
In the Name of Equality? The Missing Intersection in Canadian Feminists' Legal Mobilization Against Multiculturalism

American Behavioral Scientist

XX(X) 1–25

© 2010 SAGE Publications

Reprints and permission: <http://www.sagepub.com/journalsPermissions.nav>

DOI: 10.1177/0002764210368096

<http://abs.sagepub.com>



Eléonore Lépinard¹

Abstract

In Canada, women's rights organizations have successfully mobilized the law to foster gender equality. In doing so, they have been constrained by legal understandings of equality and discrimination, which have shaped their strategies to seek justice. In return, their mobilization, mainly through litigation, has contributed to craft or to alter legal categories (such as "substantive equality," "women," "sexual harassment," etc.), which in turn sustain their identities and their interests. However, claims made in the name of gender equality raise two issues: They tend to overlook the intersection of gender with other grounds of discrimination such as religion or race/ethnicity; and they tend to conflict with multiculturalism, a value enshrined in Canadian law. The recent decision taken by the province of Ontario to ban religious arbitration for family matters offers an illuminating case study of this tension between gender equality and religious rights in the Canadian context. This article analyzes women's rights activists' legal understandings of gender equality and religious/ethnic discrimination to explain how these representations have influenced women's mobilization against religious arbitration in Ontario. Bringing together the insights developed by critical legal studies about intersectionality and the study of legal mobilization, this article explores through a concrete example the tension between feminism and multiculturalism.

Keywords

[AQ: 2]

¹Université de Montréal, Canada

Corresponding Author:

Eléonore Lépinard [AQ: 1]

Email: eleonore.lepinard@umontreal.ca

Since the adding of the Canadian Charter of Rights and Freedom¹ to the Constitution Act 1982, the Canadian women's movement has been exceptionally successful in challenging previous legal understandings of gender equality and proposing new theoretical insights that have changed the legal doctrine in that field (Manfredi, 2004; Morton & Allen, 2001; Women's Legal Education and Action Fund [LEAF], 1996). Indeed, early on, and to influence constitutional politics as well as the legal system, Canadian feminists have joined forces and created several organizations: the National Action Committee on the Status of Women (NAC; 1971), LEAF (1985), and the National Association of Women and the Law (NAWL; 1974). These three organizations have concentrated their activism on law as the main road to achieve gender equality. Hence, they have been particularly active in constitutional politics (Dobrowolsky, 2000) and in Supreme Court litigation challenging the Charter (Majury, 2002; Manfredi, 2004; Razack, 1991). Canadian feminists have used legal scholarship, political mobilization, and litigation to pursue their agenda; and they have made substantial judicial gains in front of the Supreme Court,² especially when it comes to the definition of equality enshrined in Section 15 of the Charter. Through several Supreme Court cases, feminist legal activists have managed to legitimate a definition of equality as substantive equality rather than just formal equality.

Appraisals of the successes and the failures of this legal strategy differ (Brodsky & Day, 1989; Majury, 2002; Manfredi, 2004; Morton & Allen, 2001; Razack, 1991). However, one can only acknowledge that Canadian feminists straightforwardly and successfully invested the legal arena, at both the level of practice, with litigation and lobbying, and the theoretical level. Canadian feminists have sought both to influence the drafting of the Charter, in other words, the rules of the game; and to foster and implement through litigation the new legal doctrine they helped to craft (Manfredi, 2004). However, recent feminist legal mobilization in Ontario suggests that the frames elaborated by Canadian feminists to seek emancipation through the mobilization of the law may have ambivalent meanings and outcomes. More specifically, the difficulty to take into account the intersection of various grounds of discrimination such as gender, ethnicity, and religion might lead to claims made in the name of gender equality that are denounced as discriminatory by religious minorities.

In the name of gender equality, and in the name of protecting vulnerable women, some key players in the Canadian feminist movement engaged in 2004 in a legal battle against procedures of alternative dispute resolution using religious principles for family issues. To prevent the setting up of what they erroneously named "Sharia courts"³—which could arbitrate some family matters such as spousal or child support, custody, and access or division of property—feminists have organized a vast national and international campaign. Some members of various Ontarian religious communities have used religious principles to arbitrate family disputes since arbitration procedures were introduced in Ontario law in 1991.⁴ These practices went unnoticed in the public eye or by Ontarian feminists, all the more so because Ontarian family law authorizes private family dispute resolution.⁵ However, in the fall of 2003, the leader of the Islamic Institute for Civil Justice (IICJ) announced in the media that his institute would use Sharia rules

under the Arbitration Act to resolve family dispute among members of the Muslim community. Several women's rights organizations subsequently mobilized and joined forces under the umbrella of a "No Religious Arbitration" coalition. Indeed, for these women's rights activists, the use of Islamic law when arbitrating family disputes meant with certainty an infringement of women's rights. In an open letter publicly released in the fall of 2005, ten prominent women often identified as feminist activists urged Ontario Premier Dalton McGuinty to ban "Sharia law" in Ontario as its use would lead to "human-right abuses, particularly for those who hold the least institutional power within the community, namely women and children."⁶ In a post-9/11 context, the opposition between rights granted to religious minorities (focusing on Muslim communities) and women's rights was thus constantly at the center of the debate and convinced Ontario's premier to take position against "Sharia courts" in the fall of 2005. The Ontario Arbitration Act 1991 was revised in February 2006 to ban the use of any religious principle when arbitrating family matters, and Ontarian family law was revised to introduce legal safeguards for alternative dispute resolution procedures (Bill 27, The Family Statute Law Amendment Act, passed on February 14, 2006). These legal changes were clearly a success for the "No Religious Arbitration" coalition. They had mobilized against what they considered a dangerous excess legitimated in the name of multiculturalism, and won, in the name of protecting women's rights, and especially Muslim women's rights.

The debate hence opposed feminism and multiculturalism, presenting thereby a recurring pattern widespread in the North American context for more than a decade. Theoretical debates questioning if "multiculturalism is bad for women"⁷ have indeed agitated the media, academia, and legal scholarship since the second half of the 1990s. Most of the time, participants in these debates have discussed the extent of the compatibility between women's rights—or individual rights—and groups' rights. Whereas liberal thinkers have consistently tried to draw the philosophical and legal line between tolerance and equal protection for all in liberal democracies (e.g., Kymlicka, 1995; Okin, 1999), deliberative democracy theorists have proposed to overcome the normative opposition between women's rights and groups' rights (Bartholomew, 2004; Benhabib, 1998; Habermas, 1994). Finally, considering the indeterminable character of the normative debate, others have sought to craft legal, political, and pragmatic solutions challenging the assumption that this tension is an irremediable one (Deveaux, 2006; Phillips, 2007; Shachar, 2001). However, no study has yet explored how and why women's movements concretely mobilize against multiculturalism, and in which legal grounds they anchor their claims. Indeed, this issue has not been left only in the hands of academics or judges having to decide in cultural defense cases.⁸ Activists, especially women's rights activists, have had to decide how to define this problem in their own terms and how to mobilize when concrete cases demand collective action in the name of gender equality. Therefore, there is now a need for research that examines the concrete effects of the intersectionality between race or religion and gender on social movements' legal strategy. The irruption in the public debate of grounds of discrimination other than gender, such as race or religion, which cut across the category "women"

that feminists have always intended to represent, has challenged previous legal mobilization strategies. Can mainstream women's rights organizations still promote gender equality in the name of all women? And with which legal means?

One must therefore explore how the Canadian women's movement has responded to these changes and how it has taken into consideration minority groups' demands in the context of Canadian multiculturalism. Indeed, since 1971, multiculturalism has been an official policy promoted by the federal government, and it was subsequently enshrined in Section 27 of the Charter. Section 27 stipulates that "this *Charter* shall be interpreted in a manner constituent with the preservation and enhancement of the multicultural heritage of Canadians." Although multiculturalism was designed in the first place as a way to break with previous colonial and racist politics vis-à-vis ethnic minorities,⁹ as well as to subsume the specific issue of Québec's nationalism and to stall discussions on its sovereignty thanks to an all-minorities encompassing concept, the inclusion of Section 27 in the Charter marked the recognition and the institutionalization of multiculturalism as a core element of Canadian identity. This interpretative clause is also often considered as the more advanced liberal response to ensure protection of individuals members of minority cultures.

The "Sharia courts" debate in Ontario thus offers an exceptional case study of a successful women's rights organization campaign¹⁰ against a legal disposition: the possibility to arbitrate family disputes by following religious principles, viewed as a by-product of multiculturalism.¹¹ How did women's rights activists successfully mobilize the law to oppose multiculturalism in its homeland? To explain their legal strategy, I develop a comprehensive approach focusing on their perception of the law.¹² Indeed, their understanding of how law can be used to protect women's rights has determined their framing of this new issue, the alliances they have forged, and their expectations. First, I explain how antidiscrimination law and mainstream women's rights organizations' litigation strategies in the past have shaped the legal concepts Canadian feminists developed. I argue that both the way the law defines distinct grounds of discrimination and the way feminists have theorized and mobilized for gender equality without being able to integrate intersectionality have contributed to the opposition of gender equality and multiculturalist values. I then examine how feminists have mobilized these categories in the recent controversy. I argue that previous feminists' legal mobilizations have created a form of conceptual (rather than institutional) path dependency:¹³ the legal rationales used to define concepts such as gender equality or women's autonomy, and the difficulty of taking into account intersectionality have, once mobilized in the context of the "Sharia court" debate, reiterated the opposition between women's rights and minority rights. I conclude with an appraisal of what scholars of discrimination can learn from this case study.

Intersectionality, Antidiscrimination, and Canadian Feminists' Legal Strategy

Constitutional politics and Charter litigation have been Canadian feminists' favorite sites of struggle for gender equality. The Canadian feminist movement's focus on legal strategy stems from a belief that law has been for a long time an obstacle to women's

rights but that it can and should be an ally.¹⁴ Through their constitutional activism (see Doerr & Carrier, 1981), Canadian feminists have first secured two important equality provisions in the Charter. Its Section 15(1) is a classical antidiscrimination provision protecting individuals from discrimination emanating from state regulation, legislation, and provincial or federal administration practices. Sex is here one of the forbidden grounds of discrimination:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The other section of importance for Canadian feminists is Section 28, which has been a crucial stake in their mobilization during the drafting of the Charter (Kome, 1983). Indeed, whereas Section 33(1) enables the Parliament or the legislature of a province to legislate acts that will operate notwithstanding the provisions included, among other sections, in Section 15, Section 28 saves sex discrimination from this potential danger by stating that “notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Gender is therefore the only ground of discrimination inexorably forbidden by the Charter.

Gender equality was therefore enshrined in the Charter through a classic antidiscrimination provision guaranteeing equal treatment between men and women, but sex was a specific ground of discrimination insofar as it was the only one protected by Section 28 against provincial or federal backlashes. Since 1982, Canadian feminist legal scholars have devoted a lot of their energy to theorizing gender equality and to giving this concept more legal substance, to go beyond the equal treatment provision. To broaden the scope of gender equality, and to deepen their concrete beneficial effects for Canadian women, Canadian feminists have challenged the legal doctrine to incorporate feminist insights in the jurisprudence (Majury, 2002; LEAF, 1996). Canadian feminist activists’ Charter litigations in front of the Supreme Court denote a very complex and profound legal consciousness developed over more than three decades (on LEAF especially, see Manfredi, 2004). In advocating for substantive equality, LEAF has emphasized the systemic character of patriarchal domination, as well as the structural dimension of gender inequality. Canadian feminists have pushed for a definition of gender equality as substantive equality, a broad definition that can encompass indirect and unintentional discrimination, especially for groups historically dominated (Baines & Rubio-Marin, 2005). Through various decisions, the Supreme Court has progressively agreed with feminists from LEAF that equality can mean treating two groups differently; that it means more than accommodating the group defined as “different”; and that to eliminate systemic discrimination, one has to challenge and revise the norms and standards that contribute to excluding dominated groups. Hence, the record of feminist legal mobilization in Canada is wide-ranging and has had numerous positive implications for Canadian women, in particular for abortion rights and the legal definition of equality (on abortion, see Brodie, Gavigan, & Jenson, 1992).

However, Canadian feminists' legal strategy is fraught with two difficulties. First, it has to rely on a classical antidiscrimination provision, Section 15, which enumerates distinct grounds of discrimination and therefore misses the possibility of their intersection. As Kimberlé Crenshaw (1989) has noted, this legal categorization has a problematic "tendency to treat race and gender as mutually exclusive categories of experience and analysis" (p. 139). In such a legal framework, it is almost impossible for a complainant to allege discrimination on two simultaneous grounds, such as gender and race. Rare attempts made to litigate in such a way in the United States (see cases in Crenshaw, 1989) and in Canada (for Canadian Human Rights cases, see Duclos, 1993) have failed. As Nitya Duclos (1993) remarks, these discrete categories constructed by anti-discrimination law (gender/race/religion/disability and so on) make individuals who are at the intersection of several unequal social relations disappear. Only in law do these relations such as sexism and racism, which are embedded within each other in real life, "become mutually exclusive categories" (p. 33). Because "law constitutes the categories of thought and analysis of social issues and possibilities" (Garth & Sarat, 1998, p. 7), it affects how individuals and groups can seek redress.

The "separate grounds" approach that prevails in antidiscrimination doctrine privileges groups that differ from the norm only by one characteristic (such as gender or race). In other words, it is easier for White women, or Black men, to file complaints for discriminatory treatment than for Black or minority women (Crenshaw, 1989). Canadian Aboriginal women have been caught in this either/or categorization since the landmark Supreme Court case *Lavell v. A-G. Canada* in 1974 (Green, 2001, 2004). Indeed, in *Lavell* the Court upheld a provision of the federal Indian Act that stated that only Aboriginal women, not their male counterparts, lost their status under the act when marrying outside of their community. The Court argued that the provision applied equally to all Aboriginal women and thus was not contrary to the principle of equality before the law. Since then, as Joyce Green (2004) suggests, Aboriginal women have "obtained rhetorical benefit, along with white and other women, from the equality guarantees in the Charter. . . . Yet, this has not translated into equitable treatment or representation as *Aboriginal women*" (p. 49). Hence, legal categorization affects which groups can ask for redress through the courts. In 1989, Gwen Brodsky and Shelagh Day noted on behalf of the Canadian Advisory Council on the Status of Women that they "would have liked to explore more fully the application of the *Charter's* guarantees to the inequality of women who are discriminated against because of race, disability, or other grounds," but that no case had reached the courts, and the only cases involving poor or lesbian women did not use the sex equality provisions of the Charter (p. 4). Since 1989, jurisprudence on cases involving intersectionality has developed, but very slowly and unevenly: As Beverley Baines (2005) suggests, if feminist legal mobilization has been able to "contextualize" women with respect to sexual orientation or age, it has not succeeded in doing so for religious or immigrant women (p. 72).

However, the "separate grounds" approach to antidiscrimination is not the only reason why minority women's interests have been less represented in the courts. Canadian feminists themselves have pushed for Section 28, which gives extra protection to

gender equality, a protection grounds of discrimination other than sex do not enjoy. The second difficulty that the dominant Canadian feminist legal strategy faces is therefore the exclusive emphasis it has given to gender discrimination. This prominence has been criticized as inapt to encompass a wide range of experiences linked to other grounds of discrimination. This emphasis typically stems from the “top-down” approach to discrimination mentioned by Crenshaw (1989). It is the perspective of a group that tends to experience only one form of discrimination, a group that differs from the norm only in one respect. For example, although for both Aboriginal women and mainstream feminists *Lavell* was a defeat—they all agreed that this provision undermined Aboriginal women’s equality rights—they did so for different reasons. For feminist groups, *Lavell* was about women’s equality rights in general. The specific experience of Aboriginal women, and the fact that the provision discriminated against them as women and as Aboriginals, did not have much relevance (Dobrowolsky, 2000, pp. 41–42). On the contrary, for Aboriginal women’s groups, *Lavell* was about the Indian Act and its discriminatory impact on Aboriginals in general and Aboriginal women in particular.¹⁵

At the end of the 1990s, with the case *Little Sisters*, the issue of sexual orientation revealed again the problems raised by the centrality of White heterosexual feminists’ experience in litigation strategies (Dobrowolsky, 2000). In its own opinion, LEAF made a very successful move against pornography in front of the Supreme Court with the case *Butler* in 1992. Following LEAF’s position, the Supreme Court agreed to define pornography based on social harm rather than moral judgment.¹⁶ However, when in 2000 this decision turned against *Little Sisters*, a lesbian bookstore that imported lesbian erotica from the United States, LEAF had to admit that the position it had previously defended in front of the Supreme Court did not take into account the needs and preferences of lesbian women. To bridge the increasing divide within the feminist movement, LEAF defended *Little Sisters* and argued that lesbian erotica could not be treated the same way as heterosexual pornography (Manfredi, 2004, pp. 78–81). This event reminded the movement once again that grounds of discrimination other than gender affected many women, who therefore could define their priorities differently.

Hence, in the 1980s and the 1990s, several tensions arose that challenged the mainstream legal strategy of the Canadian feminist movement. Priorities such as abortion and pornography were questioned, and the definition of gender as a basis for the movement’s legal mobilization strategy was criticized as being essentialist (Dobrowolsky, 1998; Pal, 1993 **[AQ: 3]**). Confirming the analysis proposed by Crenshaw, the omission of intersectionality in feminist litigation strategies, although perhaps involuntary, has had a structural impact on feminist practices and contributed to the marginalization of the needs and specific experiences of women of color and minority women in general (Crenshaw, 1991) and to reify and essentialize cultural difference (Volpp, 2001).

The missing intersection in the women’s rights movement’s legal strategy is therefore a by-product of both antidiscrimination law and of the movement’s emphasis on gender alone. Hence, despite controversies, decades of legal mobilization and legal categories have helped to structure the framing of Canadian feminists’ right claims, as well as the formation of the collective identity that sustains their legal mobilization.

Feminist organizations have tended to litigate to impose a substantive definition of *gender* equality and have done so in the name of a homogeneous category: “women.” How has this missed intersection influenced feminists’ reactions to the “Sharia court” debate, their expectations, their potential solidarities, and the development of their legal strategy to ask for a reform that would forbid the use of religious principles in family dispute arbitrations? The mobilization against religious arbitration reveals that the legal concepts built through years of litigation and theorizing have deeply shaped feminists’ understanding of the issue and their mobilization.

“Sharia Courts” in Ontario: A Multicultural Stone in the Feminist Backyard

Since the end of the 1980s, several debates have called into question the politics of multiculturalism in Canada. Although originally multiculturalism was promoted strategically to associate the issue of Québec’s sovereignty and that of Aboriginal nations’ rights in order to mitigate their claims, Canada’s active immigration policy altered its target groups and aims. As early as 1988, the scope, the legitimacy, and the legality of multiculturalism were questioned with respect to immigrant communities in Ontario as Sikh students wearing their traditional *kirpan* (a ceremonial small dagger) were banned from school and subsequently filed a complaint in front of the Ontario Human Rights Commission (OHRC).¹⁷ The OHRC set up a board of inquiry that recognized in 1990 that the policy prohibiting the wearing of a *kirpan* at school violated Section 10 of the Ontario Human Rights Code, as it discriminated against Sikh students and “was unreasonable considering that no incident of *kirpan* misuse had occurred in any Canadian School” (Wayland, 1997, p. 549). Although this recommendation did not entail a consistent provincial policy, it did settle the issue at the time (Wayland, 1997, p. 550).

In 1994 and 1995, Québec also had its own *hijab* affairs. The first one, in 1992, appeared publicly when a Québécois newspaper revealed that female teachers who were willing to teach in Muslim schools were required to wear a veil. This first affair did not lead to litigation, contrary to the second one. In 1994, a young Muslim girl was expelled because of her wearing of the veil. She complained to the provincial antidiscrimination commission (Commission des droits de la personne et des droits de la jeunesse), which ruled in her favor, considering that her religious freedom had been infringed. This recommendation was legally conceivable at the provincial level, again because Québec’s Charter of Human Rights and Freedoms, which is recognized by the Supreme Court as “quasi-constitutional,” includes the right to religious freedom in its antidiscrimination statute, which is not the case in all Canadian provinces. Hence, the Commission used Article 3 of the Québec Charter on the fundamental right to freedom of expression and religious freedom and Article 10 on the right to equal recognition and exercise of rights and freedoms. It stated in its decision that restrictive school dress codes, such as the one banning headscarves, infringed on Muslim girls’ ability to choose their public school. Finally, in 2001, the wearing of the *kirpan* was also debated in Québec when a school refused to allow a Sikh pupil to wear his dagger in a secure

sheath. However, contrary to the two previous cases, this one went to the Supreme Court and was settled in 2006. These three debates were settled by public authorities (provincial Human Rights Commission and Supreme Court), and the official or legal decisions allowing students to wear these religious items in school each time upheld multiculturalist values.¹⁸

The “Sharia courts” debate hence is only one of several debates over multiculturalism in Canada. However, it is different because it takes place in the post-9/11 context, marked by an increase in discriminatory practices against Muslim communities¹⁹ (Helly, 2004). Moreover, whereas the previous *kirpan* affairs²⁰ did not raise the issue of women’s rights, the religious arbitration debate’s focus quickly became the tension between multiculturalism and gender equality. Finally, contrary to previous debates, in this case the premier and the legislative assembly of Ontario decided to restrict what religious communities are allowed to do. Therefore, despite precedents, and despite previous litigation concerning Aboriginal women’s rights, the religious arbitration debate was the first major public debate in which feminists argued, and won, against multicultural accommodations.

Syed Mumtaz Ali, leader of the IICJ in Toronto in the fall of 2003, launched the public debate when he stated that he would use the provincial law on arbitration to arbitrate family disputes according to Sharia rules. This declaration released to the media and his alleged connection to Islamic fundamentalists encouraged the Canadian Council of Muslim Women (CCMW) to contact several women’s rights organizations, including NAWL, and to alert the government. What specifically spurred the CCMW to act was the IICJ’s declaration that “good Muslims” would use its services to resolve family disputes. They feared that pressure would exist in the community to direct Muslims to one particular institution, which, they thought, was particularly conservative. They were strongly opposed to the IICJ’s attempt to define itself as the legitimate judge with respect to religious practices in the Ontarian Muslim community. As an organization that unites religious women with different takes on their religious practices, the CCMW felt that the declaration of the IICJ’s leader endangered its own vision of the Muslim community as a diverse one. However, through the process of coalition building with various local and transnational actors, this first framing of the issue—maintaining plurality within the Muslim community—was rapidly replaced with a new one, underlining the potential dangers of Islamic law for immigrant and religious women.

The first set of actors the CCMW interpellated were existing Canadian women’s rights organizations such as NAWL, LEAF, the Mouvement Ontarien des femmes migrantes francophones (MOFIF), and National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC). However, they also rallied new actors. Indeed, the CCMW contacted early on a transnational organization, Women Living Under Muslim Law (WLUML). They had had no previous contact, but Rights and Democracy, an organization based in Montréal and with close ties to NAWL, connected them. WLUML, as a transnational organization fighting to improve women’s rights and protections under Muslim law, especially in countries applying Sharia in their justice system, had a wide knowledge of discriminatory practices done in the name of

Sharia in several countries. They brought to the coalition not only expertise but also numerous cases of abuses and rationales in favor of separation of state and religion, which became central to the mobilization against religious arbitration. Although the cases and the expertise they used concerned almost exclusively Middle Eastern countries and were not relevant, from a legal point of view, for the Ontarian situation, they still greatly contributed to the shaping of the coalition's stake on the issue.

Rapidly, at the beginning of 2004, this coalition appointed a steering committee, gathering other women's rights organizations as well as individuals, especially legal scholars, to work on the issue. The CCMW hired a legal scholar to analyze the reception of Muslim family law in three democracies (France, Germany, and Britain). NAWL also hired a legal scholar to research the legal background of arbitration and family laws to elaborate the official position of the coalition finally released in a report (Fournier, 2004). In May 2005, the committee organized a conference inviting WLUML to participate among others organizations, and the "No Religious Arbitration" coalition was officially launched. Simultaneously, an Iranian refugee in Ontario, Homa Arjomand, created her own coalition, "No Sharia," launching a media-savvy and international campaign against religious arbitration in Ontario, including a worldwide petition, talks, conferences, travels to Europe, press releases, and so forth.

Meanwhile, the government reacted to these organizations' pressure and appointed an independent investigator to review the issue of alternative dispute resolution applied to family law, to evaluate its impact on vulnerable individuals, and to propose recommendations. With a record as a former attorney general, a member of the Ontario Bar, and a prominent feminist voice—she had been a major activist against domestic violence—the investigator had the credentials to respond to women's rights organizations' demands. Members of the staffs of the two mandating institutions (three came from the Ontario Ministry of Attorney General and three from the Ontario Women Directorate) were appointed to help her with her task. The closest team was from the Ministry of the Attorney General's staff and was composed of two lawyers trained respectively in family law and arbitration law, as well as a legal scholar with training in political science and law who researched the issue for her. The complexity of both Ontarian family law and the Arbitration Act of 1991, which were at stake, demanded close examination. As all participants in the debate acknowledged, on both sides, nobody knew beforehand about the ins and outs of arbitration law. As the investigator's terms of reference suggest, protecting "potentially vulnerable individuals, such as women, disabled, and old people" from negative impact of arbitration practices in family dispute resolution was the government's main concern. The investigator's mission was to examine existing legal protection and to make recommendations that would reflect, among other principles, the values of the Charter (Boyd, 2004, Appendix 1).

At the time when the government took action and the review process was beginning, the discursive frame was clearly in place: Religious law's impact on women, defined as a vulnerable category, was the issue at stake and the issue being investigated from a legal point of view. Although on both sides, the coalition and the government, legal research was going on, the outcome of these two parallel processes were opposite.

Whereas the “No Religious Arbitration” coalition concluded that the Arbitration Act had to be revised to forbid religious arbitration, the investigator concluded her public hearings and review with a report recommending that religious arbitration be controlled with safeguards for women, but still legal (Boyd, 2004, Section 8).

For the investigator, the issue was about protecting vulnerable women while respecting Canadian multicultural values as well as the spirit of the Ontarian legal system. According to her recommendations, arbitration for family dispute was congruent with the Ontarian family law system that allows private dispute resolution. However, it had to be regulated, via official training of the arbitrators; and records of decisions had to be kept so that the negative impact on specific categories such as women could be evaluated in the future. Moreover, a reform of the Arbitration Act had to set safeguards for vulnerable individuals. Women could be rightly protected, in her opinion, if independent legal advice was compulsory before entering an arbitration process, if there was screening for domestic violence and if programs of legal education targeting vulnerable women were adequately developed.²¹ Besides, financial legal aid had to be secured so that poor women could also benefit from independent legal advice. In her opinion, religious arbitration was consistent with the values enshrined in the Charter, especially its Section 27; it was occurring within a legal framework and had to be kept so; otherwise, she felt there was a risk of religious practices going underground and being impossible to review. In her view, such a phenomenon would affect vulnerable women even more, as they would no longer be able to seek legal advice at all.

The report, released on September 20, 2004, received many criticisms from the “No Religious Arbitration” coalition, which instantly decided to lobby the Ontario premier and political elites to counter its recommendations. For about 9 months the “No Religious Arbitration” coalition joined efforts with the “No Sharia” campaign, organizing conferences, networking, and, more importantly, talking to the media. Depictions of what women could endure under a Sharia law regime—although Ontario Arbitration Act permitted arbitrators to take decisions according to religious principles only insofar as the decisions respected Ontario laws, and obviously human rights—soon spread in the news media and interpellated the public. The debate resonated within the post-9/11 context and the criticisms against the values promoted by multiculturalism, and gender became the battlefield of multiculturalist politics.²² Similarly to other debates that occurred in North America and in the international arena about female genital mutilation or honor crimes (see Berkovitch & Bradley, 1999; Cohen, Howard, & Nussbaum, 1999), women’s fate in minority groups was instrumentally mobilized to denounce multiculturalism as a nondesirable political project.

Dutch MP Ayaan Hirsi Ali, a vocal opponent to Islam, was invited to Ontario by the “No Sharia” campaign to denounce the drift towards fundamentalism and the lack of governmental action to protect women from their own communities. Homa Arjomand repeatedly argued that the IICJ’s demand was only a first step in an international plan to foster what she called “political Islam” and to install fundamentalism within Muslim communities in Western countries. Hence, the Ontarian debate resonated with other

debates taking place at an international level and imported to Ontario through transnational actors. Opponents to religious arbitration presented Ontario as a “test case.” The provincial government therefore had the responsibility to send a clear message to the rest of the world. For them, multiculturalism in Canada had to be interpreted through an international lens focusing on the rise of Islamic fundamentalism in many places in the world.

Women’s Vulnerability: A Category of the Feminist Legal Critique

The issue of Muslim women’s vulnerability was at the center of the controversy. The terms of the investigator’s mission stated it clearly, as did those of the “No Religious Arbitration” coalition report. Although its title, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, suggests that all women could suffer from arbitration, the emphasis throughout the report is on “the impact that Sharia law could have on Muslim women in Ontario” (Bakht, 2005, p. 6). Scholars of law and social movements (Garth & Sarat, 1998; McCann, 1998; Rosenberg, 1991) have argued that the way activists perceive the law determines the type of claim they can elaborate. In the case of the “No Religious Arbitration” coalition, the actors that had more legal expertise translated the terms of the feminist legal analysis they had developed on issues such as domestic violence or the privatization of family law to understand and analyze the issues at stake and to propose adequate remedies. The translation of the terms of their former legal analysis into a new legal claim made in the name of minority women’s protection was not only a possibility made available because organizations representing Muslim women’s interests, such as CCMW, concurred with their analysis. This translation was also a necessity: Because of the lack of intersectionality in their former legal mobilization, women’s rights activists had not yet elaborated legal rationales on how to protect minority or religious women. Importing from previous legal analysis elaborated to protect “vulnerable” women was therefore a choice following from a form of elective affinity in their legal reasoning.

The way the members of the “No Religious Arbitration” coalition perceived the law, and how it should protect women, is therefore a crucial factor in understanding their position in the debate and the framing of the issue they have elaborated. Because the aim was a legal reform, NAWL was mainly in charge of the legal analysis: It provided the legal expertise and the reports that defined the position of the coalition. LEAF did also provide some legal expertise, but to do so it hired the same scholar as NAWL. Hence, the legal analysis is quite similar for both organizations. For CCMW, this political and legal campaign was the first one; they had no legal background and relied on NAWL’s analysis. As a transnational organization, WLUML was not directly part of the legal campaign and only brought expertise on women living under Muslim law in other countries. NAWL’s work was thus crucial. The coalition’s rejection of religious arbitration relied on its close analysis of the Arbitration Act as well as Ontarian

family law, which showed that the legal framework was discriminatory against women and that it did not ensure gender equality.

To analyze this new issue, NAWL relied on its previous legal expertise elaborated through decades of mobilization for legal reform. Indeed, the protection of women under Ontario family law, especially under the alternative procedures of dispute resolutions it authorized (such as mediation and private agreements), had been on their agenda since the inception of the organization.²³ NAWL imported the terms of this previous analysis on the privatization of family law and translated it for this new issue. In this translation process, the figure of the vulnerable woman changed, from woman victim of domestic violence to vulnerable Muslim/immigrant woman, but the content of the analysis remained.

To understand how this process of translation occurred, it is crucial to underline that nobody knew the legal ins and outs of the Arbitration Act; there was no data available on arbitral decisions that could show a differential negative impact on women, as the Arbitration Act did not require arbitrators to keep records of their decisions.²⁴ Besides this lack of data, there also was a lack of judicial cases. Courts had decided upon arbitration cases only twice. No legal scholar could elaborate a consistent judicial interpretation based on such a small number of cases. Moreover, the women involved in these cases could not be depicted as vulnerable. Finally, there was also a lack of data on migrant women in Ontario. Although they were at the center of the controversy, according to government officials, no socioeconomic data was available that could help define their concrete situation and their potential social vulnerability.

All the participants in the controversy admitted that this fact was a crucial factor in the elaboration of their position on the issue, but they tried to compensate for this lack with two different approaches. The government investigator launched a wide public consultation to attempt to compensate this lack of data with direct testimony, but despite a great number of people and groups offering their insights on the issue, none gave direct or indirect testimony of discriminatory arbitral decisions against women. On the contrary, NAWL relied on its previous expertise and its many experiences with respect to women and the law: Legal theory and legal expertise became crucial tools for women's rights advocates to craft their position.

To explore these legal issues, NAWL hired a legal scholar who had previously worked for them on family law issues. Although she was not a long-time NAWL member, she had a background in feminist legal scholarship and knew NAWL's positions on family law. Moreover, although she worked on the report that would be the basis for NAWL's position against religious arbitration, she was closely supervised by one of NAWL's leaders in charge of family law issues. Her dialogue with her supervisor reveals the process by which NAWL's frames were imported in the analysis of this new issue (N. Bakht, interview with the author, March 31, 2006). In her report, she included rationales on consent, voluntariness, and free will that had been developed for other issues (Bakht, 2005, pp. 18-20), as well as a whole section on Charter interpretation that dealt with the definition of equality and discrimination.

NAWL, and to a certain extent LEAF as well, relied heavily on their previous experiences and repertoires. They used analogical reasoning—a standard legal technique—to build their case, and they compared women facing domestic violence with migrant women. They translated the terms of the feminist analysis, according to which mediation or privatized forms of justice are not favorable to women trying to escape domestic violence, to the case of religious arbitration. NAWL had done important work on domestic violence issues and insisted that the asymmetry of power that characterizes gender relations in general, and is even more prominent in situations of domestic violence, invalidated the idea that women could enter freely into a private agreement defining the terms of a separation or property division issues. For several decades, NAWL, among others, had mobilized in sexual assault cases before the Supreme Court to ask that the definition of consent take into account the asymmetry of power between men and women. Drawing on these previous experiences and conceptualizations, NAWL elaborated its perspective on family law insisting that gender inequalities could only be reinforced by the privatization of justice. As one of its leaders remarked,

It's been years we've been writing about mediation. Not that we are opposed to it, but we're asking for safeguards. We're opposed when there is domestic violence, when there is inequality. All the studies demonstrate that women are not better off with mediation.

When the issue of religious arbitration appeared on its radar, NAWL had no previous knowledge on arbitration procedures or arbitral decisions. However, in a context in which intersectionality had never really been dealt with, and women's rights tended to be opposed to religious groups' rights, Muslim women could be defined as migrant and/or vulnerable. This definition made it possible to translate previous frames elaborated for women victims of domestic violence to frame this new claim against religious arbitration. In interviews with members of the various organizations opposed to religious arbitration, as well as with bureaucrats from the Ontario Women's Directorate, the comparison with women victims of domestic violence was a recurrent theme.²⁵ NAWL's leader clearly drew on her critical analysis of family law and consent:

This question was crosscutting in all our analysis. There are many levels of analysis, but when I was making short speeches to summarize our position I insisted on the issue of women's consent, whether in mediation or arbitration. Consent in a situation of inequality, it's difficult to talk about real consent, when you don't have information about your rights you can hardly call it reasonable consent, or when there is domestic violence, or just when there is socioeconomic inequality. That was the core of our analysis. (A. Côté, interview with the author, March 13, 2006)

Another feature of NAWL's legal expertise was its emphasis on women's rights as universal human rights. They insisted on the preeminence of gender equality over

other rights in the Charter, interpreting Section 28 as the proof that gender equality has a specific legal status, although the Supreme Court has not yet had the opportunity to decide if Section 28 trumps other rights enshrined in the Charter. In this perspective, the banning of religious arbitration was seen as a way to guarantee equal treatment to all women. If religious women had to go to civil courts, then they would all be subject to the same law and have the same rights guaranteed. A NAWL member in charge of the issue argued,

For sure we were convinced that women are often taken over by their community. They are waved as flags. Many Muslim women have become standards raised by their community, to identify the group, as Aboriginal women have been. Hence we claim for a truly universal implementation of the law. (A. Côté, interview with the author, March 13, 2006)

Hence, the way NAWL perceives the law as a tool that can be reformed to protect women, its critical understanding of legal categories such as consent and autonomy, and its feminist expertise determined the main legal framing of the “No Religious Arbitration” coalition. Women victims of domestic violence and Aboriginal women were a key element of the comparison that sustained NAWL’s legal analysis. This comparison helped emphasize women’s vulnerability to religious arbitration as well as underline structural inequality in power between men and women in migrant or religious communities. Religious arbitration was then framed as a process in which reasonable consent of the weaker party could not be guaranteed. It was also framed as a particular regime of justice, enshrining a double standard of normative principles in the justice system. Taking arbitral decision upon religious principles contradicted the universal application of the law. In these circumstances, women’s rights organizations argued, gender equality could not be secured under the Arbitration Act, and the act had to be repealed. This claim was heard and agreed to by Ontario Premier Dalton McGuinty when he finally declared to the press on September 11, 2005—a symbolic date—“There will be one law for all in Ontario,” clearly echoing the framing of the issue elaborated by NAWL and its allies and putting an end to the controversy.

Competing Narratives of Women’s Emancipation and Multiculturalism

However well argued, the legal analysis of NAWL and of its allies did not convince the investigator in charge of the review process for Ontario’s premier. She was herself a former activist against violence against women and a self-defined feminist, but she and her staff of lawyers had another take on the issue, anchored in a different perception of law. Indeed, the investigator and the small staff working for her were all lawyers and bureaucrats, very much influenced by their legal understanding of Ontarian law, as well as by their work in the service of the government of Ontario. In other words, values central to the Ontarian legal system and to the province of Ontario—and even to Canada to a certain extent—guided their analysis of the issue. Here too, their identity

as civil servants or former representative of the province determined their position. They had no transnational allies and defined the issue from a local perspective.

Moreover, they had a specific perception of the law and of how it can serve women's interests. Three main features defined their legal consciousness. First, they believed that the Ontarian legal system allows, and encourages, individuals to act and to decide for themselves rather than to go to civil courts. In a typical liberal stance, state intervention should be, when possible, minimal, and individuals should be considered *a priori* autonomous. Second, they also argued very strongly that multiculturalism was a central value defining Ontarian as well as Canadian identity and that allowing communities to arbitrate religiously with some safeguards would only favor their integration into Canadian society. Third, the investigator insisted that denying Muslim women autonomy was patronizing and discriminatory. It portrayed Muslim women as lacking agency and as unable to make the choices that suit them best.

These understandings of Ontarian law guided their analysis of the problem. Whereas opponents to religious arbitration argued that migrant women's social position deprived them of the agency to be an autonomous individual, the investigator's team insisted that nobody could assume the right to talk in the name of these women, to represent them, or to pretend to know better than they what was good for them. This conviction was reinforced by the public hearings held during the review process. Indeed, she insisted that

many religious Muslim women who do work in their community, do advocacy work, work with feminist organizations, came forward and overwhelmingly said the challenge was to balance individual rights with religious rights, and very strongly said we're not doing women who are religious women a favour by telling them they can't make religious choices in terms of what they can accept in a family law resolution. (M. Boyd, interview with the author, March 21, 2006)

In other words, she and her staff considered that migrant women could be autonomous individuals under Ontarian law and could therefore enter into private agreements authorized by this law. The power imbalance between men and women denounced by the coalition could be dealt with pragmatically, with the amendments to the Arbitration Act and to family law that they proposed.²⁶

Hence, the investigator proposed a competing narrative of women's emancipation and of the feminist project. This narrative had been forged through her own experience as an activist in the domain of domestic violence. She insisted that, contrary to the dominant representation of women who are victims of domestic violence, these women could and did show their agency in the decisions they made and that they should not be defined only as victims. Here again, the analogy enabled her to compare women victims of domestic violence with migrant women, but this time to draw the opposite conclusion. She therefore argued in favor of a feminist movement that could take into account the criticisms it had faced throughout the 1990s:

In fact it's another chapter in a very long struggle to really make feminism inclusive in Canada. To recognize intersectionality. We still struggle all the time in recognizing that gender is only one part of our identity and that from time to time it may be the more important, but for some women religion, culture, language may be more important. And women . . . women are not . . . homogeneous in the sense, what their value is always going to be, the gender politics of it. (M. Boyd, interview with the author, March 21, 2006)

Besides her own convictions about gender equality and women's autonomy, the public hearings she conducted for her report, which took place over a 2-month period in the summer of 2004, also influenced her recommendations. She heard 198 individuals, and 43 organizations submitted materials and came to talk to her as well. Members of religious communities especially expressed their desire that the Arbitration Act be revised but not repealed. They all appealed to the Charter, and especially to Section 27 on multiculturalism and Section 15 on equal treatment to back up their position. Moreover, Muslim organizations were prompt to denounce a potential discrimination, as they felt Islam was targeted rather than religion in general. Indeed, for example, the Canadian Muslim Lawyers Association; the Canadian Council of American-Islamic Relations; and representatives from a major Toronto mosque, Masjid-El Noor, underlined in their memos the fact that arbitration had been going on since 1991 in many communities, especially in the Orthodox Jewish community, but that it aroused the media's interest only when it became public that Islam practiced it when the IICJ made its announcement. Many people conveyed this fear of discrimination to the investigator during the hearings, and she was influenced by both this argument and their demand that arbitration should be regulated. Indeed, this request for regulation was also intended to show that the practice of Islam was compatible with a Western democratic system. As Masjid-El Noor's memo argues,

[Religious arbitration] is valuable to the discourse on the compatibility of Islam with democracy. Far from being a signal to the despots of the world that misuse Islam, it is a loud cry against them and a solid proof that Islam is flexible enough to work within the current Western systems. This point should be a very important one to consider because it gives the state direction as to how it will proceed with its Muslim population—a clash of civilizations or an embrace.

As a former attorney general of Ontario, the investigator was convinced by this argument, and she felt it did correspond to the Canadian model of multiculturalism, as well as to the spirit of Ontario family law, which allows many private ways to solve disputes. Her report underlines several times the issue of Ontarian and Canadian identity as a country of immigration committed to multiculturalism and accommodation towards religious minorities. In some of her public speeches, she strategically dated the practice and the spirit of arbitration back to the end of the 18th century when it

was used to satisfy the French Catholic minority. Overall, she argued that regulated arbitration was compatible with the Ontarian legal system and the values it embraces. She and her staff of lawyers agreed that the final banning of religious arbitration passed by the Ontarian government in February 2006 constituted a minor but still real break with the Canadian model embedded in the Ontarian legal system. As the investigator remarked,

I'm afraid I see a shift away from a commitment to true multiculturalism. True multiculturalism is when people can practice their cultural and religious views under the umbrella of Canadian law. And [the banning of religious principles] said to people, well if we don't like what your principles and values are you can't practice them in Canada, that's a pretty bad message! (M. Boyd, interview with the author, March 21, 2006)

The way the investigator and her staff perceived the role of law in protecting vulnerable women was influenced by their direct practice of law, as lawyers, and their mission to embody Ontario official values as civil servant or ex-members of government. They tried to argue from a law specialist perspective, insisting on the legality of religious arbitration under the Ontarian law and that it did not contradict Ontarian and Canadian values. The hearings they held further convinced them that Muslim women should not be portrayed as structurally vulnerable and that safeguards could guarantee their protection while respecting their autonomy as religious women. Finally, multiculturalism, as a core Canadian value, oriented their legal analysis. They felt that Canada had built a specific societal model to accommodate minorities and that banning religious arbitration would go against previous commitments.

Conclusion

On both sides of the controversy, values enshrined in the Canadian Charter were claimed, the Charter itself was interpreted, and the role of law in the making of a just society was underlined. However, these interpretations of common principles differed greatly. Indeed, each actor interpreted the Charter and Ontarian law according to its previous legal analysis. As this case study has shown, previous legal mobilization and previous practice of law are crucial in the making of activists' legal consciousness and their framing of new issues. Central to the feminist analysis of law, concepts such as consent, women's autonomy, or gender equality, elaborated during decades of legal mobilization on various issues, helped organizations such as NAWL define their position on the new issue of religious arbitration. As this case study has shown, a movement's perception of legal categories—in this case characterized by a missing intersection between gender and other grounds of discrimination such as religion—is a crucial factor in explaining how it elaborates its claim on a new issue.

Finally, two lessons can be drawn from this case study for scholars of discrimination. The first one is that antidiscrimination law tends to encourage activists to seek "protection" and redress for victims. Because it appeals to our sense of injustice and to the gap

between equality in the book and in reality (Ewick & Silbey, 1995), these provisions are powerful ones. However, when the groups identified as victims are situated at the intersection of several social power relations, the claim for redress or protection might introduce a tension between various features of their identities. Although they experience different elements of their identities, such as gender and religion, as a whole, the claims for protection might entail giving up one dimension for another. Therefore, for the activists who seek to represent constituencies such as “Muslim women,” the rationale of protection might be a double-edged sword for the group it intends to protect.²⁷

The second lesson that can be drawn from the debate on religious arbitration is that discrimination law and policy can give rise to major antagonisms between legal progressivist activists, and even self-defined feminists, when they target the intersection of several grounds of discrimination, mainly gender and religion in this case. Discrimination law and policy traditionally target one group at a time, on the basis of one ground of discrimination: gender or religion or ethnicity. This compartmentalization of the issue of discrimination has led social groups to organize around one feature of their identity rather than several and, therefore, to leave aside other important aspects of their own social experience and/or of other groups’ social experience, such as minority women. Legal mobilizations have been focused on the fight against one type of discrimination, such as gender, therefore contributing to the crafting of “one-sided” legal consciousness. As a result, legal mobilization around cases involving several grounds of discrimination can be antagonistic, and the policy-making process can only be controversial, with sometimes paradoxical or unintended consequences. The shift away from the multiculturalist model in the land of multiculturalism is only one example of the unforeseen effects of the lack of articulation, within discrimination law and policy, of various types of discrimination.

Declaration of Conflicting Interest

The author(s) declared no conflicts of interest with respect to the authorship and/or publication of this article. **[AQ: 4]**

Funding

The author(s) received no financial support for the research and/or authorship of this article. **[AQ:5]**

Notes

1. Subsequently named the Charter.
2. This statement is mostly true for Anglophone feminists. Indeed, due to their legal system and political culture, Francophone feminists in Québec have used law reform through their national Parliament rather than litigation in front of the Supreme Court (Revillard, 2007). Hence, mainly Anglophone feminists have supported the cases that have helped secure a substantive definition of equality in front of the Supreme Court. Therefore, in this research the term *Canadian feminists* designates mostly feminists outside of Québec. Moreover, the term *Canadian feminists* cannot capture the wide diversity of this movement nationwide; it rather aims here at designating the main organizations which have fought for legal change

since the mid-1970s, that is to say, mainstream and mostly White middle-class organizations such as the Women Legal Education and Action Fund (LEAF), the National Association of Women and the Law (NAWL), and the National Action Committee on the Status of Women (NAC).

3. The word *Sharia* designates a complex and encompassing legal framework designed to regulate all aspects of the believer; but beyond this vague definition, what it concretely entails falls within the domain of religious interpretations. The denomination of “Sharia courts” was erroneous because the Arbitration Act did not allow religious communities to set up courts that would have the same status as civil court. It only allowed individuals involved in a family dispute to choose an arbitrator who could resolve the dispute according to religious principles. The final decision could also be, under certain circumstances, enforceable by civil courts.
4. The Arbitration Act originally targeted the domain of commercial disputes. However, it did not mention that arbitration could not be used for family disputes. Arbitration as a mode of alternative dispute resolution had therefore been legal since 1991, although that was not the legislator’s intention in the first place.
5. Except for divorce, which is a federal matter. However, mediation and private agreements are extensively used.
6. The open letter was released to the press on September 10, 2005.
7. Susan Moller Okin’s essay that launched the debate in the United States was titled, “Is Multiculturalism Bad for Women?” (Cohen, Howard, & Nussbaum, 1999).
8. On cultural defense in the U.S. context, see Volpp (2000) and Song (2005a, 2005b); in Britain, see Phillips (2003); and in the Canadian/Québécois context, see Bilge (2005).
9. For a critical history of multiculturalism and an exploration of its colonial roots, see Day (2000).
10. As NAWL (2007) suggests.
11. This case study is based on research conducted in 2006 to 2007 in Québec and Ontario. The main actors of the controversy were interviewed ($n = 15$), public conferences on the subject were attended ($n = 5$), the press was analyzed for the period of the debate 2004 to 2006, all the reports and the material submitted to the investigator and archived at the Ontario Ministry of the Attorney General were scrutinized, as was her own final report. In-depth interviews were conducted with leaders of women’s rights organizations involved in the debate (NAWL, CCMW, “No Sharia” campaign, National Organization of Immigrant and Visible Minority Women of Canada [NOIVMWC], and Rights and Democracy), with legal scholars, with the investigator named by the Ontario government and two of her three staff members, as well as with the director of the Ontario Women’s directorate.
12. The term *legal consciousness* can also be used here to designate the way a social movement understands and uses law to frame its claims, even if, as Susan Silbey (2005) noted, such a use of the concept tends to deprive it of its original cutting edge, when it is aimed at capturing the ways in which legal hegemony manifests itself.
13. The simple definition of path dependency borrowed from Douglas North (1990, p. 100) here is that choices made at time T influence choices made at time $T + 1$. However, I characterize it as a conceptual path dependency because I do not intend to apply here a neoinstitutionalist

analysis to the women's rights coalition campaign against religious arbitration. The focus is on the various usages of legal categories, inherited from previous legal mobilization, rather than on institutional features and resources of this movement.

14. The first pessimistic accounts of what the Charter could accomplish for feminists (such as in Brodsky & Day, 1989; and Razack, 1991) have been replaced by much more positive or nuanced accounts of feminists' litigation strategy. For example, LEAF has been the main recipient of the "Court Challenges Program" and has had an exceptional record of victories at the Supreme Court Level, as well as an important impact on the Supreme Court's doctrine itself (LEAF, 1996). Morton and Allen (2001) have determined that feminist claims prevailed in 72% of the cases they examined (including Charter and non-Charter cases).
5. In 1983, Section 35(4) was entrenched by constitutional amendment; it stipulates that Aboriginal and treaty rights are guaranteed equally to male and female persons. However, later litigation, still on trial in 2004, will decide if "tradition" trumps women's rights (Green, 2004).
16. For an analysis of LEAF's position in *Butler*, see Gotell (1997).
17. The complaint was based on Section 1 (right to equal treatment with respect to service, goods, facilities without discrimination because of . . . ethnic origin, citizenship, creed . . .), Section 4(1) (right to equal treatment with respect to employment), and Sections 8 and 10 (indirect discrimination and reasonable accommodation provisions) of the Ontario Human Rights Code.
18. Board of Inquiry, OHRC, July 6, 1990, Recommendation from Commission des droits de la personne (December 21, 1994, COM-388-6.1.1) on "Le port du foulard islamique dans les écoles publiques"; and Supreme Court case *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006).
19. The Québec *kirpan* affair also emerged in the post-9/11 context (the young Balvir Singh Multani dropped his *kirpan* in the schoolyard on November 19, 2001). This context crystallized the decision by Québec's appeal court to reject the accommodation on March 4, 2004. However, the Supreme Court reversed the Provincial judgment on March 2, 2006.
20. One could add that contrary to what could be expected, the Québec *hijab* affair did not really raise the issue of women's rights (as opposed to the French *hijab* affair of 2004 for example; see Scott, 2005). Indeed, the Québec Human Rights Commission carefully avoided any interpretation of what the *hijab* can mean for women who wear it. Therefore, the main frame of the debate could not be about women's rights versus minority rights (Commission des droits de la personne et ds droits de la jeunesse, 1995).
21. These are only the main points made by the investigator. Her report lists 46 recommendations on legislation and regulations, and most of them tend to contribute to the goal of protecting vulnerable parties.
22. A phenomenon already acknowledged in Cohen et al. (1999); see, for example, the responses to Susan Moller Okin by Kymlicka, Bonnie Honig, and Azizah Y. al-Hibri.
23. The improvement of women's legal status in the family and society through law reform has been in their mission statement since 1974. See also Bakht (2005, pp. 62-64).
24. This absence of records was one of the reasons why people resorted to arbitration. Indeed, information such as income and property could therefore not be scrutinized by the government.

25. This analogy was also constantly brought up by members of organizations opposed to religious arbitration in front of the Standing Committee on General Government in charge of the hearings on the Family Statute Law Amendment Act 2006 (retrieved from http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/2006-01-16_G011.htm).
26. Representatives of the Canadian Jewish Congress as well as B'nai Brith Canada share the same positions and argued along the same lines in front of the Ontario legislator.
27. This dilemma of representation can be applied to any claim made "in the name of," including "women," which tends to reify the heterogeneity of a group (for another example, see Lépinard, 2007).

References

- Baines, B. (2005). Using the Canadian *Charter* of Rights and Freedom to constitute women. In B. Baines & R. Rubio-Marin (Eds.), *The gender of constitutional jurisprudence* (pp. 48-74). Cambridge: Cambridge University Press.
- Baines, B., & Rubio-Marin, R. (2005). Introduction: Towards a feminist constitutional agenda. In B. Baines & R. Rubio-Marin (Eds.), *The gender of constitutional jurisprudence* (pp. 1-21). Cambridge: Cambridge University Press.
- Bakht, N. (2005). *Arbitration, religion and family law: Private justice on the backs of women*. Ottawa, Canada: National Association of Women and the Law.
- Bartholomew, A. (2004). Group-differentiated cultural rights, constitutionalism and feminism. In A. Z. Dobrowolsky (Ed.), *Women making constitutions: New politics and comparative perspectives* (pp. 216-225). Gordonsville, VA: Palgrave Macmillan.
- Benhabib, S. (1998). Democracy and identity. In search of the civic polity. *Philosophy and Social Criticism*, 24, 85-100.
- Berkovitch, N., & Bradley, K. (1999). The globalization of women's status: Consensus/dissensus in the world polity. *Sociological Perspectives*, 42(3), 481-498.
- Bilge, S. (2005). La "différence culturelle" et le traitement au pénal de la violence à l'endroit des femmes minoritaires: quelques exemples canadiens ["Cultural difference" and the treatment of violence towards minority women in criminal law: Some Canadian examples]. *Journal International de Victimologie*, 3(3). **[AQ: 6]**
- Boyd, M. (2004). *Dispute resolution in family law: Protecting choice, promoting inclusion*. Ministry of the Attorney General. Retrieved from <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>
- Brodie, J., Gavigan, S. A. M., & Jenson, J. (1992). *The politics of abortion, representations of women in Canada*. Toronto, Canada: Oxford University Press.
- Brodsky, G., & Day, S. (1989). *Canadian Charter Equality Rights for Women. One step forward or two steps back?* Ottawa: Canadian Advisory Council on the Status of Women.
- Cohen, J., Howard, M., & Nussbaum, M. C. (Eds.). (1999). *Is multiculturalism bad for women? Susan Moller Okin with respondents*. Princeton, NJ: Princeton University Press.
- Commission des droits de la personne. (1994). *Le port du foulard islamique dans les écoles publiques* (COM-388-6.1.1). Québec, Canada: Author.
- Commission des droits de la personne et des droits de la jeunesse. (1995). *Le pluralisme religieux au Québec: un défi d'éthique sociale* (Cat. 7.113-2.1.1). Québec, Canada: Author.

- Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum*, pp. 139-168.
- Crenshaw, K. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review*, 43(6), 1241-1299.
- Day, R. J. F. (2000). *Multiculturalism and the history of Canadian diversity*. Toronto, Canada: University of Toronto Press.
- Deveaux, M. (2006). *Gender and justice in multicultural liberal states*. New York: Oxford University Press.
- Dobrowolsky, A. Z. (1998). Of "special interests": Interest, identity and feminist constitutional activism in Canada. *Canadian Journal of Political Science*, 31(4), 707-742.
- Dobrowolsky, A. (2000). *The politics of pragmatism. Women, representation and constitutionalism in Canada*. Toronto, Canada: Oxford University Press.
- Doerr, A., & Carrier, M. (Eds.). (1981). *Women and the constitution in Canada*. Ottawa: Canadian Advisory Council on the Status of Women.
- Duclos, N. (1993). Disappearing women: Racial minority women in human rights cases. *Canadian Journal of Women and the Law*, 6(1), 25-51.
- Ewick, P., & Silbey, S. S. (1995). Subversive stories and hegemonic tales: Towards a sociology of narrative. *Law & Society Review*, 29(2), 197-226.
- Fournier, P. (2004). *The reception of Muslim family law in Western liberal states*. Gananoque, Ontario: Canadian Council of Muslim Women.
- Garth, B. G., & Sarat, A. (1998). Studying how law matters: An introduction. In B. G. Garth & A. Sarat (Eds.), *How does law matter?* (pp. 1-14). Evanston, IL: Northwestern University Press.
- Gotell, L. (1997). Shaping *Butler*: The new politics of anti-pornography. In B. Cossman, S. Bell, L. Gotell, & B. L. Ross (Eds.), *Bad attitude/s on trial: Pornography, feminism, and the Butler decision* (pp. 48-106). Toronto, Canada: University of Toronto Press.
- Green, J. (2001). Canaries in the mines of citizenship: Indian women in Canada. *Canadian Journal of Political Science*, 34(4), 715-738.
- Green, J. (2004). Balancing strategies: Aboriginal women and constitutional rights in Canada. In A. Z. Dobrowolsky (Ed.), *Women making constitutions: New politics and comparative perspectives* (pp. 36-51). New York: Palgrave Macmillan.
- Habermas, J. (1994). Struggles for recognition in the democratic constitutional state. In A. Gutmann (Ed.), *Multiculturalism. Examining the politics of recognition* (pp. 107-148). Princeton, NJ: Princeton University Press.
- Helly, D. (2004). Are Muslims being discriminated against in Canada since September 11th 2001? *Journal of Canadian Ethnic Studies*, 36(1), 24-47.
- Kome, P. (1983). *The taking of Twenty-Eight: Women challenge the constitution*. Toronto, Canada: Women's Press.
- Kymlicka, W. (1995). *Multicultural citizenship. A liberal theory of minority rights*. Oxford, UK: Clarendon.
- Lépinard, E. (2007). The contentious subject of feminism: Defining *women* in France from the second wave to parity. *Signs*, 32(2), 375-403.

- Majury, D. (2002). The *Charter*, equality rights, and women: Equivocation and celebration. *Osgoode Hall Law Journal*, 40(3-4), 297-336.
- Manfredi, C. P. (2004). *Feminist activism in the Supreme Court: Legal mobilization and the Women's Legal Education and Action Fund*. Vancouver, Canada: UBC Press.
- McCann, M. W. (1998). How does law matter for social movements? In B. G. Garth & A. Sarat (Eds.), *How does law matter?* (pp. 76-108). Evanston, IL: Northwestern University Press.
- Morton, F. K., & Allen, A. (2001). Feminists and the courts: Measuring success in interest group litigation in Canada. *Canadian Journal of Political Science*, 34(1), 55-84.
- National Association of Women and the Law (NAWL). (2007). *No religious arbitration coalition: What have we learned?* Retrieved from <http://www.nawl.ca/ns/en/documents/2007ReligiousArbitBestPractices.pdf>
- North, D. (1990). *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.
- Okin, S. M. (1999). Is multiculturalism bad for women? In J. Cohen, M. Howard, & M. C. Nussbaum (Eds.), *Is multiculturalism bad for women? Susan Moller Okin with respondents* (pp. 7-25). Princeton, NJ: Princeton University Press.
- Phillips, A. (2003). When culture means gender. Issues of cultural defence in the English courts. *Modern Law Review*, 66, 510-531.
- Phillips, A. (2007). *Multiculturalism without culture*. Princeton, NJ: Princeton University Press.
- Razack, S. (1991). *Canadian feminism and the law: The women's legal education and action fund and the pursuit of equality*. Toronto, Canada: Second Story Press.
- Revillard, A. (2007). Entre arène judiciaire et arène législative: les stratégies juridiques des mouvements féministes au Canada [Between the judicial arena and the legislative arena: Juridical strategies and feminist movements in Canada]. In J. Commaille & M. Kaluszynski (Eds.), *La fonction politique de la justice* (pp. 145-163). Paris: La Découverte.
- Rosenberg, G. N. (1991). *The hollow hope: Can courts bring about social change?* Chicago: University of Chicago Press.
- Scott, J. W. (2005). Symptomatic politics. The banning of Islamic head scarves in French public schools. *French Politics, Culture & Society*, 23(3), 106-127.
- Shachar, A. (2001). *Multicultural jurisdictions: Cultural differences and women's rights*. Cambridge: Cambridge University Press.
- Silbey, S. S. (2005). After legal consciousness. *Annual Review of Law and Social Sciences*, 1, 323-368.
- Snow, D. A., Rochford, E. B., Jr., Worden, S. K., & Benford, R. (1986). Frame alignment processes, micromobilization, and movement participation. *American Sociological Review*, 51, 464-481.
- 【AQ: 7】**
- Song, S. (2005a). La défense par la culture en droit américain [The cultural defence in American criminal law]. *Critique internationale*, 28, 61-85.
- Song, S. (2005b). Majority norms, multiculturalism, and gender equality. *American Political Science Review*, 99(4), 473-489.
- Volpp, L. (2000). Blaming culture for bad behavior. *Yale Journal of Law and the Humanities*, 12(1), 89-116.
- Volpp, L. (2001). Feminism versus multiculturalism. *Columbia Law Review*, 101, 1181-1218.

- Wayland, S. V. (1997). Religious expression in public schools: *Kirpans* in Canada, *hijab* in France. *Ethnic and Racial Studies*, 20(3), 545-561.
- Women's Legal Education and Action Fund (LEAF). (1996). *Equality and the Charter. Ten years of feminist advocacy before the Supreme Court*. Toronto, Canada: Edmond Montgomery.

Bio

Eléonore Lépinard is an assistant professor of Political Science at the Université de Montréal. Her research interests include gender equality policies, feminist theory, intersectionality, the politics of multiculturalism, social movements, and law. She has recently published a book on the parity reform in political representation in France: *L'égalité introuvable. La parité, les féministes et la République* (Elusive Equality. Parity, Feminists and the Republic) (Paris: Presses de sciences po, 2007); and coedited an issue of the journal *Cahiers du genre* (No. 39) on French feminisms. Her publications have appeared in *American Behavioral Scientist*; *Signs*; *Social Politics*; as well as, in French, *Droit et société*, *Revue française de science politique*, and *Pouvoirs*.