotomies souvent présentées aux groupes vulnérables dans une minorité, tels que le choix entre accepter les exigences dictées par les traditions d'une minorité et profiter d'avantages offerts à la société dans son ensemble (tels que l'éducation publique ou l'équité des procédures juridiques). Cette nouvelle approche cherche à concilier les bénéfices d'une justice accrue entre les groupes à la réduction des injustices en leur sein. L'auteure analyse la proposition de Dar-ul-Qada et propose des suggestions concrètes afin d'assurer à la fois le respect des valeurs religieuses et une protection suffisante du droit à l'égalité.

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Introduction	51
I. Definitions: Women, Culture, and “Reactive” Assertion of Communal Identity	54
II. Foundations: The Multicultural Citizenship Model	55
III. An Update from the Frontiers of the “Feminism and Multiculturalism” Debate	59
<i>A. Illustrations: The Gendered Dimension of Intercommunal Strife and Its Legal Manifestations</i>	59
1. The French Debate over Muslim Women’s Right to Wear the Hijab in Schools	59
2. The Canadian Debate over the Establishment of a Private Islamic Arbitral Tribunal	61
<i>B. “Re-designs”: The Public Policy Implications of the Feminist Critique</i>	69
<i>C. Innovations: The Sharia Tribunal as a Case Study</i>	73
IV. The Rejection of Multicultural Citizenship: Liberal, Civic-Republican and Ethnocultural Variants	78
<i>A. The Liberal Model</i>	78
<i>B. The Civic-Republican Model</i>	82
<i>C. The Ethnocultural Model</i>	83
Conclusion: Recovering Multiculturalism with Feminist Insights?	86

Introduction

From the controversy in France over whether Muslim girls have the right to wear a headscarf (hijab) in public schools to the recent controversy over the establishment of a private Islamic arbitration tribunal (Dar-ul-Qada) in Canada, state and religion currently appear to clash on a regular basis in virtually every region of the world.¹ While disputes over the scope and limits of religious accommodation are not novel, what is distinctive about this new brand of secular-religious quandary is that so many of the central issues raised revolve around the regulation of women, gender or sexuality and the family.

For complex and numerous reasons, which I have explored in depth elsewhere, women and the family often serve a crucial symbolic role in constructing group solidarity vis-à-vis wider society.² Under such conditions, women's indispensable contribution in transmitting and manifesting a group's "culture" is coded as both an instrument and a symbol of group integrity. As a result, idealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of "authentic" group identity. This valorization occurs through carefully crafted binary codes of "respectable" behaviour: the female group member ought to be veiled (versus exposed), modest (versus promiscuous), loyal (versus morally corrupt), married (versus sexualized), fertile (versus childless), and so on. These images of "idealized womanhood" become cultural markers that help erase internal diversity and disagreement, while

¹ My focus in this article is on cultural and legal/institutional controversies that involve a potential clash between religious adherents of the Muslim faith and the state in predominantly non-Muslim societies, such as Canada and France. While similar dilemmas concerning the limits of accommodation have also been raised by members of other religious communities or denominations, I wish to emphasize the new gendered "cultural wars" that have been given added impetus by the events of 11 September 2001 and their aftermath.

² See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 45-62 [Shachar, *Multicultural Jurisdictions*]. My work is part of an emerging interdisciplinary body of literature that explores the relationship between gender and sexuality and the construction of collective identity. See e.g. Nira Yuval-Davis & Floya Anthias, eds., *Woman-Nation-State* (London: Macmillan, 1989); Marie-Aimée Hélie-Lucas, "The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws" in Valentine M. Moghadam, ed., *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective* (Boulder, Colo.: Westview Press, 1994) 391 [Moghadam, *Identity Politics*]; Deniz Kandiyoti, ed., *Women, Islam and the State* (London: Macmillan, 1991); Inderpal Grewal & Caren Kaplan, eds., *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (Minneapolis: University of Minnesota Press, 1994); Vrinda Narain, *Gender and Community: Muslim Women's Rights in India* (Toronto: University of Toronto Press, 2001); Katherine Franke, "Sexual Tensions of Post-Empire" 38 *Studies in Law, Politics and Society* [forthcoming].

concurrently allowing both minority and majority leaders to politicize selective and often invented boundaries between the “self” and the “other”.³

The hardening of the borders of inclusion and exclusion, accompanied by fear of the challenges presented by assimilation and secularization, often serve as a ready-made rationale for conservative group leaders to impose a rigid and strict reading of a tradition’s personal status laws in the name of a collective effort to preserve the group’s distinct identity in the face of real or imagined external threats. I label this phenomenon “reactive culturalism”.⁴ The conflation of “reactive” claims of culture, intercommunal tensions, and gendered images of idealized womanhood has become a focal point for the current global spate of state-and-religion conflicts over foundational collective identity and basic citizenship questions.⁵ It is crucial to understand this dynamic in order to better comprehend the pressures that are imposed on women within minority cultures. With greater understanding comes the potential for innovation and improvement.

In my previous writings, I have focused primarily on the unjust gendered costs that strong multicultural accommodation policies often impose on women within a minority community.⁶ In this article, I continue to explore the centrality of gender and

³ Ironically, such gendered constructions of group identity may be shared by representatives of both minority and majority communities, as is demonstrated by the current debate over the hijab in France. See Part IV, below.

⁴ Reactive culturalism is never simply an expression of pure unalloyed collective identity. It represents a radical reinterpretation of minority traditions, which is the result of cross-cultural interaction in which the surrounding society and its public institutions inevitably play a crucial role. It is best described as a defensive response to increasing pressures of assimilation and secularization, which may lead certain religious minority communities (or their leaders) to define their collective identity in restrictive, uncompromising terms that portray any “unorthodox” interpretation of the tradition as evidence of moral decay threatening the very survival of the group. In instances of reactive culturalism, images of gender, sexuality, and the family frequently become symbols of a minority groups’ “authentic” cultural identity. Under such conditions, almost any challenge to “traditional” practices quickly becomes interpreted as an attack on the very essence and existence of that community. When a group’s assertion of its own identity becomes inlaid with elements of reactive culturalism, fear that any adaptation may lead to increased assimilation or disintegration of the group can make it difficult to retreat from a path of heightened rigidity, or “fossilization” of the group’s tradition.

⁵ These intersecting conflicts will be referred to as the new “cultural wars” or “state-and-religion quandaries” throughout my article.

⁶ These gendered costs are flagrantly evident in the family law context. Here, women’s indispensable contribution in transmitting the group’s distinct ways of life to future generations has, ironically, come to serve as a rationale for a rigid and strict reading of the group’s personal status laws, rules concerning property allocation, and membership rules. Accordingly, women who dare break the codes of “appropriate” marriage, sexuality or procreative behavior are heavily sanctioned. See Shachar, *Multicultural Jurisdictions*, *supra* note 2. Many of the concerns I raise concerning the regulation of sexuality and the family as a socio-political tool for “sculpting” the boundaries of inclusion and exclusion have important ramifications for understanding the status of sexual minorities within ethno-national or religious communities.

the family in recent instances of cultural and legal struggles over group recognition in the public sphere and the resulting implications for broader theoretical debates over the merits and pitfalls of multicultural or “differentiated” citizenship. To illuminate these broader trends, I refer primarily to two pressing contemporary illustrations: the debates over the Muslim hijab in France and the proposed Dar-ul-Qada in Canada. These examples serve to emphasize the importance of this topic and to place it in the context of the real world, where concrete legal struggles over who may regulate minority women’s expressions of gender and sexuality have come to manifest deeper societal dilemmas concerning the scope and limits of the accommodation of cultural and religious identity. I will argue that in light of the prominence of gender and the family in real-life collective identity struggles, the feminist critique of multiculturalism provides the most appropriate analytical framework for comprehending, with the hope of redressing, the serious challenges posed by the new wave of cultural wars in multicultural societies.

The discussion proceeds in four parts. After a few terminological comments in Part I, I briefly outline in Part II the thrust of the first wave of multicultural literature, and explain why it is insufficient for understanding the controversies at the heart of the new cultural wars. I then identify two major strands of critique that are emerging in response to claims of culture that pivot around gender and the family. For the sake of analytical clarity, I classify these new additions to the debate over differentiated citizenship into two distinct categories: *internal* and *external* critiques of multiculturalism.

Part III focuses on the *internal* critique, as represented here by the feminist critique of multiculturalism.⁷ This critique emphasizes the potentially negative effects of accommodation policies on the precarious position of women and members of sexual minorities in religious groups, particularly those groups that have reacted to historical and current assimilationist pressures through a form of “reactive” or “revivalist” assertion of communal identity. The feminist branch does not claim that differentiated citizenship inevitably produces detrimental effects. Rather, its proponents hold that law and public policy-makers must be vigilant in attending to intragroup diversity to ensure the representation of women and sexual minorities during the consultations or negotiations leading to a formal juridical realignment of the relationship between minority communities and wider society. Such a focus avoids the ironic result of unwittingly endorsing a multiculturalism that empowers those who are already well-established in the group at the expense of silencing alternative voices and points of view, especially where the latter reflect more moderate and reformist understandings of the group’s own tradition. In addition, attention must be paid to avoiding the exposure of vulnerable members to disproportionate and injurious intragroup costs that may become exacerbated by the redefinition of the boundaries of responsibility, jurisdiction, and interdependence

⁷ For further discussion of the internal branch of critique, see Ayelet Shachar, “Two Critiques of Multiculturalism” (2001) 23 *Cardozo L. Rev.* 253 at 257-59, 261-75 [Shachar, “Two Critiques”].

between the group and the state. This critique therefore stresses that any transition toward greater cultural and religious accommodation must be undertaken with great caution. I will illustrate these concerns, and then turn to the topic of possible directions for innovation, by focusing on the example of the newly proposed Dar-ul-Qada in Canada.

Part IV examines the *external* branch of critique, which (as I have illustrated in earlier work) “challenges the wisdom of adopting *any* multicultural policy that legalizes differences”, and asserts that “under certain conditions, multiculturalism is dangerous, unjust, and unjustifiable.”⁸ Proponents of this position fear that cultural recognition can only be achieved through the devaluation of other important public values, such as the neutrality of public institutions, the values of shared citizenship, or the national or cultural traditions of the majority society. The most powerful external arguments against multicultural citizenship rely on three alternative conceptualizations of political membership: liberalism, civic-republicanism, and ethnoculturalism. I address each in turn, using the contemporary example of the hijab controversy in France.

Addressing the serious challenges raised by the new spate of cultural wars between state and religion is an urgent task, especially in the current atmosphere of increased fear and mistrust between majority and minority communities. In analyzing these important developments, I wish to establish that the internal feminist critique of multiculturalism offers a more nuanced and promising framework for reducing the tension between religious accommodation and gender equality than any of the variants of the external critique. In particular, the feminist critique is attractive because it offers an illuminating contribution to citizenship debates by providing the analytical toolbox required to identify, dissect, and better understand these confluences of culture, tradition, and religion with heightened regulation of women, gender and sexuality, and the family. It explicitly cautions against imposing the heaviest costs of accommodation or assimilation policies on those who are already placed at risk by both their own minority community and the state.

I. Definitions: Women, Culture, and “Reactive” Assertion of Communal Identity

Let me preface the discussion by clarifying the terminology that I use. When speaking about “women’s rights”, I have in mind an expansive conception of such rights, one that encompasses women’s rights to equality, freedom, dignity, and security of the person (the traditional human rights dimension), *as well* as their rights to cultural membership and to the expression of their religious identity (the multicultural dimension). When speaking about “culture”, my work rejects simplistic definitions that assume that minority communities offer unified, uncontested

⁸ *Ibid.* at 259. See also *ibid.* at 260, 275-87.

narratives of tradition, which are “pure”, “authentic”, and unaffected by the social context in which they operate. Instead, we must acknowledge that identity groups, especially the religious minority communities that are the focus of my analysis—the very groups that today petition the state for special accommodation of their “difference”—have already been touched by the operation of the state. Indeed, some of the strictest “traditionalist” or “fundamentalist” readings of religious texts can be interpreted as modern, “revivalist” responses to cross-communal interaction that has already occurred.⁹

II. Foundations: The Multicultural Citizenship Model

The pioneering works of theorists such as Will Kymlicka, Charles Taylor, and Iris Young marked the beginning of the current multiculturalism debate.¹⁰ The primary focus of these scholars has been on the justice claims of minority groups: they argue in favour of respecting group-based cultural differences through a multicultural citizenship regime.¹¹ Unlike the standard thinking on citizenship, which posits a unique, reciprocal and unmediated relationship between the individual and the state, the new multicultural understanding of citizenship also recognizes that identity groups deserve special or differentiated rights. Will Kymlicka, for example, distinguishes between three forms of group-differentiated rights: “self-government rights”, which involve the delegation of legal powers to national minorities; “polyethnic rights”, which might include financial support and legal protection for certain practices

⁹ Under certain conditions of intercommunal strife, majority communities themselves—the oppressors in the eyes of the minority—may feel threatened by the minority to such an extent that they begin to display symptoms of reactive culturalism. See the discussion of ethno-national responses to multiculturalism in Part IV, below.

¹⁰ The complete list of works relevant to the multiculturalism debate is too long to cite. A partial list of influential contributions includes: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) [Kymlicka, *Multicultural Citizenship*]; Charles Taylor, “The Politics of Recognition” in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) at 25; Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990). My present discussion reproduces in part the analysis developed in Shachar, “Two Critiques”, *supra* note 7 at 251-54. Other influential contributions published in the early 1990s include: Judith Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994); Ronald Beiner, ed., *Theorizing Citizenship* (Albany: State University of New York Press, 1995); Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

¹¹ For a comprehensive discussion of the justifications for multicultural citizenship, see generally Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989). See also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994). I explore the arguments raised by the “first wave” of literature on multiculturalism in greater detail in Ayelet Shachar, “The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority” (2000) 35 Harv. C.R.-C.L.L. Rev. 385 [Shachar, “Puzzle”].

associated with particular ethnic or immigrant groups; and “special representation rights”, such as guaranteed seats for national or ethnic groups within the central institutions of the larger society.¹² Such thinking departs from the perception of citizens as individuals who are uniform in their membership of a larger political community. Instead, it views them as having equal rights as individuals, while *simultaneously* meriting differentiated rights as members of identity groups. There are several approaches through which multicultural accommodation can be implemented in practice. I have argued that “[s]uch accommodation may translate into a wide range of public policy measures designed to facilitate minority cultures’ practices and norms. For example, members of specific groups may receive exemptions from general laws, as in the landmark cases of *Sherbert v. Verner*¹³ and *Wisconsin v. Yoder*¹⁴ in the United States,¹⁵ or the *Simpsons-Sears*¹⁶ decision in Canada. Members of such groups may also seek a degree of autonomous jurisdiction in specific policy arenas, such as the provision of social services, control over linguistic policy, management of schools, the regulation of marriage and divorce, and so on.”¹⁷

¹² See Kymlicka, *Multicultural Citizenship*, *supra* note 10 at 6-7, 26-33.

¹³ 374 U.S. 398 (1963). The case carved out an exemption to facially neutral law by permitting a Seventh-day Adventist to receive unemployment compensation after she had been fired for refusing to work on Saturday.

¹⁴ 406 U.S. 205 (1972). The court acknowledged the state’s interest in universal education, but required that it be balanced when it impinges on fundamental rights and interests such as the free exercise of religion. It ruled that the state’s interest in requiring school attendance until the age of sixteen for children with eight years of schooling (that had provided them some degree of education necessary to prepare citizens to participate effectively and intelligently in an open society) was not of sufficient magnitude to override the First Amendment’s free exercise interest.

¹⁵ See also *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), rejecting a lower court ruling that denied a Jehovah’s Witness unemployment compensation after he had refused to work for religious reasons; *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), overturning the Unemployment Appeals Commission’s decision to deny unemployment benefits to a Seventh-day Adventist who was fired for refusing to work on her Sabbath, and reasserting the strict scrutiny test for free exercise claims.

¹⁶ *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, [1986] 23 D.L.R. (4th) 321, holding that an employer is duty-bound to make reasonable adjustments to employee work schedules so as not to discriminate against Seventh-day Adventist employees who observed the Saturday Sabbath.

¹⁷ Shachar, “Two Critiques”, *supra* note 7 at 254-55. I treat the protection of the freedom of religion of minority communities as the focus of my analysis because so many of the cultural wars revolve around freedom of religion. Furthermore, freedom of religion has stronger legal protection than “freedom of culture”. The commitment to freedom of conscience, religion, and belief is established in the most fundamental international law documents, as well as in the domestic laws and constitutions of the majority of the world’s countries. See art. 18 of the United Nations’ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res. 36/55, UN GAOR, Supp. No. 51, UN Doc. A/36/684, 1981, 71; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 18, Can. T.S. 1976 No. 47 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and*

At the core of the first wave of literature on multiculturalism (which was produced in the mid-1980s to mid-1990s) lies a deep commitment to creating a more just society by expanding the traditional understanding of citizenship. Instead of prioritizing either individual rights or a strong sense of membership in the political community, as in the classic liberal or civic-republican conceptions of membership, proponents of differentiated citizenship called for a new vision: citizenship, they claimed, should be reimagined as “a heterogeneous public, in which persons stand forth with their differences acknowledged and respected.”¹⁸ This understanding of citizenship has as its foundation the view that group-based distinctiveness should be recognized, respected, and even nourished by the contemporary state, rather than ignored in favour of assimilation into a dominant or majority identity.

Surprisingly, however, first-wave multiculturalists have paid relatively little attention to the claims raised by religiously defined minority communities.¹⁹ Although they were not central to the writing of first-wave multiculturalists, religious minority groups stand at the core of the contemporary gender and cultural wars over the scope and limits of accommodation. The failure of first-wave theorists to recognize the centrality of the claims of religious minorities has robbed them of a wealth of historical and comparative legal experiences. As the following sections will show, the experiences of religious minority groups assist us in thinking more systematically about how best to address the twin goals of respecting identity and protecting women’s rights.

The work of first-wave multiculturalists aims to eradicate injustice between groups through accommodation policies; however, they have regrettably overlooked some of the resulting risks and costs to more vulnerable minority group members. This problem is most evident in the context of institutionalized (or “strong”) multicultural accommodation, whereby minority cultures acquire formal jurisdiction over their members in social arenas that are seen as crucial for cultural preservation, such as family law and education.²⁰ Although such policies are designed to reduce

Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, art. 9, Eur. T.S. 5 [*European Human Rights Convention*]; U.S. Const. amend. I; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 2, 16 [*Charter*].

¹⁸ Young, *supra* note 10 at 119.

¹⁹ For instance, these groups do not occupy a special category in Kymlicka’s tripartite typology (*Multicultural Citizenship*, *supra* note 10 at 6-7).

²⁰ For case studies that demonstrate the disproportionate burden that women bear when their group’s personal status law and property relations codes are “accommodated” by the state, see e.g. Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994); Courtney W. Howland, ed., *Religious Fundamentalisms and the Human Rights of Women* (New York: St. Martin’s Press, 1999); Moghadam, *Identity Politics*, *supra* note 2. “Strong” accommodation measures can also put children’s rights and interests at risk. See, for example, the Israeli case of paternity determination according to sharia law in CA 3077/90 *Plonit v. Ploni*, 49 (2) PD 578, as well as South African intestate succession disputes in *Mabena v. Letsalo*, [1998] 2 S. Afr. L.R. 1068 (Transv. Prov. Div.); *Mthembu v. Letsela*,

tensions between majorities and minorities, an unforeseen consequence may be the solidification of existing power inequalities within minority groups. The risk that certain accommodation policies may potentially have negative effects is particularly acute for those already exposed to some risk in the context of their cultural or religious traditions.²¹ As I have noted elsewhere, “[f]ocusing on the impact that multiculturalism has on the rights of persons *within* minority communities, several scholars (including myself) have stressed the concern that strong accommodation could become a license for in-group subordination. The major concern is that although all group members may accrue benefits from public policies that accommodate their unique ways of life, *some* categories of group members (particularly, but not only, women) may be required to bear disproportionate costs.”²² They may also suffer disproportionate injuries for the sake of preserving their group’s collective identity. By the late 1990s, penetrating second-wave critiques of multiculturalism had established themselves in the literature.²³ A prominent place in this pantheon of critique is reserved for the burgeoning literature on women and multiculturalism, or the feminist critique of multiculturalism.

[1997] 2 S. Afr. L.R. 936 (Transv. Prov. Div.); *Mthembu v. Letsela*, [1998] 2 S. Afr. L.R. 675 (Transv. Prov. Div.); *Mthembu v. Letsela*, [2000] 3 S. Afr. L.R. 867 (S. Afr. S.C.). At issue in *Mthembu* was the question of whether the daughter of a deceased from a customary union should be allowed to inherit. According to the customary succession rule of primogeniture, women were excluded from intestate succession; as a result, the deceased’s widow (the plaintiff) and her daughter would be denied succession from the estate and all property would pass to the deceased’s father (the defendant). The plaintiff argued that the customary rule of succession, specifically the principle of primogeniture, violated the equality provisions of section 8 of the Interim Constitution because it discriminated on the grounds of sex and gender. She asked the court to declare her daughter, Tembi Mthembu, the only intestate heir. The final decision of the Supreme Court of Appeal in May 2000 found against Mthembu, most notably on the grounds that her daughter was barred from succession not because she was female, but because she was an “illegitimate” child. This series of judgments generated a great deal of criticism. Following the *Mthembu* decision, the South African Law Commission recommended the amendment of the country’s succession law to cover the estates of deceased persons who were subject to customary law, in order to ensure protection of the material welfare and interests of their surviving spouses and children. On the legislative attempts to regulate succession, and the debates surrounding them, see South African Law Commission, *Discussion Paper 93, Project 90: Customary Law* (N.p., 2000), online: South African Law Commission <<http://www.law.wits.ac.za/salc/discussn/dp93.pdf>>. See also the *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 of 2000.

²¹ To provide one concrete example: Orthodox Jewish divorce law, which is informed by a tradition that praises women’s contribution to the group as bearers of collective identity (captured in cultural images such as *eshet hail*, or the “woman of valor”), has nevertheless failed to find *Halakhic* solutions to the problem of the *agunah*, the woman who is “anchored” in a religious marriage against her will for as long as her husband refuses the *get* (divorce decree). The *agunah* example inevitably raises concerns about gender inequality and unfair bargaining. I have elaborated on this theme in Ayelet Shachar, “On Citizenship and Multicultural Vulnerability” (2000) 28 *Political Theory* 64.

²² Shachar, “Two Critiques”, *supra* note 7 at 257.

²³ For a detailed analysis of the major strands of the second-wave critique of multiculturalism, see *ibid.*

III. An Update from the Frontiers of the “Feminism and Multiculturalism” Debate

While the feminist critique of multiculturalism encompasses a wide array of positions, it does have two distinguishing features.²⁴ The first is that it questions the basic assumption that policies premised on “respect for difference” provide greater freedom and security for *all* group members, especially where patterns of persistent gender-based inequalities find textual support in rigid interpretations of a group’s traditions. The second is that it calls attention to in-group power relations and to ongoing struggles over “authentic” interpretations of the group’s tradition espoused by conservative or fundamental elements, which may put women disproportionately at risk. Such instances of reactive culturalism may also motivate aggressive responses by the majority community, which may feel threatened by the resurgence and perceived radicalization of religious minority-group identity. The following concrete legal examples illustrate this trend.

A. Illustrations: The Gendered Dimension of Intercommunal Strife and Its Legal Manifestations

1. The French Debate over Muslim Women’s Right to Wear the Hijab in Schools

In France, the growing alienation and animosity between members of the Muslim minority and wider society has crystallized in a highly gendered debate over the hijab (the headscarf worn by some Muslim women), leading to the passage of national legislation that restricts the display of overt religious symbols in public schools.²⁵ France is not the only country where headscarves have proved contentious. Similar debates have occurred in Belgium, Denmark, Germany, Singapore, and Russia. A

²⁴ Of this growing body of literature, see *e.g.* Howland, *supra* note 20; Martha Minow, “About Women, About Culture: About Them, About Us” (2000) 129:4 *Daedalus* 125; Monique Deveaux, “Conflicting Equalities? Cultural Group Rights and Sex Equality” (2000) 48 *Political Studies* 522; Moghadam, *Identity Politics*, *supra* note 2; Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (New York: Routledge, 1997); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen *et al.*, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999); Omid Safi, ed., *Progressive Muslims on Justice, Gender, and Pluralism* (Oxford: Oneworld Publications, 2003); Sawitri Saharso, “Female Autonomy and Cultural Imperative: Two Hearts Beating Together” in Will Kymlicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000); Ayelet Shachar, “Group Identity and Women’s Rights in Family Law: The Perils of Multicultural Accommodation” (1998) 6 *Journal of Political Philosophy* 285 [Shachar, “Group Identity”]; see also Arvind Sharma & Katherine K. Young, eds., *Feminism and World Religions* (Albany: State University of New York Press, 1999).

²⁵ For a detailed discussion of the legislation banning the hijab in French public schools, see Part IV, below.

number of Muslim countries, including Turkey, have already banned the hijab from schools or other public institutions.²⁶ Meanwhile, in parts of the Arab world, such as Saudi Arabia, it is the failure of women to don a veil that prompts outrage.

In Canada, most of the debate over the regulation of the hijab in schools has occurred in Quebec. In 1995, following the expulsion of a young Muslim student from a public school for wearing the hijab, the Quebec Human Rights Commission (“QHRC”) ruled that public school dress codes which ban religious attire (be it the Islamic hijab, a Jewish *kippa*, a Sikh turban, or a Christian cross) violate Quebec’s *Charter of human rights and freedoms*.²⁷ The QHRC recently investigated whether the *Quebec Charter* also prohibits banning the hijab in private schools, following a private school’s decision to prevent a sixteen-year-old Muslim student from attending classes while wearing the hijab.²⁸ Religious and civil society organizations such as the

²⁶ The European Court of Human Rights affirmed Turkey’s ban on wearing the hijab in institutions of higher education in *Sahin v. Turkey* (2004), App. No. 44774/98 (European Court of Human Rights), online: European Court of Human Rights <<http://www.echr.coe.int/eng/judgments.htm>> [*Sahin*]. In *Sahin*, the court rejected an appeal by a Turkish student who challenged the ban, claiming that it constituted an unjustified interference with her right to freedom of religion, and in particular her right to manifest her religion. The applicant relied on Article 9 of the European Human Rights Convention, which provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others (*European Human Rights Convention*, *supra* note 17, art. 9).

In light of the limitations set out in Article 9(2) of the Convention, the Strasbourg court held that the ban served “the legitimate aims of protecting the rights and freedoms of others and of protecting public order” (*Sahin* at para. 84). It further ruled that the regulations imposing restrictions on the wearing of Islamic headscarves at Turkey’s higher education institutions and the measures taken to implement them were “justified in principle and proportionate to the aims pursued and, therefore, could be regarded as ‘necessary in a democratic society’” (*Sahin* at para. 114). The court thus accepted the view advocated by the Turkish government, with its strict interpretation of the separation between state and religion.

²⁷ R.S.Q., c. C-12 [*Quebec Charter*]. The Commission further issued a statement emphasizing that in the debate over the place of religion in the public sphere, “special attention should be paid to the fact that tolerance and mutual respect are the most fundamental values in our society.” (Commission des droits de la personne du Québec, *Religious Pluralism in Quebec: A Social and Ethical Challenge* (N.p., 1995) at 24).

²⁸ Centre for Research Action on Race Relations, News Release, “Muslim, Minority and Civil Rights Groups Call on Quebec Human Rights Commission to Issue Immediate Statement on Hijabs in Private Schools” (18 November 2004). Collège Charlemagne, the school in question, reached a private settlement with the student and the case has been dropped. The issue is not settled, however,

Muslim Council of Montreal, the Alliance of South Asian Communities, the Canadian Council on American Islamic Relations, the Canadian Jewish Congress, the League for Human Rights of B'nai Brith Canada, and the Centre for Research Action on Race Relations, have all condemned the private school's decision to expel the student for wearing the hijab.²⁹

2. The Canadian Debate over the Establishment of a Private Islamic Arbitral Tribunal

Recently, certain members of the Muslim community in Toronto have proposed to establish an arbitration tribunal, or Dar-ul-Qada, that would acquire binding arbitration powers to resolve disputes between consenting parties according to the principles of Islamic law.³⁰ The formation of such a tribunal in Canada does not require any action by the government; neither does it require an amendment to the provincial *Arbitration Act*, which currently allows private parties to voluntarily agree to resolve civil disputes outside the public court system.³¹ The primary advocates of the private Islamic tribunal, the Canadian Society of Muslims, have established the Islamic Institute of Civil Justice, which officially registered the name “*Darul Qada – Muslim Court of Arbitration*”.³² This is a new twist to the inclusionary theme of

and the QHRC has failed to make a clear statement of its position on the issue of religious headgear. Collège Charlemagne also forbids Jewish students from wearing skull caps (the *kippa*).

²⁹ See *ibid.*

³⁰ In October 1992, the Canadian Society of Muslims made public its plan to “[e]stablish a *Darul Qada*—a judicial tribunal that will, in effect, operate as a private Islamic Court of Justice ...” (Syed Mumtaz Ali, “Establishing an Institute of Islamic Justice (*Darul Qada*)” News Bulletin (October 2002), online: The Canadian Society of Muslims <<http://muslim-canada.org/news02.html>> [Ali, “Establishing an Institute of Islamic Justice”]). The Canadian Society of Muslims then elected an *ad hoc* council of thirty members for the purpose of defining the transitional steps toward formally establishing the “*Darul Qada* (a judicial tribunal) to be known as the Islamic Institute of Civil Justice”. See Judy Van Rhijn, “First Steps Taken for Islamic Arbitration Board” *Law Times* (24 November 2003) at 11.

³¹ In Ontario, the *Arbitration Act*, 1991, S.O. 1991, c. 17, requires consent as a necessary condition for establishing binding arbitration over disputing parties. This condition will have to be met before arbitration can take place under the auspices of the new Islamic arbitration tribunal. See *Arbitration Act*, *ibid.*, s. 1: “‘arbitration agreement’ means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them (‘convention d’arbitrage’).”

³² See Syed Mumtaz Ali, “An Update on the Islamic Institute of Civil Justice (*Darul Qada*)” News Bulletin (August 2004), online: The Canadian Society of Muslims <<http://muslim-canada.org/news04.html>>. The Institute is a private incorporation (Letters patent of incorporation #1579565), not a government-affiliated agency or body. However, the public announcement of the plan to establish a religiously based tribunal has engendered a great deal of confusion regarding the status of the Institute. The lack of clarity has been furthered by statements made by the tribunal's proponents, such as the following: “It is now clear that according to the current Canadian Law, we are free to set up independent Muslim Arbitration Boards (*Darul-Qada*) to serve those who choose to come to them. The decisions of *Darul-Qada* once rendered will be binding on the parties, the relevant *Rules of Civil Procedure* would be applicable, and the decisions will be enforceable through the normal enforcement agencies of the government in the same way as any order of a Canadian Court.”

Canadian multiculturalism.³³ If no changes are introduced to existing legislation, the Dar-ul-Qada will be free to apply, when both parties are consenting, the “laws (*fiqh*) of any [Islamic] school e.g. Shiah or Sunni (Hanafi, Shafi’i, Hambali, or Maliki)” to resolve divorce disputes in lieu of the application of secular Canadian law.³⁴

The establishment of the Dar-ul-Qada in Ontario represents the culmination of nearly two decades of campaigning by its proponents to permit the implementation of Sharia provisions into the family law affairs of Muslim Canadians.³⁵ In the words of the Dar-ul-Qada’s principal advocates, the Canadian Society of Muslims, this would allow Muslims living in a non-Muslim country to “live [their] faith to the best of [their] ability.”³⁶ But, they stress, once the possibility of turning to a Sharia tribunal becomes readily available, this will represent a clear choice for Muslim Canadians: “Do you want to govern yourself by the personal laws of your religion, or do you prefer governance by secular Canadian family law?”³⁷

This statement highlights the primary difficulty with the tribunal: it purports to represent an either-or choice for group members between loyalty to the faith and governance by the state. Yet this is a false dichotomy. The Dar-ul-Qada explicitly

(Syed Mumtaz Ali, “Darul-Qada: Beginning of Muslim Civil Justice System in Canada” News Bulletin (April 2003), online: The Canadian Society of Muslims <<http://www.muslim-canada.org/news03.html>> [Ali, “Beginning”]). While technically accurate, this description could easily lead a non-lawyer to conclude that the Dar-ul-Qada is somehow connected to the civil court system, rather than an *alternative* to it.

³³ Canada is one of a few countries in the world that have adopted an official multiculturalism policy. See the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24; *Canadian Charter of Rights and Freedoms*, *supra* note 17, s. 27. On Canada’s official multiculturalism policy, see Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998). Freedom of religion in Canada is protected under subsection 2(a) of the *Charter*. For a detailed survey of the content given by Canadian courts to this *Charter* guarantee, see David M. Brown, “Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of *Charter* Rights” (2000) 33 U.B.C. L. Rev. 551. The first pronouncement on the scope of freedom of religion guaranteed by subsection 2(a) is found in the landmark decision *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [*Big M* cited to S.C.R.], invalidating secular legislation that appears neutral but is in fact rooted in the religious values of the dominant majority. The court in *Big M* held that the *Lord’s Day Act* (mandating Sunday closing of businesses) violated the principle of freedom of religion because it served as “a subtle and constant reminder to religious minorities ... of their differences with, and alienation from, the dominant religious culture” (*Big M*, *ibid.* at 337).

³⁴ Ali, “Establishing an Institute of Islamic Justice”, *supra* note 30.

³⁵ While in theory this new faith-based tribunal could arbitrate disputes in various fields of law, including commercial or business arbitration, its adherents envision a forum that would permit arbitrators “to act as ‘private judges’ [to] apply our own Muslim Personal law, including family law (e.g., marriage, *khula*, divorce, custody, guardianship, *mehr*, division of property, wills and inheritance, gifts, *waqf*, etc.)” (*ibid.*).

³⁶ Interview of Syed Mumtaz Ali, President of the Canadian Society of Muslims (August 1995), online: The Canadian Society of Muslims <<http://muslim-canada.org/pfl.html>> [Ali, “Muslim Law Campaign”]. See also Ali, “Beginning”, *supra* note 32; and Van Rhijn, *supra* note 30.

³⁷ Ali, “Muslim Law Campaign”, *ibid.*

relies on Canadian law (specifically, Ontario's *Arbitration Act*) in order to legitimize its operation. If the Dar-ul-Qada comes into existence, it will ultimately depend on the civil court system to ensure the enforceability of its decisions.³⁸ Furthermore, Muslim Canadians, the tribunal's target population, are affiliated with both their religious community and the larger Canadian political community. Given this multiplicity of affiliations, coupled with the inevitable richness of sharia interpretations, the very establishment of the Dar-ul-Qada as a faith-based tribunal claiming to manifest "authentic" group identity may make dissent within the Muslim Canadian community and the quest to re-read sharia laws in light of egalitarian principles more difficult. The self-proclaimed "guardians of the faith" are liable to argue against innovations that, in their perception, threaten to weaken the unwritten code that ties idealized womanhood to loyal group membership.³⁹

This concern is not merely theoretical. The initiative to establish the Islamic Institute for Civil Justice was introduced following little dialogue within the broader Muslim community.⁴⁰ Virtually no consultations were held with the Canadian Council of Muslim Women, the largest faith-based women's organization within the Canadian Muslim community.⁴¹ It is also disconcerting that the tribunal's advocates employed the provisions of the Ontario *Arbitration Act*, which are typically used for resolving business and commercial disputes, to establish a very different kind of institution: one that is designed to settle family law disputes. This was done without approaching the government or making any adjustments to the *Act's* provisions in order to reflect the significant differences in the nature of these disputes.⁴²

³⁸ See Ali, "Establishing an Institute of Islamic Justice", *supra* note 30.

³⁹ For a similar line of critique, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001).

⁴⁰ But see text accompanying note 47, below.

⁴¹ The Canadian Council of Muslim Women is a national organization that aims to assist Muslim women to participate effectively in Canadian society. It also works to promote understanding between Muslim women and women of other faiths. See Canadian Council of Muslim Women, online: <<http://www.ccmw.com>>.

⁴² By contrast, the *Civil Code of Quebec* has an explicit public policy exception that provides: "disputes over the status and capacity of persons, family law matters or other matters of public order may not be submitted to arbitration" (Art. 2639 C.C.Q.). Similarly, the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, 30 October 1999, online: Hague Conference on Private International Law <<http://www.hcch.net/e/conventions/draft36e/html>>, explicitly excludes matters of personal status and family law from the scope of its application (*ibid.*, art. 1(2)(a)), while otherwise endorsing and encouraging choice of forum and choice of law by consenting parties. Recent legislation in Ontario has also introduced special exemption provisions in order to protect the interests of family law disputants and more vulnerable parties. For instance, the 2002 amendment of the *Solicitors Act*, R.S.O. 1990, c. 15, s. 28.1(3) has explicitly prohibited contingency fee agreements in the family law area: "A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of, ... (b) a family law matter" (as am. by R.S.O. 2002, c. 24, Sch. A, s. 4). Similar attention has been paid to protecting the interests of vulnerable parties in the new *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 16(1): "There is no limitation period in respect of, ... (c) a proceeding to obtain support

Although the proposed Dar-ul-Qada clearly provides greater public recognition to the religious identity of members of Canada's Muslim community, the proposal fails to account for the differential effect that Sharia personal status laws may have on different categories of group members. The "traditional" roles emphasized for women as a result of prevalent reactive culturalism renders women particularly vulnerable to potential negative consequences. This concern is magnified by the strong emphasis that the Dar-ul-Qada proposal places on the family as a symbol of communal and religious identity.⁴³ Under such a definition of "authentic" identity, women who choose to adjudicate family law matters through secular legal processes rather than according to the norms of their own group (as established by the Dar-ul-Qada) may increasingly be seen by fellow group members as somehow lacking "full loyalty" to the group.⁴⁴

A host of additional concerns and uncertainties are raised by the current proposal. For example, although the champions of the Dar-ul-Qada have repeatedly asserted that the tribunal's Sharia-based arbitrations will not violate Canadian law, they have failed to provide adequate clarification concerning the means through which substantive equality for women will be protected if the arbitration board is to apply a particularly rigid and conservative interpretation of Islamic laws and schools of thought (*fiqh*). Also left unaddressed are questions of how dissent will be registered, whether the private ordering procedure will be bound by the *Canadian Charter of Rights and Freedoms*, and whether a woman will be free to reject the tribunal's private-ordering procedure if and when she comes to believe that, despite her initial agreement to arbitration, her rights and interests may be better protected by a formal court hearing under secular law.⁴⁵ (At present, once an arbitration procedure based on the Ontario *Arbitration Act* is underway, court intervention is narrowly limited to procedural grounds specified in the *Act*.)⁴⁶

under the Family Law Act ..." To date, no similar sensitivity to power inequalities and information asymmetries is found in the provisions of the *Arbitration Act*, *supra* note 31.

⁴³ See *e.g.* Syed Mumtaz Ali, "The Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law: A Submission to the Ontario Civil Justice Review Task Force" (1994), online: The Canadian Society of Muslims <<http://muslim-canada.org/submission.pdf>>.

⁴⁴ This point is eloquently made by Shahnaz Khan, who writes that "no doubt they [Muslim women] would experience a certain amount of pressure to conform. ... [S]hould they decline to be governed by Muslim Personal Status Laws ..., [they will] find themselves ostracized by their families and their community ..." (Shahnaz Khan, "Canadian Muslim Women and Shari'a Law: A Feminist Response to 'Oh! Canada!'" (1993) 6 C.J.W.L. 52 at 60). Additional concerns about power imbalances and information asymmetries are further aggravated by the fact that at least some of the parties who will have their disputes heard by the Dar-ul-Qada will be recent immigrants less familiar with the various options available to them through the Canadian legal system.

⁴⁵ See *National Ballet of Canada v. Glasco et. al.*, (2000) 49 O.R. (3d) 230, which held that the *Charter* does not apply directly to an arbitration award as it is a result of a private, consensual procedure.

⁴⁶ See *Arbitration Act*, *supra* note 31, ss. 6(3), 19. In Ontario, courts have exercised the highest degree of deference to arbitration awards and arbitration disputes, while emphasizing the importance

As mentioned above, it is precisely due to the Dar-ul-Qada's reliance on an existing legal framework that the advocates of the Muslim arbitration tribunal were able to introduce it without extensive consultation, either within the Muslim Canadian community or with various levels of government. To some extent, however, this initial defect has been remedied by a government-initiated consultation process open to all interested parties—including various women's organizations, community-based input, and submissions by representatives of different religious faiths—or in other words, involving not only those who would be immediately affected by the operation of the Islamic Institute of Civil Justice, but also other stakeholders interested in the balance of religious accommodation and gender equality. This inclusive consultation process was itself a result of significant mobilization against the tribunal within the Muslim community.⁴⁷ Combined with intensive domestic and international media interest in the proposed Dar-ul-Qada, this reaction contributed to the Ontario government's decision to launch a review process to examine religious arbitration in the family law context.⁴⁸ The review explored whether and how private arbitration may negatively impact vulnerable individuals.⁴⁹

The Dar-ul-Qada example highlights the fact that sensitivity to cultural difference must take into account the internal diversity of the minority community in question.⁵⁰ It is essential to examine the dimensions of intra-group “politics of representation”, which become particularly salient when certain segments of a minority group attempt to make claims on behalf of the entire community. In the context of the Dar-ul-Qada, feminist scholar Pascal Fournier rightly asks: “Who speaks for Islam in Canada?”⁵¹

of “[a]n unbiased appearance [which] is, in itself, an essential component of procedural fairness” (*Hercus v. Hercus*, [2001] O.J. No. 534 at para. 75 (Sup. Ct) (QL)). Parties are even permitted to contract out of their appeal rights in their arbitration agreement. See *Arbitration Act*, *supra* note 31, s. 3.

⁴⁷ See Canadian Council of Muslim Women, “Submission to Ms. Marion Boyd: Review of the Ontario *Arbitration Act* and Arbitration Processes, Specifically in Matters of Family Law” (30 July 2004), online: Canadian Council of Muslim Women <<http://www.ccmw.com/ShariainCanada/Submission%20made%20to%20Ms%20Marion%20Boyd.htm>>; Muslim Canadian Congress, “Submissions by Muslim Canadian Congress: Review of Arbitration Process by Marion Boyd” (26 August 2004), online: Muslim Canadian Congress <[http://www.muslimcanadiancongress.org/MCC%20Submission%20to%20Marion%20Boyd%20\[Final\].pdf](http://www.muslimcanadiancongress.org/MCC%20Submission%20to%20Marion%20Boyd%20[Final].pdf)>; The International Campaign Against Sharia Court in Canada, “Resolution 04-11-01 to Remove Family Law from the *Arbitration Act* of Ontario 1991”, online: International Campaign Against Sharia Court in Canada <<http://www.nosharia.com/resolution-04-11-01.htm>>.

⁴⁸ See Ministry of the Attorney General, News Release, “Former Attorney General and Women’s Issues Minister to Review Arbitrations Processes: Marion Boyd to Focus on Implications of Private Arbitrations in Family and Inheritance Cases” (25 June 2004), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20040625-arbitrationreview-nr.asp>>.

⁴⁹ See Ministry of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (N.p., 2004, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd>> (Chair: Marion Boyd) [*Boyd Report*]).

⁵⁰ See Section 4 of the *Boyd Report*, *ibid*.

⁵¹ “Religious Tribunals and State Law: *Sharia*’s Courts and Beyond” (Roundtable at the University of Toronto Faculty of Law, 4 November 2004).

More pointedly, she questions whether, and to what audience, “the sub-altern—the Muslim woman—can speak.”⁵² Many questions of this nature must be addressed: Is there a duty to listen to the least powerful in the minority community if their perspective significantly differs from that expressed by the community’s more powerful members? Should it matter who benefits from the meaning assigned to cultural or religious “difference”? What role can law and institutional design play in empowering women (and other group members who are potentially at risk) to engage in cultural transformations that resist adherence to a selective, rigid and often deeply gendered interpretation of the so-called “authentic” group tradition?

In other parts of the world, feminist activists have begun to address precisely these challenges. In Egypt, for example, a coalition of women advocates, moderate Muslim clerics, divorce lawyers, and civil court judges have succeeded in securing the endorsement of that country’s religious establishment in order to enact one of the Muslim world’s most far-reaching reforms of family law. A new Egyptian law relating to personal status, which came into effect in 2000, launched the creation of a family law court authorized to facilitate divorce cases, family insurance plans, and other liberalizing revisions.⁵³ The most significant aspect of the law establishes a woman’s right to divorce her husband with or without his assent. This is accomplished by invoking *khul* divorce, and requires that any gifts of jewelry (*shabka*) or dowry payments (*mahr*) be returned to the ex-husband. The new law further provides that the divorced wife will be able to call upon the Egyptian government to garnish her former husband’s wages if he fails or refuses to provide maintenance to her. In addition, if the husband cannot pay a court-ordered living allowance, the woman will have the right to draw money from a special state bank in order to provide for her family.⁵⁴ Although this is not a perfect solution, since it favours women who are economically better off by placing them in a better position to dissolve ailing marriages, the Egyptian family law reform is generally recognized as improving the lot of women by precluding gender-based “abuses that had crept into Muslim practice.”⁵⁵

Similar change has been achieved by a coalition of Muslim-Israeli and Jewish-Israeli feminist organizations. Despite fierce opposition from more conservative representatives of the Islamic movement, a legislative amendment was enacted that significantly restricts the exclusive authority of Sharia courts over Muslim women in Israel, following a similar amendment that restricted the powers exercised by rabbinical courts over Jewish women.⁵⁶ This legislation represents a rare example of

⁵² *Ibid.*

⁵³ For an outline of the new law and its implications, see John L. Esposito & Natana J. DeLong-Bas, *Women in Muslim Family Law*, 2nd ed. (Syracuse: Syracuse University Press, 2001) at 60-62.

⁵⁴ See *ibid.*

⁵⁵ *Ibid.* at 61.

⁵⁶ *Family Court Law*, S.H. 1995, v. 1537, p. 393, s. 3 (b1) as am. by *Family Court Law Amendment* (No. 5), S.H. 2001, v. 1810, p. 16. See Ran Hirschl & Ayelet Shachar, “Constitutional Transformation,

successful coalition building across the deep inter-communal divide between Jewish and Arab citizens. The result of this political collaboration has been to enhance the choices available to both majority and minority women in instances where they need to renegotiate their family law rights concerning child custody, inheritance entitlement, paternity determination, spousal maintenance, or property division, yet without asking them to compromise or abandon their group loyalty or religious identity.⁵⁷

The importance of focusing on women's rights in designing multicultural accommodation schemes is further illustrated in a recent South African legislative proposal intended to extend full recognition to Islamic marriages. Such marriages had been treated as null and void by South African jurisprudence prior to 1996.⁵⁸ In extending recognition to Muslim marriages, the proposed legislation will also regulate the rights of the parties to a marriage and will establish guidelines with respect to minimal age requirements, polygamy, and other important issues to ensure compliance with South Africa's constitutional commitments to gender equality.⁵⁹

Even prior to this proposed legislative reform, South Africa's courts had gradually expanded judicial recognition of marriage according to Islamic rites in order to facilitate inheritances or other claims on the estates of a deceased person. South African courts have also granted women legal entitlements and protections vis-à-vis third parties such as insurers, as demonstrated in the 1999 decision of *Amod v. Multilateral Motor Vehicle Accidents Fund*⁶⁰ and the 2004 decision of *Daniels v. Campbell*.⁶¹ The proposed South African legislation goes further than the established case law, however, by directly engaging contentious issues such as the requirements for validity and dissolution of a Muslim marriage, the proprietary consequences of divorce, as well as child custody, access, and maintenance provisions. These are

Gender Equality, and Religious/National Conflict in Israel: Tentative Progress Through the Obstacle Course" in Beverly Baines & Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005) at 224-26.

⁵⁷ It remains to be seen how this amendment will be implemented in practice. Given the situation of structural inequality between Jews and Arabs in Israel, some Arab-Palestinian women may not wish to turn to the institutions of the Israeli state, which are seen as discriminatory.

⁵⁸ South African Law Reform Commission, *Project 59: Islamic Marriages and Related Matters* (N.p., July 2003), online: South African Law Reform Commission <<http://www.law.wits.ac.za/salc/report/pr59report.pdf>>.

⁵⁹ *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, online: South Africa Government Online <<http://www.info.gov.za/constitution/1996/96cons.htm>>. Section 30 provides protection and recognition of an individual's right to participate in the culture of his or her choice; section 31 introduces a group right to participate in cultural activities. Neither of these rights may be exercised "in a manner inconsistent with any provision of the Bill of Rights". Subsection 15(3) of the South African constitution provides for legislative recognition of marriages conducted under any "tradition" or "systems of personal and family law under any tradition."

⁶⁰ [1999] 4 S. Afr. L.R. 1319 (S. Afr. S.C.).

⁶¹ (11 March 2004) CCT 40/03 (S. Afr. Const. Ct.), online: Constitutional Court of South Africa <<http://www.concourt.gov.za/files/daniels/daniels.pdf>>.

highly controversial issues that have special bearing on women's economic status, family life, and community standing; in fact, they have become highly politicized points of contention in several societies around the world.⁶²

The issue of conflict over politicized identities is best illustrated by a discouraging development in India, where "reactive" patterns of assertion of Muslim identity have led to national legislation that explicitly limits the rights of divorced Muslim women to maintenance support from their former husbands. Such an extreme example must be examined within the context of the vexed relations between India's Muslim minority and Hindu majority. Tensions between these groups erupted following the much-discussed *Shah Bano* case, in which a Muslim woman was divorced by her husband of forty-three years by way of a unilateral (*talaq*) divorce following a three year separation. Shah Bano then turned to the Indian court system to secure maintenance payments from her ex-husband. Her case eventually reached the Supreme Court of India, which ruled in her favour.⁶³ This decision, which dealt with a relatively standard balance-of-resources dispute, was nevertheless understood by more conservative representatives of the Muslim minority community as proof of attempts by the Hindu majority to weaken the minority Muslim identity. In response to the decision, Muslim religious leaders launched a massive political campaign in which they demanded that the government "exempt" Muslim women from recourse to state law in determining the proprietary consequences of a religious divorce, thus depriving them of rights and remedies available to fellow Indian female citizens. A year after the Supreme Court handed down its decision, the Indian Parliament bowed to the pressures of conservative Muslims. It overruled the Court's decision in *Shah Bano* by passing the *Muslim Women's (Protection of Rights on Divorce) Act*.⁶⁴ The new bill, despite its reassuring name, removed the rights of Muslim women to appeal to state courts for post-divorce maintenance payments. In addition, it relieved Indian Muslim ex-husbands from other post-divorce obligations toward their children. As a result, the *Muslim Women's Act* now deprives Indian Muslim women of benefits that they would receive if they lived in Egypt, as well as many other Muslim countries where Sharia family law codes are applied through state courts.

The Egyptian, Israeli, and South African examples described above demonstrate that by creating legal/institutional structures that encourage increased coordination and cooperation between state and religious authorities, progress can be made toward alleviating, or at least reducing, gender-based inequalities within different identity

⁶² See South African Law Reform Commission, *supra* note 58.

⁶³ *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 A.I.R. (S.C.) 945.

⁶⁴ *The Muslim Women (Protection of Rights on Divorce) Act, 1986*, No. 25 of 1986, s. 3(b) [*Muslim Women's Act*], online: India Code Information System <<http://indiacode.nic.in>>. For a critique of this provision, see Paras Diwan, *Muslim Law in Modern India*, 4th ed. (Allahabad, India: Allahabad Law Agency, 1987) at 155-58. The Supreme Court of India affirmed the constitutionality of the *Act* in the case of *Danial Latifi v. Union of India*, online: Supreme Court Online <<http://www.supremecourtsonline.com/cases/8037.html>>.

communities. By contrast, the Indian example demonstrates the opposite trend: here, the state has reinforced a rigid and often harsh interpretation of a group's tradition with regard to women and the family. Such reactive assertions of identity are encouraged by so-called "defenders of the tradition", who typically inlay claims of cultural authenticity with hierarchical and gendered images of idealized womanhood.

B. "Re-designs": The Public Policy Implications of the Feminist Critique

Collectively, the preceding examples illustrate how the regulation of gender and the family has come to serve as a focal point in much broader conflicts over the redefinition of shared citizenship in diverse societies. The internal critique of multiculturalism is particularly well positioned to explain the centrality of gender and the family in recent struggles over communal identity and recognition which continue to occur in diverse societies around the world. Much of the initial feminist writing aimed to establish that first-wave multiculturalists were wrong to underestimate the significance of the potentially negative consequences of their proposed accommodations.⁶⁵ In my opinion, this formative stage of the "feminism and multiculturalism" debate is largely complete. Today, most stakeholders in the differentiated rights debate acknowledge the potential for tension between commitments to cultural diversity and gender equality. In this respect, the feminist critique has succeeded in asserting its main claims in the contemporary multicultural citizenship debate.⁶⁶

This acknowledgement is not a conclusion; instead, it must be viewed as the foundation for more difficult questions which remain unresolved. Specifically, what are the public policy implications of the "feminism and multiculturalism" debate?

⁶⁵ See e.g. Leila Ahmed, *Women and Gender in Islam* (New Haven: Yale University Press, 1992); Deveaux, *supra* note 24; Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington: Indiana University Press, 2001); Narayan, *supra* note 24; Nussbaum, *supra* note 24, c. 3 at 167ff; Okin, *supra* note 24; Shachar, "Group Identity", *supra* note 24.

⁶⁶ Attempts to disaggregate gender subjugation from cultural or racial discrimination are found in the recent work of Anne Phillips, Sonia N. Lawrence, and Leti Volpp. See e.g. Leti Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defence'" (1994) 17 *Harv. Women's L.J.* 57; Sonia N. Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom" (2001) 13 *C.J.W.L.* 107; Anne Phillips, "When Culture Means Gender: Issues of Cultural Defence in the English Courts" (2003) 66 *Mod. L. Rev.* 510. While raising important arguments, these authors are consumed primarily by concern over the "other-ing" of immigrant women's experiences by mainstream institutions, primarily courts engaged in criminal cases in which "cultural defences" are raised. However, when cultural defenses serve as criminal defenses, they provide a narrow, case-by-case exemption from culpability and are not general measures of accommodation that delegate powers to a community to control its own affairs; neither are they an expression of state policy that refuses to recognize cultural identity or difference in the public sphere. Issues such as these are at the heart of my analysis in this article.

Some, like Brian Barry, have concluded that we must reject altogether the project of publicly accommodating religious and other cultural identities.⁶⁷ Most writers, however, have moved toward defending qualified (or “weak”) accommodation measures.

Several authors have begun the complex task of trying to envision better ways of respecting the rights and interests of individuals to assert their distinct cultural or religious identities despite the historical vulnerability of their position within minority groups. These authors acknowledge the feminist critique of multiculturalism regarding in-group subordination and the potential for cultural identities to become “fossilized” as a result of official recognition. However, they posit different strategies in response to the feminist critique.

On one end of the spectrum, we find authors who urge the adoption of increased toleration-through-democratization.⁶⁸ These proposals imply “a right not to offer reasons to be different.”⁶⁹ Instead, the minority group can simply claim: “We have our own reasons for doing things the way we do.”⁷⁰ Advocates of this approach still need to clarify who gets to define the group’s so-called “way of doing things,” and according to what procedures. They must further explain whether the right “not to offer reasons to be different” is likely to increase or decrease the prevalence of “reactive” interpretations of religious texts and their corresponding emphasis on idealized images of women. In addition, forcing the principles of democracy on any religious institution is highly controversial.⁷¹ Externally enforced democratic reforms would appear particularly intrusive and unjust from the viewpoint of a minority community if it were asked to displace qualified jurists with elected officials. More generally, in matters of religious interpretation, it is not clear whether change *ought* to follow majority rule. If anything, it seems plausible that cultural transformations ought to utilize the *internal* resources for reinterpretation or innovation within the tradition itself, a topic which proponents of toleration-through-democratization have yet to address.

Advocates of “deliberative” procedures, for their part, call for discursive processes designed to enhance the voices of, and the weight given to, historically

⁶⁷ See e.g. Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001).

⁶⁸ The most influential essay in this line of argument is Partha Chatterjee, “Secularism and Toleration” in *The Partha Chatterjee Omnibus* (Oxford: Oxford University Press, 1999) 228. See also Jeff Spinner-Halev, “Feminism, Multiculturalism, Oppression, and the State” (2001) 112 *Ethics* 84.

⁶⁹ Chatterjee, *ibid.* at 256.

⁷⁰ *Ibid.* at 257.

⁷¹ See e.g. Cass R. Sunstein, “Should Sex Equality Law Apply to Religious Institutions?” in Cohen *et al.*, *supra* note 24. Note, however, that we must distinguish between religious institutions operating as voluntary associations in civic society (such as the Catholic Church in the United States), and those that exercise authority under the colour of state law (such as religious courts in Israel). In the latter case, these religious institutions exercise *public* powers authorized through state legislation, and may therefore be held accountable to basic governance standards of fairness and equality.

vulnerable segments of minority populations by facilitating specific conditions for dialogue within the minority community, within wider society, and between the two.⁷² Theorists such as Seyla Benhabib and Monique Deveaux take as their starting point the need to acknowledge intra-group inequalities rather than simply laying trust in representation and dialogue conducted through official group “spokesmen” (many of whom are older men). Instead, they view cross-cultural dialogue and intra-group contestation as important media through which the formation of identity and remapping of “culture” occurs.⁷³ These are crucial observations, which lead to the rejection of a vision of multiculturalism that would encourage groups to insulate themselves from the wider society in which they operate.

When compared with the toleration-through-democratization approach, deliberative processes are easier to justify because they envisage a multicultural society guided by principles of inclusiveness and egalitarianism, where all group members participate fully in shaping their fate and faith.⁷⁴ Yet it is precisely these principles of discursive inclusiveness and egalitarianism that may be rejected by minority cultures that have adopted the “reactive” path.⁷⁵

Recognizing this dilemma, proponents of legal/institutional solutions seek to design multicultural policies that create incentives for the group to reinterpret its tradition in ways that preserve culture and identity, while concurrently allowing women to improve their standing within the group. My “joint governance” approach, which I began to elaborate in *Multicultural Jurisdictions*,⁷⁶ serves here as an example of such solutions.

Joint governance seeks to avoid an either-or choice between culture and rights. Instead, it creates a dynamic division of powers between competing authorities, and generates an impetus for both group and state to better serve their constituent members. Once individuals are no longer obliged to fall completely under the jurisdiction of either entity, there is added incentive for change. By tying the mechanisms for reducing sanctioned in-group rights violations to the very accommodation structures that increase the jurisdictional autonomy of minority communities, joint governance seeks to align the benefits of enhancing justice

⁷² On the deliberative approach, see Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002); on the dialogical approach, see Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, Mass.: Harvard University Press, 2000). See also Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).

⁷³ See e.g. Benhabib, *ibid.* at 5-11. Benhabib devotes much of her book to defending a social constructivist vision of culture.

⁷⁴ See *ibid.* at 129-32. See also Monique Deveaux, “A Deliberative Approach to Conflicts of Culture” (2003) 31 *Political Theory* 780.

⁷⁵ A more promising application of such principles may be found in the contexts of intercommunal dialogue or multi-level deliberation processes that engage state agencies, non-governmental organizations, and various representatives of different social segments within the group.

⁷⁶ *Supra* note 2.

between groups with reducing injustice *within* them. This fresh approach recognizes that cultures are not static, and that group members may emphasize different aspects of their identity in different social contexts at different times. It therefore allows group members to draw on input from both state law and group tradition in resolving legal disputes in family law, criminal sentencing, immigration law, environmental law, education, and other areas that are important to minority groups—and which constitute some of the most pressing issues of justice that have come to the forefront of public debate in diverse societies.

On an institutional level, joint governance requires the creation of overlapping or shared jurisdictions, where individuals are never subject solely to the authority of either the group or the state. This allows vulnerable group members greater flexibility and room for negotiation with both entities, as failure to perform by one entity may lead to a loss of jurisdiction over its members. Such a structure of sharing and dividing authority rests on three core principles. The first principle is the *submatter allocation of authority*. This involves identifying the unique interrelated functions involved in the specific social arena in which accommodation is sought. These functions include, for example, status and property in family law; conviction and sentencing in criminal law; and selection and admission in immigration law. The second principle of joint governance is the *no-monopoly rule*, which draws on the rich tradition of modern democratic theory to defend a separation-of-powers principle, holding that neither the group nor the state can ever acquire exclusive control over a contested social arena that affects individuals as group members and citizens. The third principle is the *establishment of clearly delineated reversal points*, which enable the individual to discipline the relevant jurisdictional powerholder by turning to the competing jurisdiction when the original powerholder has failed to provide an adequate remedy.⁷⁷

This final requirement of joint governance, the reversal point, is designed to ensure that if the interests of the vulnerable party are systemically ignored or left unmet by the relevant powerholder, the competing authority gains the right to provide a remedy—for instance, by overturning the decision made by the original powerholder. Rather than risk losing authority over members altogether, religious and political leaders will be encouraged to find an internal solution that is satisfactory to the dissenting voices in the group. In this way, joint governance seeks to tackle the major problem of providing incentive for leaders and powerholders to change course by listening to the voices and concerns of those who have long been silenced and marginalized, and finding within the tradition itself resources for more egalitarian reinterpretation. Islamic legal doctrine in particular is replete with creative

⁷⁷ For a detailed description of these requirements, their justification and implementation, see Shachar, *Multicultural Jurisdictions*, *supra* note 2, c. 6 at 117-45 and the appendix at 151-65.

methodologies of reinterpretation that can serve as rich sources for more gender-friendly readings of religious texts.⁷⁸

C. Innovations: The Sharia Tribunal as a Case Study

Turning from theory to practice, let me quickly sketch out how the joint governance approach could apply to the contentious example of the Dar-ul-Qada. As mentioned earlier, the tribunal would operate under the provisions of the *Arbitration Act*, which offers a form of private dispute resolution that, at least in the commercial context, is typically awarded the highest deference by the courts. After briefly looking at some possibilities as to how such deference might function in real-life situations, I will outline what I consider to be the basic institutional conditions that must be met in order to encourage interaction between different sources of authority—in this case, religious personal status laws and state laws—in an attempt to best protect the rights and interests of women.

According to the core principles of joint governance, we would expect to see a division of authority along the lines of defined subject matter.⁷⁹ For instance, the tribunal could be empowered to dissolve a marriage in accordance with religious requirements defined by the relevant Islamic school of interpretation chosen by the divorcing spouses, while the norms of Canadian and Ontario family law would govern property matters such as the division of assets and support obligations.⁸⁰ By creating a hybrid of Canadian and Muslim sources of law, the no-monopoly rule would be fulfilled. Of equal importance is the fact that the tribunal would have to ensure legal representation for both parties, clearly register their consent, and permit the parties to turn to the civil court at any time if they feared that their rights were being violated.

While the above represents the ideal, it is far from clear that this ideal would be reflected in reality. To begin with, it is important to note that permission to turn to a civil court at any time is not the current norm in binding arbitration. Under the present legal structure, judicial review is narrowly defined: it is limited to procedural defects

⁷⁸ See e.g. El Fadl, *supra* note 39; Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Cambridge, Mass.: Kluwer Law International, 1999). See also Asma Barlas, “Believing Women” in *Islam: Unreading Patriarchal Interpretations of the Qur’an* (Austin: University of Texas Press, 2002); Ziba Mir-Hosseini, “The Construction of Gender in Islamic Legal Thought and Strategies for Reform” (2003) 1 *Hawwa: Journal of Women of the Middle East and the Islamic World* 1.

⁷⁹ Note that because of the unusual circumstances involved here, i.e., the use of an existing Act, the crucial stage of negotiation and consultation which joint governance requires has been circumvented.

⁸⁰ This may include providing an opportunity for the parties to settle their disputes themselves before the arbitrator intervenes in shaping the terms of the divorce and separation award according to religious requirements. A final decree of divorce will still have to be issued by the Ontario court, as is the case with secular arbitration settlements.

in the arbitration process.⁸¹ Furthermore, turning to the civil court on appeal may be particularly daunting for women, for financial reasons of course, but also because of severe social and communal pressures to express group loyalty by accepting the tribunal's judgment—despite the fact that it might entitle a woman to less than she would have received under secular family law provisions.

This concern becomes especially acute in light of statements made by proponents of the Dar-ul-Qada who have publicly asserted that “Muslim minorities living in non-Muslim countries like Canada are like wandering Bedouins to whom Shariat applies regardless of where they live.”⁸² When asked why they wish to incorporate Muslim personal law into the arbitration process, Syed Mumtaz Ali, the President of the Canadian Society of Muslims and the driving force behind the Dar-ul-Qada proposal, answered as follows:

Sharia is part of our life. If we proclaim to be a Muslim, we must live our life according to the injunctions of Allah [God] and His Prophet. Let's take the example of marriage. You cannot have an Islamic marriage without applying Sharia. Similarly, if there is a fear a matrimonial dispute is about to occur, the Qur'an clearly states that you must try to solve it by having two arbitrators, one from each side. This is the command that in order to a Muslim, you must surrender to the command of Allah. If you don't, then you are not a good Muslim.⁸³

If this is indeed correct, then the language of “choice” or “free will” in discussions on whether individuals will submit their disputes to the tribunal's authority is entirely without substance. If following the Sharia route is presented as a matter of duty and loyalty to the group, then the argument is essentially that “to be a ‘good’ Muslim, one must live under Muslim family law.”⁸⁴ This leaves little if any room for individual choice by women who care about their group affiliation.

Furthermore, we must also contemplate the possibility that the tribunal, or at least some of its arbitrators, without the unanimous consent of both parties, may impose rigid and strict readings of Muslim personal status law, which tend to disadvantage women in the concrete terms of divorce settlements.⁸⁵ While we should not

⁸¹ As defined in s. 6(3) of the *Arbitration Act*, *supra* note 31. This legal situation may change following the recommendation of the *Boyd Report*, *supra* note 49, as it calls for greater oversight and evaluation of arbitrators (*ibid.* at 140-41, recommendations 36-42), and leaves open the possibility for providing “a higher level of court oversight” of religious tribunals (*ibid.* at 142, recommendation 46).

⁸² Ali, “Beginning”, *supra* note 32.

⁸³ Interview of Syed Mumtaz Ali by “The Ambition” [a Canadian young Muslims' Journal] (23 May 2004), online: The Canadian Society of Muslims <<http://www.muslim-canada.org/ambitioninterview.html>>.

⁸⁴ Canadian Council of Muslim Women, *Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada* (Revised 25 May 2004), online: Canadian Council of Muslim Women <http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm>.

⁸⁵ I do not address the interests of children in my discussion above because even under the current interpretation of the *Arbitration Act*, the best interests of the child trump any contractual agreement

automatically rule out the possibility that the system could manifest the best intentions that were behind its conception, it would be irresponsible to turn a blind eye to the possibility that negative effects may prevail. Under the current proposal, there are insufficient legal safeguards to ensure that female members of minority communities will be adequately protected if and when they choose to turn to religious arbitration.⁸⁶ This is not surprising since, as mentioned above, the *Arbitration Act* was designed to deal primarily with commercial and business disputes, where concerns about power inequality and information asymmetries are far less prevalent than in the family law context.

In order to balance the goals of religious accommodation and the protection of women's rights, I propose three procedural amendments to the *Arbitration Act* that would make it more compatible with the joint governance approach:

1. Introduce a requirement of mandatory and independent legal advice for each party *before* entering the binding arbitration process.⁸⁷ The purpose of this consultation session would be to inform the parties about the legal consequences of the following choices:

(i) Choice of forum, that is, turning to binding religious arbitration as opposed to a civil court; and

(ii) Choice of law under the tribunal. For instance, the arbitration could follow the norms of secular family law or those of religious law. In the latter case, the parties must specify which school of Muslim jurisprudence is to be followed. The parties could further agree to apply a combination of secular and religious sources of law according to subject matter. For example, the requirements set as default rules in Canadian secular laws could be selected as binding on property-related questions, while the relevant school of Muslim law would formulate the status dimension of the divorce settlement.

made by the parties to the arbitration. See *Duguay v. Thompson-Duguay* (2000), 7 R.F.L. (5th) 301, [2000] O.J. No. 1541 (Ont. S.C.J.) (QL).

⁸⁶ One example of a private religious tribunal that affords greater safeguards to women is the Jewish *Beth Din* of Toronto, which arbitrates a small number of family law disputes every year. The *Beth Din* has in effect created a hybrid of Jewish and Canadian law by ensuring that all religious divorce (*get*) settlements or awards are made in accordance with the requirements of the Ontario *Family Law Act*, R.S.O. 1990, c. F-3, including the requirement of full financial disclosure. This adoption of Canadian (secular) norms by the religious tribunal has provided an important response to concerns about power inequalities between the spouses under a strict reading of Jewish (Halachic) law. See letter from Rabbi Reuven Tradburks to Ms. Marion Boyd (2 September 2004) in B'nai Brith Canada, "Review of the Arbitration Process in Ontario: Submission by B'nai Brith Canada to the Ontario Ministry of the Attorney General", online: B'nai Brith Canada <<http://www.bnaibrith.ca/briefs/sharia/sharia040908.pdf>>.

⁸⁷ Such procedural safeguards have in fact been strongly endorsed by the *Boyd Report* (*supra* note 49 at 137, recommendations 21-24).

2. Permit a non-governmental organization to act as *amicus curiae* to assist women, should they desire it, in making these choices.

3. File a written affidavit confirming the consultation session and the choices made by each party with a civil registration authority or local court.

These three requirements seek to provide some meaningful content to the consent requirement spelled out in the *Arbitration Act*. They are not, however, sufficient to counter the potential charge of non-loyalty (or “failing to be a ‘good Muslim’”) that may inhibit the exercise of real choice in deciding whether or not to turn to the tribunal.⁸⁸

To address this serious problem, which could make it nearly impossible for a woman to opt out of faith-based arbitration, it is important to consider the joint governance model’s insistence on a structural remedy or “reversal point”. In the Dar-ul-Qada example, we can envision the introduction of a mandatory review of all family law arbitration settlements or awards prior to their finalization. Such a review process would not have to be initiated by the vulnerable party, recognizing the chilling effect of the fear of social ostracism or of being branded a “traitor” to the faith. Instead, such a review would be a required part of the arbitration process. In this model, the settlement or award could not become final, binding, or legally enforceable without such a review.⁸⁹

At the review stage, it would be necessary for each settlement or arbitration award to be assessed against an agreed standard.⁹⁰ For instance, that standard may reflect the spirit of “marriage as a form of partnership” (as currently defined in the Preamble to the *Family Law Act*⁹¹), and the need to “provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership.”⁹² This does not necessarily require a fifty-fifty split; however it does require a context-specific analysis of the mutual obligations of the parties to each

⁸⁸ This is not an exhaustive list. Others have pointed out the need to regulate the qualifications of the arbitrators, to ensure legal representation for the parties, and to keep a written record of the arbitration process. Such changes would presumably apply to both secular and religious family law arbitrations, thus making them more similar to a public court hearing. This result would satisfy advocates for vulnerable parties who have long cautioned against the informality of settlement, mediation, and arbitration. In the Dar-ul-Qada example, it would also shift onto the arbitrators the burden to come up with a sufficiently balanced resolution, or risk losing their reputation. It is indeed crucial to their credibility that they be able to find a legally enforceable resolution to the dispute according to the combined norms of Islamic and Canadian laws.

⁸⁹ This would apply to both secular and religious arbitration procedures in the family law context. This procedure has the advantage of relieving the more vulnerable party from carrying the “reversal” burden.

⁹⁰ Ideally, the state and the group would agree on the review standard prior to the division of authority between them, and would further specify which institution is best positioned to provide such oversight—for example, a joint committee of secular and religious legal experts.

⁹¹ *Supra* note 86.

⁹² *Ibid.*

other (and their children, where relevant). It is hard to imagine a case in which a severely one-sided division of property or a very short period of support, such as a three-month *iddat* period, could be considered “equitable.” Thus, even if the religious tradition may permit such a resolution, the reversal point would not. As a result, the competing jurisdictional entity (in this context, a civic or joint secular-religious authority) would have the power to overrule this aspect of the agreement.

If the review process were introduced as a condition for the legality of the arbitration in family law, it would be in the interest of the religious tribunal to find religiously acceptable ways of implementing the norm of equitable division in order to prevent the overruling of their decisions. This would put pressure on arbitrators to find a balance that would be acceptable to the parties, the religious faith, and the state. In other words, it would create an incentive for the religious arbitrators to develop a more reformist and egalitarian interpretation of the tradition. Such an interpretation would address the underlying concern that the relegation of binding legal authority to the religious arbitration body might strengthen a conservative interpretation that disadvantages women.

In its most far-reaching public policy implications, the feminist critique strives to establish institutional conditions under which different voices within the accommodated community can be heard, thus allowing for a re-examination of the unfair and disproportionate costs imposed on women as “emblems of culture”. What unites the deliberative and legal/institutional proposals is the desire to rely on change from within the minority group as the preferred method of achieving gender equality in the context of politicized and revivalist assertions of communal identity. Such proposals hold a *prima facie* advantage because they allow the accommodated group to establish a degree of autonomy vis-à-vis the state. At the same time, they avoid the trap of the either-or dilemma, and in the process free women from the excruciating plight of being caught between competing group, state, religious, and gender loyalties, “forced almost to choose between betrayal and betrayal.”⁹³

While these feminist-inspired “re-designs” do not offer a panacea for the difficult challenges raised by contemporary state-and-religion quandaries, which often manifest themselves in reactive and gendered assertions of collective identity, we must judge their promise vis-à-vis the competing alternative: that of abandoning altogether the delicate attempt to balance the twin goals of cultural and religious accommodation with gender equality. Using another topical example, that of the French debate over Muslim girls’ right to wear the hijab in public schools, the following section identifies and critically assesses the merits and pitfalls of the strongest arguments against multicultural citizenship: those that preach a total withdrawal from the project of recognizing identity-based claims in the public sphere.

⁹³ Leila Ahmed, “Early Feminist Movements in the Middle East: Turkey and Egypt” in Freda Hussain, ed., *Muslim Women* (London: Croom Helm, 1984) 111 at 122.

IV. The Rejection of Multicultural Citizenship: Liberal, Civic-Republican and Ethnocultural Variants

This section explores the external critique of multiculturalism. It focuses on the strongest arguments against differentiated citizenship, which are informed by three alternative conceptualizations of political membership: liberalism, civic-republicanism, and ethnoculturalism. I explore the objections raised by these models in detail, because if proponents of these alternative conceptions of political membership are correct in their assertion that recognition of group identity in the public sphere is unjust and unwise, then there is no case for envisioning new joint governance regimes that create nuanced and multi-level resources of law, interpretation, and governance for members of minority communities (particularly women) to legitimately seek to express their religious or cultural identity while concurrently challenging their in-group subordination.

A. *The Liberal Model*

For many secularist liberals, the idea of multicultural or differentiated citizenship is objectionable because they fear it might reveal a dark side of politicized group (and national) identity. They claim that it will unwisely valorize communities at the expense of their members, silence dissent, restrict individual autonomy and freedom, inflame ethnic and religious zealotry, and destabilize a social peace that is already fragile in many parts of the world. These are serious allegations. But can they be substantiated? Intellectuals in the public eye such as Benjamin Barber and Michael Ignatieff have popularized these alarming themes through titles such as *Jihad vs. McWorld* or *Blood and Belonging*, in which they offer detailed and terrifying accounts of brutal ethnic and religious hatred and violence run amok in many regions of the world.⁹⁴ However, little if any of this disturbing evidence is directly connected to multicultural accommodation policies designed to enable individuals to stand forward with their differences acknowledged and respected. Rather, intercommunal hatred, fear, and bloodshed seem to flourish under precisely the opposite conditions: where patterns of systemic deprivation, discrimination, and retaliation are directed at those deemed to be “too different”.

A more persuasive line of argument is advanced by liberal scholars who emphasize the importance of neutrality and the separation of state and religion. Informed by fears of religious excess and intolerance, which often stem from memories of Europe’s bloody history of religious wars, contemporary liberals from John Rawls to Jurgen Habermas to Brian Barry have emphasized the importance of maintaining a strict separation between religion and state. They contend that only such formal, legal separation can provide the necessary institutional framework for

⁹⁴ Benjamin R. Barber, *Jihad vs. McWorld* (New York: Random House, 1995); Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (Toronto: Penguin Books Canada, 1993).

finding a political language of “reasonableness” and “impartiality” that will allow for communication and mutual trust in the public domain among individuals who may adhere to different conceptions of the common good. It will also guarantee each community the freedom to uphold its religious customs and traditions in the private domain. The separation of state and religion permits a relatively high degree of diversity in civil society, but it does not endorse the multicultural citizenship approach of publicly recognizing and institutionalizing religious and cultural identities.⁹⁵ If anything, for authors who caution against the excessive accommodation of difference, it leads to the opposite conclusion: “precisely because liberals recognize the important role that religion plays in many people’s lives ... they emphasize the importance of neutralizing it as a political force.”⁹⁶

In other words, the real debate is about whether the state ought to respect distinct cultural or religious identities in the public sphere, or alternatively, whether it ought to hold on to the model of state neutrality that has long been one of the cornerstones of the modern concept of citizenship. In defense of unitary (as opposed to “differentiated”) citizenship, Barry offers a comprehensive justification of the traditional liberal strategy of privatizing and depoliticizing identity and difference.⁹⁷ This analysis reaffirms the classical “two spheres” solution of relegating religious and other manifestations of cultural identity to the private sphere in order to establish civil peace in the public sphere. Liberal critics of multiculturalism such as Barry are well aware of the extensive literature that challenges this public/private distinction. I have previously written that Barry rejects these challenges on the basis of “his strong belief that ‘privatizing difference’ is the only way in which the liberal state can offer neutral and level ground on which people from different backgrounds and cultures can meet and coexist.”⁹⁸ He contends that “[such] neutrality requires that *all* religious communities give up their public ambitions and manifestations, even if this means that some communities are more heavily burdened by this requirement than others.”⁹⁹

⁹⁵ For further discussion of this line of argument, see Ian Shapiro, *The Moral Foundations of Politics* (New Haven: Yale University Press, 2003) at 175-89.

⁹⁶ Barry, *supra* note 67 at 25.

⁹⁷ *Ibid.* at 24-32.

⁹⁸ Shachar, “Two Critiques”, *supra* note 7 at 278.

⁹⁹ *Ibid.* [emphasis in original]. Barry specifically acknowledges that this strategy may impose greater burdens on members of non-Christian communities in secular Western societies. This is where he fails to provide a satisfactory rebuttal to first-wave multiculturalists’ key arguments concerning “blindness-to-difference.” A main theme in the arguments of pro-accommodation authors such as Will Kymlicka, Charles Taylor, and Iris Young is that public institutions which “purport to be neutral amongst different ethnocultural groups ... are in fact implicitly tilted towards the needs, interests, and identities of the majority group; and this creates a range of burdens, barriers, stigmatizations, and exclusions for members of minority groups.” See *e.g.* Will Kymlicka & Wayne Norman, “Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts” in Kymlicka & Norman, *supra* note 24, 1 at 4.

It is difficult, however, to see how banning the hijab in French public schools in the name of the separation of state and religion in education could seem neutral to members of the Muslim community in France. This community has been plagued in recent years by severe political under-representation, unemployment, poverty, and heightened antiterror regulations which typically profile and target individuals of Arab origin. Despite its apparently neutral language, the new French law, which bans “signs and dress that ostensibly denote the religious belonging of students” in public schools,¹⁰⁰ is widely interpreted by members of the minority and majority alike as legally interdicting the hijab.

A critical but often unstated point is the fact that this “neutral” legislation privileges individuals whose religion or gender does not require them to wear anything that “denotes their religious belonging”. What is most important for our discussion is the recognition that in this case, as well as in many other contemporary cultural wars, women’s bodies and their dress have become symbolic of a much larger set of political and societal intercommunal tensions. The controversy over the hijab reflects public anxiety on the part of the majority concerning the rise of Islamic extremist factions, which allegedly promote veiling as a symbol and proclaimed method of “deployment” for spreading sectarian doctrines and politicizing religious identity. As the French *Conseil d’État* stated in 1989, wearing the hijab in the classroom is potentially “a threat to the establishment’s order or to the normal functioning of teaching.”¹⁰¹ This perceived threat is posed because the hijab purportedly exhibits a sign of religious belonging, which “by its nature [or] by the conditions under which it is worn individually or collectively [is] ostentatious or combative [*revendicatif*] in character.”¹⁰² Interestingly, this interpretation of veiling as a political manifestation of identity—rather than merely a religious or cultural form of expression—is also accepted by various female Muslim writers who defend the practice of veiling, particularly in societies with a non-Muslim majority.¹⁰³

¹⁰⁰ Art. L. 141-5-1 Code de l’éducation, as am. by *Loi n° 2004-228 du 15 mars 2004*, J.O., 17 March 2004, 5190 [translated by author]. The original text reads: “Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une apparence religieuse est interdit.”

¹⁰¹ France, Conseil d’État, “Analyse de la jurisprudence de 1991 à 1999”, online: Conseil d’État <http://www.conseil-etat.fr/ce/jurisp/index_ju_aj9209.shtml> [translated by author].

¹⁰² *Ibid.* For an illuminating discussion of France’s distinct brand of secularism, see Michel Troper, “French Secularism, or *Laïcité*” (2000) 21 *Cardozo L. Rev.* 1267. For detailed analysis of France’s 1989 *affaire du foulard*, which led to the *Conseil d’État* decision, see Françoise Gaspard & Farhad Khosrokhavar, *Le foulard et la République* (Paris: La Découverte, 1995).

¹⁰³ Much has been written in recent years about the political function of the veil in asserting Muslim identity. For different feminist positions on the politics of the veil, see *e.g.* Lama Abu-Odeh, “Post-Colonial Feminism and the Veil: Considering the Differences” (1992) 26 *New Eng. L. Rev.* 1527; Nilüfer Göle, *The Forbidden Modern: Civilization and Veiling* (Ann Arbor: University of Michigan Press, 1996); Sajida Sultana Alvi, Homa Hoodfar & Sheila McDonough, eds., *The Muslim Veil in North America* (Toronto: Women’s Press, 2003). For contemporary legal and political theory debates on this issue, see Anna Elisabetta Galeotti, “Citizenship and Equality: The Place for Toleration”

Indeed, both the state and the group seem locked in battle over gendered images of women as the signifiers and promulgators of group identity. On the one hand, hijab-wearing girls are presented as the advance guard of an Islamist insurgency that threatens to undermine no less than the French Republic. On the other hand, these same young women are portrayed as victims of violence and subjugation by male members of their community, from whom they must be protected by the state. These competing interpretations are part of a larger struggle over the public manifestation of Islam in France. This is a debate that occurs simultaneously within the Muslim community and between this minority community and the larger society. The focus on women's dress thus serves as the embodiment of a larger cultural and political battleground, which puts female group members on the horns of a misguided either-or dilemma: either they become "cultureless" members of the state by refraining from wearing the hijab, thus gaining entitlement to valued goods such as public education, or, if they uphold their cultural "difference" by veiling, their action is understood as a manifestation of an excessively politicized group identity perceived by the majority to counter national unity and republican values. This latter choice may lead to their exclusion from full participation in the body politic and its public institutions. Such increased polarization between the state and the group may in practice translate into the absence of space for women to express their multiple affiliations—as French *and* Muslim—simultaneously.

In short, the hijab saga illustrates that despite vows to be neutral and value-free, public institutions cannot be fully disengaged from a cultural ordering of ends.¹⁰⁴ Moreover, when apparently neutral laws and policies such as the new French secularism law are crafted to address the anxieties, interests, and identity concerns of the majority group, this creates a range of burdens and barriers that make the achievement of freedom, security and equality significantly more difficult for those whose values do not inform the law. This is particularly true for those who have not always been treated as full members of the polity in the past. Most crucial for our discussion, proponents of the strict non-accommodationist approach fail to recognize that group members—even those bearing disproportionate costs for the sake of preserving the collective—may also find value in their cultural and religious identity.¹⁰⁵ Instead, they are treated as victims without agency, who are in constant need of state protection and guardianship. This oversimplified view has led some liberal proponents to suggest that women (or any other group member subject to systemic injustice within the group) might be "better off ... if the culture into which

(1993) 21 *Political Theory* 585; Martha Minow, "Identities" (1991) 3 *Yale J.L. & Human.* 97 at 122ff.; Benhabib, *supra* note 72 at 94-100; Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) at 155-59.

¹⁰⁴ Civic-republicans point out that if a rootless and cultureless idealized liberal polity were ever to materialize in practice, it would be an unattractive place in which to attempt individual and collective deliberation. See Ronald Beiner, *What's the Matter with Liberalism?* (Berkeley: University of California Press, 1992) at 98-141.

¹⁰⁵ For further discussion, see Shachar, "Puzzle", *supra* note 11 at 390-99.

they were born were ... gradually to become extinct.”¹⁰⁶ It assumes that the best solution to the complex relations between the group, the state, and the individual lies in simply reiterating the lexical priority of state norms over any competing sources of authority, such as those arising from group traditions.

B. The Civic-Republican Model

In contrast to the assertion of unitary citizenship, which focuses on individual rights, the republican conception of political membership focuses on the political community, or the state, as the source of social cohesion. It considers the state to be a key element in the forging of the identity of the citizen. To be a citizen, by this account, is to privilege one's identity as a member of the state over and above any other form of loyalty, whether such alternate allegiance is based on religion, ethnicity, class, gender, sexual orientation, national origin or any other affiliation. Civic-republicans consider that the state has the right and the duty to construct both the citizen and the “good society” so as to ensure individual autonomy and social cohesiveness within the polity. This last point is best demonstrated by a statement made by a spokesman for French President Jacques Chirac, who described the new law banning ostensible signs of religion in school as “a decision that respects our history, our customs and our values.”¹⁰⁷ Presumably, the reiterated “*our*” is inscribed as French, civic-republican and secular. It requires little imagination to fill in the blanks as to what and who constitute “their” history, “their” customs, and “their” values. This message was not lost upon many French Muslims, including those who demonstrated in France and elsewhere in Europe against the ban; it in turn contributed to growing fears among those holding a rigid interpretation of the almost sacrosanct principle of *laïcité* (“secularism”) in France. Finally, it added fuel to the efforts of more opportunistic vote-seeking politicians who harbor ethno-national and racial prejudice against France's five million Muslims.

Despite the current effects of the principle, it is important to recall that the French tradition of *laïcité* was originally intended to limit the influence of Catholicism (the dominant religion) in public affairs. In other words, French secularism is not designed to target or intimidate minority cultures. Indeed, civic-republicans are equally unsympathetic to any and all churches or religious groups that attempt to intervene in the affairs of the state.¹⁰⁸ Accordingly, any perceived sectarian religious symbol is vigilantly removed from the official public sphere. The extent of this distinctively

¹⁰⁶ Susan Moller Okin, “Feminism and Multiculturalism: Some Tensions” (1998) 108 *Ethics* 661 at 680.

¹⁰⁷ Noelle Knox, “Effort to Ban Head Scarves in France Sets off Culture Clash” *USA Today* (3 February 2004). See also “Chirac on the Secular Society”, *BBC News World Edition* (18 December 2003), online: BBC <<http://news.bbc.co.uk/2/hi/europe/3330679.stm>>.

¹⁰⁸ For historical analysis of the *Conseil d'État's* policy of limiting the power of Catholic institutions, see Elwyn Elms, “The Conseil d'État and the Religious Communities, 1879-1906” (2002) 16 *French History* 174.

strict separation between religion and group identity (as private) and state and citizenship (as public) can be seen, for example, in a recent case in which a French public school teacher was sanctioned because she wore a small gold cross on a chain around her neck.¹⁰⁹ It is unlikely that similar regulations would have passed constitutional muster in the United States or Canada, given the more generous interpretation of the individual's right to freedom of religion that is afforded in those states.¹¹⁰

C. The Ethnocultural Model

Finally, it is important to acknowledge that in emphasizing the importance of “claims of culture” and the security such claims provide for both individuals and collectives, multiculturalists may have gotten more than they bargained for: they have unwittingly offered compelling arguments for nationalist members of the *majority* community to seek protection for *their* “endangered” collective identity. In countering identity groups’ demands for accommodation of their distinct ways of life, nativist and populist politicians often find fertile ground in reactive claims of ethnocultural nationalism, which pit members of the majority against the minority. When such intercommunal tensions are reframed as struggles over the very “character” of the state, it puts religious and ethnic minorities in an increasingly vulnerable position. Generally, when members of the majority begin to assert their entitlements, obligations, and ultimately their cultural and historical domination, the resulting regime of inclusion and exclusion is far less hospitable to minority cultures than a liberal conception of the neutrality of public institutions, however imperfect that may be.

The potential slippage from multiculturalism as a celebration of difference to ethnoculturalism’s hierarchic and exclusionary overtones has received surprisingly little attention in literature on legal and political theory. It has not been lost, however, on students of ethnic and cultural studies. These scholars have long cautioned that any public policy that fossilizes cultural identities—with their fluid and mutable cache of customs, beliefs, and practices—into more rigid and unchanging matrices of “difference”, may lead to structural inequality and domination along the lines of essentialized group-based categorizations.¹¹¹ Such stratification may turn minority

¹⁰⁹ See Troper, *supra* note 102 at 1267.

¹¹⁰ The right to freedom of religion is expressed in the First Amendment to the American Constitution and in subsection 2(a) of the *Charter*, *supra* note 17.

¹¹¹ See e.g. Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996); Gershon Shafir & Yoav Peled, “Citizenship and Stratification in an Ethnic Democracy” (1998) 21 *Ethnic and Racial Studies* 408; Sammy Smooha, “Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel” (1990) 13 *Ethnic and Racial Studies* 389; Anthony W. Marx, *Faith in Nation: Exclusionary Origins of Nationalism* (Oxford: Oxford University Press, 2003).

cultural markers such as language, ethnicity, or religion into systemic grounds for ghettoization, deprivation, and stigmatization.

This danger is always present in multi-ethnic and multiracial societies. It becomes more acute when elites in the dominant majority gain an interest in mobilizing and politicizing ethno-national markers of identity (themselves partly invented), especially in the context of competition over relatively scarce and valued resources within the larger society composed of formally equal citizens from different ethnic or national groups.¹¹² Under such circumstances, minority difference becomes a pretext, if not a licence, for discrimination and subordination. Ignoring the thin line between accommodation of difference and imposition of ethnic or racial borderlines, as well as between choice and ascription of identity, was a grave mistake made by first-wave multiculturalists.

This error now reappears in the return of revivalist nativism. Nationalist revival effectively uses the language of culture to create a hierarchy of inclusion in the state, whereby only members of the dominant ethnic or religious community gain access to all the goods and rights that citizenship offers, while members of the minority are extended formal civil and political rights but are effectively barred from shaping and defining the ends of the state to which they belong. Such patterns of exclusion become explicit when struggles over rights and resources are marked as “ethnocultural”, as in Sri Lanka, Cyprus, Lebanon, Kenya, and Indonesia.¹¹³ Patterns of exclusion may also be more subtly expressed in the politicized use of cultural claims by the majority. Majority claims may be veiled by the banner of secularization or national security threats within civic—not merely “ethnic”—nations. Real-life examples of this pattern of marginalization and stigmatization are mushrooming in the post-9/11 era, where a combination of formal rules and informal social practices are helping to erect difference-based boundaries between formally equal members of the same polity.¹¹⁴ These are not, however, the kind of boundaries envisioned by multiculturalists, who had hoped to ensure greater equality between majority and minority communities by providing special rights and privileges to minorities. The new “law-and-order” ethnocultural regulations promoted under the guises of secularization and national security place those deemed to be “too different” under growing scrutiny; minorities are pressured to manifest their loyalty to the nation and

¹¹² On the instrumentalist theory of ethnic mobilization, see Joseph Rothschild, *Ethnopolitics: A Conceptual Framework* (New York: Columbia University Press, 1981). On the “invention of tradition” argument, see e.g. Eric Hobsbawm & Terence Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

¹¹³ See Paul R. Brass, *Ethnicity and Nationalism: Theory and Comparison* (London: Sage Publications, 1991).

¹¹⁴ See e.g. Sujit Choudhry, “Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter” in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 367; Leti Volpp, “The Citizen and the Terrorist” (2002) 49 UCLA L. Rev. 1575.

to conform to its shared moral purposes—otherwise they risk increased regulation, suspicion, and mistrust.

Even if motivated by bona fide intentions (such as national security concerns), excessive measures of surveillance and policing of minorities may corroborate a dangerous pattern of mutual construction of a collective “self” contrasted with an imagined and artificially unified “other” (such as the minority as conceived by the majority, or the majority as interpreted by the minority). Processes of mirror-image constructions of difference and identity tend to ignore in-group dissent and inequality, leading instead to a stifling of positions within each group, in addition to the aggravation of cultural wars between them.

Returning to an example offered earlier in this paper, the French government’s ban on the hijab as an ostensible religious symbol (which, according to Chirac, is “a sort of aggression”)¹¹⁵ purported to be a facially-neutral law.¹¹⁶ Although the law is widely regarded as an effort to respond to specific concerns about the “failure” of France’s Muslim minority to integrate into the wider society, it does not target one particular ethnic or religious group. The problem of Muslim social exclusion in France has manifested in various ways, including a disturbing correlation of Muslim ethnic or religious affiliation with low socio-economic status, high unemployment, and lack of political representation at the national level. Instead of targeting these issues directly, the new law reduces the deep and complex intercommunal problems in France to a charged debate that focuses on the regulation of women’s inclusion in the polity based on whether or not they are veiled.

The events in France indicate that minority groups are not alone in implicitly conflating images of cultural identity with idealized images of women. The state may also become implicated in similar narratives, although it usually presents them as attempts to “liberate” women from the shackles of an oppressive cultural tradition. Significantly, instead of encouraging the inclusion of French Muslim women in both their religious community *and* their secularist state, the new anti-hijab law makes the attainment of education—the only long term strategy that has consistently been linked to improved life chances and empowerment for girls and women worldwide—more difficult than ever. Rather than facilitating their inclusion in multiple cultural and legal worlds of tradition and secularism, the hijab ban makes movement across cultural barriers much harder, if not virtually impossible.

¹¹⁵ “Scarf Wars”, *The Economist* (US edition, 13 December 2003).

¹¹⁶ The law does not officially target members of the Muslim (or any other) minority community in France. It is not based on an innate and immutable category of identity such as race or sex, which would have made it explicitly discriminatory, in violation of basic international human rights norms that France is committed to preserving. Rather, the law is officially intended to preserve the public school as a neutral ground where young citizens are educated as members of the French polity, irrespective of their “different” cultural identities as members of different religious, linguistic, or national groups.

In contrast to the liberal, civic-republican, or ethnocultural rationales for supporting the ban, I believe that we should challenge the practice of imposing the heaviest costs of the new cultural wars on those who are already placed at risk by their own minority community and the state. This is particularly important when vulnerable individuals belong to a cultural or religious community which feels threatened and largely unwelcome in the wider society. This last point serves to remind us of the significance of the feminist critique of multiculturalism. In this particular case, the feminist critique must address the added difficulty of protecting the interests of two different subgroups of women within a minority community: those who wish to protect their freedom to assert their religious identity in the public sphere (by donning the hijab), and those who oppose group pressures which force them to do so. In short, the feminist critique must account both for those seeking freedom *of* religion and those seeking freedom *from* religion. This more nuanced view also helps to explain why the debate over the hijab, as an example of the new sexualized cultural wars, has quickly enmeshed competing arguments about women's equality, autonomy, and freedom with arguments about endangering the civic values and the very (secular) nature of the state.¹¹⁷ In these highly charged debates, women's voices, disagreements, and motivations for action—which often seek to challenge both group and state authorities—are often lost, ignored, or misinterpreted.¹¹⁸

Conclusion: Recovering Multiculturalism with Feminist Insights?

Like many scholars grappling with these difficult questions, I find the extant legal and normative solutions proposed by liberal neutrality, civic-republicanism, ethnocultural revivalism, as well as minority group isolationism ultimately unattractive. The feminist critique of multiculturalism, on the other hand, provides a more useful framework for comprehending and potentially redressing the tensions that have come to the forefront of public policy in the new sexualized cultural wars.

Instead of forcing trade-offs between equality, human dignity, and the rights to cultural choice and group membership, the feminist critique of multiculturalism asks us to acknowledge that individuals may perceive themselves as authors and subjects of more than one legal and cultural system. The feminist perspective investigates the feasibility and viability of structures of authority that require both coordination and competition between the group and the state. This perspective allows not only for cultural preservation, but also for dialectical interaction between the two systems, which may result in innovation within each system and the regeneration of both.

¹¹⁷ In this case, arguments favouring full inclusion in the public sphere without discrimination based on open espousal of a “different” cultural or religious identity, or alternatively, arguments supporting the freedom to challenge gendered and “revivalist” expressions of Muslim identity.

¹¹⁸ A similar concern is raised by Gaspard & Khosrokhavar, *supra* note 102, and Benhabib, *supra* note 72 at 117-18.

In addition, by creating a complex web of overlapping jurisdictions, feminist-oriented multicultural policies such as joint governance may, if carefully implemented, help to address the very real risk that under conditions of intercommunal conflict, any internal dissent might be construed as betrayal—thus allaying the spectre of potential in-group silencing of women or other subgroups in the name of protecting the collective entity. Under joint governance schemes, individuals are no longer forced to choose between their cultural identity, their gender, and their role as citizen. Instead, these schemes grant individuals opportunities to challenge their own subordination by providing a multiplicity of venues to seek empowerment.

It is clear that not all minority groups would be happy with the basic practice of joint governance (or similar feminist-inspired public policy initiatives). Joint governance does not allow a group to fully insulate its members from the effects of secular law, and would be especially unpopular with revivalist religious groups that seek absolute control and exclusive regulation over all aspects of their members' lives. It would be equally unpopular, however, with strong secular states that resist the claims of religious minority communities to assert their markers of identity in the public sphere, especially when such expressions of “difference” tend to offend the sensitivities of the mainstream majority.

The new hijab law in France and the initiative to establish a Dar-ul-Qada in Canada each represent a rejection of joint-governance: the former by state officials, the latter by group representatives. The French state is extending rights in exchange for eschewing an expression of an important religious and cultural symbol of identity, whereas the advocates of the Dar-ul-Qada are asking citizens to emphasize their group identity, even at the cost of potentially restricting access to public courts implementing the general law of Canada. In each of these scenarios, women—more than any other category of group members—are forced to make punitive either-or choices between their culture and their rights.

In rejecting this type of resolution and recognizing the prominence of gender, sexuality, and the family in real life collective identity struggles, it is not surprising that the feminist critique emerges as that best equipped to assist us in better comprehending and redressing the serious challenges that women (and other group members such as sexual minorities) currently face in belonging to cultural or religious communities that feel threatened and largely unwelcome in the wider society. The feminist critique is particularly instrumental in identifying the gendered dimensions of such intercommunal strife in the first place, and in providing a much-needed framework for envisioning new and creative public policies. Once informed and shaped by specific domestic circumstances in each particular context, such policies might help to provide viable and concrete remedies for those who need them most.

Admittedly, even the best feminist-inspired public policy solutions cannot offer a panacea for the difficult challenges raised by the new cultural wars. However, the internal feminist critique puts members of minority communities—especially those members who have historically been vulnerable—at the centre of the debate by allowing them the potential to become promising agents of renewal of their own cultural traditions. This is surely a celebrated moral achievement, which further represents the most practical hope for ensuring that women and other members at risk do not become the primary casualties of the new cultural wars.
