In presenting this thesis in partial fulfilment of the requirements for an advanced
degree at the University of British Columbia, I agree that the Library shall make it
freely available for reference and study. I further agree that permission for extensive
copying of this thesis for scholarly purposes may be granted by the head of my
department or by his or her representatives. It is understood that copying or
publication of this thesis for financial gain shall not be allowed without my written
permission.

Department of **POLITICAL SCIENCE**

The University of British Columbia
Vancouver, Canada

Date **Aug. 24/92**
ABSTRACT

Shah Bano was a seventy-three year old Indian Muslim divorcee who successfully sued her ex-husband for maintenance. Her husband, an advocate by profession, appealed the verdict all the way to the Supreme Court of India. In April 1985, after a ten year legal battle, the Supreme Court decided in favour of Shah Bano.

The decision provoked massive demonstrations. Muslim fundamentalists protested the Court’s interference in Muslim personal law, and Hindu fundamentalists organized anti-Muslim rallies to celebrate the decision and to protest Muslim backwardness. The political backlash from the decision prompted the government of Rajiv Gandhi, who had initially supported the Supreme Court decision, to do an about face on the issue. Almost a year after the controversy began, the Prime Minister introduced a bill into Parliament, the Muslim Women (Protection of Rights on Divorce) Bill 1986, that effectively reversed the decision. This bill proved to one of the most unpopular bills the Prime Minister ever introduced, and it cost him important support even within his own party.

Why did the rights of the Muslim minority conflict with the rights of Muslim women in the Shah Bano case? How could the conflict have been better resolved? In order to answer these questions, this thesis explores the theoretical literature on conflicts between gender and minority rights. I argue that, as it stands, the theory contributes little to an understanding of Shah Bano and other conflicts between gender and minority rights. This thesis draws on the example of Shah Bano in order to begin to fill the theoretical gap.

The problem in the Shah Bano case was that Muslim demands for autonomy in regard to Muslim personal law conflicted with the concern of some women’s groups that autonomy for Muslims would deprive Muslim women of even the most minimal legal
protection. The issue was which group would have the final word on reforming Muslim personal law. Women’s groups demanded that the government not relinquish its ability to pursue the goal of sexual equality for Muslim women. Simultaneously, Muslims demanded control over any reform of the personal law.

Shah Bano is an example of one of the most complex problems that arises in regard to minority rights: what to do when granting autonomy to minorities threatens to exacerbate the situation of groups that are systematically oppressed within the minority culture. How is it possible to grant autonomy to a minority without depriving minority women of the legal protection they would otherwise have enjoyed? In this thesis I propose that some protection for women’s rights could be obtained by requiring that institutions that represent the minority group must include a significant number of women representatives in order to be officially recognized by the State. I then briefly examine this proposal as a possible solution to the Shah Bano case, and consider a few practical obstacles to implementing the proposal.
# TABLE OF CONTENTS

| Abstract | ii |
| Table of Contents | iv |
| Acknowledgement | v |

**Chapter One: Introduction**
- Cultural Relativism as a Methodological Problem | 5

**Chapter Two: Gender Versus Minority Rights**
- Minority Rights | 8
- A Liberal Perspective | 10
- Autonomy and Patriarchal Minorities | 16
- Community or Social Group? | 20
- Minority Rights, Autonomy and Difference | 24
- False Consciousness | 27
- Opposition by Elites | 28
- Conclusion | 30

**Chapter Three: The Shah Bano Controversy**
- Muslims in India | 33
- The Political Context | 38
- The Decision | 39
- The Reaction to the Decision | 45
- Critiques of the Decision | 49
- The Muslim Women Bill | 52
- “A Disaster for the Prime Minister” | 57

**Chapter Four: Shah Bano and Minority Rights**
- Personal Law and Muslim Identity | 59
- Minority Autonomy and Gender Rights | 62
- Community or Social Group? | 64
- Muslim Autonomy and Sexual Equality | 66
- False Consciousness | 68
- Opposition by Elites | 71
- Conclusion | 73
- Implications for Minority Rights Theory | 75

**Bibliography** | 77
ACKNOWLEDGEMENT

I am greatly indebted to my advisor, John Wood, who never failed to make useful comments and suggestions during our many, many discussions of this thesis. His patience and encouragement have made this thesis a great deal easier to write. I would also like to thank Avigail Eisenberg, whose insightful comments helped me clarify my thoughts. Both of these people went out of their way to help in the quick completion of this thesis.

I would also like to thank my mother, my father, and my grandmother who helped me get to graduate school in the first place. Without their love and support I would have been lost this summer. Finally, I would like to thank Sean, whose patience and sense of humour kept me sane during a very intense summer.
CHAPTER ONE: INTRODUCTION

Shah Bano was a divorced Indian Muslim woman who took her husband to court to sue for maintenance. Shah Bano, who was in her sixties, had been married to her husband for over forty years at the time of the divorce. In 1979 she was awarded Rs. 25 per month under section 125 of the Criminal Procedure Code of India. She appealed this award to the High Court of Madhya Pradesh, which increased her award to Rs. 179.20 per month. Her husband, an advocate by profession, appealed the order of maintenance to the Supreme Court of India, arguing that the order for maintenance conflicted with Muslim personal law. He argued that since he had already fulfilled his obligation to Shah Bano under Muslim personal law, he could not be ordered to pay her any further maintenance. The Muslim Personal Law Board, an organization known for its traditionalist leanings, intervened in the case on behalf of the husband. In April 1985, after a ten year legal battle, the Supreme Court upheld the order for maintenance and dismissed the husband’s appeal.¹

The Muslim Personal Law Board and other Muslim fundamentalist groups began to organize demonstrations against the decision. Muslims, both men and women, gathered in the thousands to protest against the Supreme Court judgement. In October 1985, more than four hundred thousand Muslims gathered to attend a conference on Muslim personal law. In November 1985 in Bombay, more than three hundred thousand Muslims joined a protest march against the judgement. The agitation that followed the Shah Bano judgement was the biggest one launched by Muslims in the post-independence period. The fundamentalist groups that organized the demonstrations demanded that the government enact legislation that would exempt Muslims from the provisions of section

125 of the Criminal Procedure Code, the section under which Shah Bano sued for maintenance.²

The government of Rajiv Gandhi had initially come out strongly in favour of the Shah Bano decision. However, after all the agitation began, the Prime Minister executed a volte face and introduced legislation, the Muslim Women (Protection of Rights on Divorce) Bill, 1986, that exempted Muslims from the purview of section 125 and set out new provisions for awarding maintenance to divorced Muslim women.

This Bill was condemned by women’s groups as well as by liberal Muslims. The Bill was criticized as discriminating against Muslim women since, of all women in India, only Muslim women would be unable to appeal to section 125.³ Furthermore, the provisions for maintenance were criticized as inadequate.⁴ Some Muslims such as Ali Asghar Engineer even argued that the Bill was unIslamic.⁵ Arif Mohammed Khan, the Muslim Congress Party member who had vocally supported the Shah Bano decision on behalf of the government (when the decision was first made), resigned when the Bill was passed. Women’s groups and secular Muslim representatives felt betrayed by Rajiv Gandhi, who seemed to have essentially ignored or repressed their opinion on the Bill, while catering to a few representatives of fundamentalist Muslims.⁶

In the view of one observer, the Shah Bano controversy was one of Rajiv Gandhi’s biggest political disasters.⁷ It is clear that the Prime Minister saw himself as

---

²Ibid.


⁴Madhu Kishwar, “Pro-Woman or Anti-Muslim”, Manushi, no.32, 1986, 4-13.


having to make a choice between the rights of Muslim women and the rights of Muslims as a whole. Why did gender rights conflict with minority rights in this case? How could this conflict have been better resolved?

One way of addressing these questions would be to ask when it is acceptable to sacrifice women’s rights in order to protect minority rights and vice versa. From this perspective, Shah Bano raises the question of whether violating the rights of Muslim women was a necessary and acceptable sacrifice in order to protect the autonomy and continued existence of Muslim culture in India.

I shall argue that answering this question provides only a partial understanding of Shah Bano. The issue in the Shah Bano case was which group, the minority or the majority, had ultimate control over reform of Muslim personal law. Muslim representatives did not argue that women’s rights had to be sacrificed to protect Islam. Rather, they argued that the Supreme Court did not have the authority to interfere in Muslim personal law. Muslims, as a distinct minority within India, perceived themselves as having a right to operate under separate personal laws, and the Court decision seemed to threaten that right.

Similarly, women’s groups and progressive Muslims were not opposed to these claims to minority rights in and of themselves. Rather, they suspected that increased autonomy for the Muslim minority would give legitimacy to traditional patriarchal elites for whom sexual equality was not a priority. The concern was that autonomy for the minority as a whole might be a step backwards for the rights of the women of that minority. At least in the Shah Bano case, this seemed to be a legitimate concern.

What was at stake in the Shah Bano case can be clarified by a brief comparison with the position of aboriginal women in Canada. Self-government has long been a goal of

---

8The term ‘majority’ shall refer to the dominant group in a society rather than the group which is numerically the majority.
native groups in Canada. Recently, the Native Women's Association of Canada opposed the proposal to give native communities the right to self-government and to exclude them from the purview of the Canadian Charter of Rights and Freedoms. The Native Women's Association opposed self-government on the grounds that if the sexual equality provisions of the Charter of Rights and Freedoms did not apply to native communities, there would be no restraints on the mostly male-dominated band governments to ensure that they respected the rights of women. Thus some women's groups oppose greater autonomy for minorities because they fear that it will give greater legitimacy to traditional patriarchal elites while at the same time exempting those elites from any obligation to respect the principle of sexual equality.  

9

Shah Bano is an example of one of the most difficult problems that arises in regard to minority rights: what to do when granting autonomy to minorities threatens to exacerbate the situation of groups that are systematically oppressed within the minority culture. Minority rights theories offer little guidance on this issue. I shall argue that it may be possible to begin to fill this theoretical gap by thinking in terms of social groups rather than communities. Thinking in terms of community does not aid in conceptualizing conflicts within the community or in understanding how these conflicts relate to other conflicts in the society at large. The concept of a social group, on the other hand, is particularly useful for conceptualizing conflicts between minority and gender rights. Both minority cultures and women are social groups that are far from homogeneous. While the members of these groups have important common interests, they also may have conflicting interests as members of other groups. For example, a Muslim woman may have more in common with a Muslim man on one issue, and may identify more strongly with a Hindu woman on another issue. Social groups crosscut each other. For example, gender divisions may appear within ethnic groups, and women are divided along ethnic lines.

Once the conflict between gender rights and minority rights is understood in this way, the question of resolving the problem becomes how to design institutions that will protect a minority's right to autonomy without compromising the rights of the women (or other oppressed sub-groups) of that minority. This was the problem that presented itself to Rajiv Gandhi in the Shah Bano case, and which he attempted to resolve.

Could the Shah Bano controversy have been better resolved? I shall propose that some protection for women's rights could have been obtained by requiring that institutions which represent the minority include a significant number of women representatives in order to be officially recognized by the State. I shall then briefly examine this proposal as a possible solution to the Shah Bano case, and shall consider a few practical obstacles to implementing the proposal.

Cultural Relativism as a Methodological Problem

In addressing the conflict between gender and minority rights, my method is essentially to see what light Western liberal democratic theorists can shed on India. It may seem that this project blithely ignores the problems that cultural difference poses for minority rights theories. Because of the many differences, cultural and otherwise, between Western and non-Western contexts, Western theory should be carefully applied in non-Western contexts. In many cases, the theory requires substantial revision in order to be appropriate to a non-Western context, or it is completely irrelevant.

A great deal can be learned from cases where Western theory does not apply at all. The problem is not actually applying Western theory to non-Western contexts, since it would be equally as controversial to assume that Western theories of justice had no application to non-Western contexts. What is necessary is a sensitivity to possible shortcomings or inappropriateness in the theory.
India is the largest liberal democracy in the world, and ‘rights discourse’ is prevalent in India. In the Shah Bano case, minority groups demanded freedom of religion and protection of minority cultures while women’s groups demanded equality before the law and legal protection for women’s rights. Thus, if the theorists considered here had nothing to say about the Shah Bano controversy, it would be very significant indeed. I shall argue that in fact these theorists can shed some light on the Shah Bano controversy. However, I will also examine how *Shah Bano* brings the shortcomings of these theories into sharp relief. Let us turn now to a more thorough examination of the exact nature of the problem raised by *Shah Bano*, namely, why do minority rights conflict with gender rights?
CHAPTER TWO: GENDER VERSUS MINORITY RIGHTS

Why did gender rights conflict with minority rights in the Shah Bano controversy? Before even beginning to answer this question, it is necessary to clarify what is meant by ‘minority’ group and to discuss why minorities should have any special claims at all.

For the purposes of most minority rights theories, a minority is more than just a group which is numerically not the majority. Some definitions include all disadvantaged or powerless groups as minorities. As Louis Wirth writes, “We may define a minority as a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination.” In this paper, however, I shall mainly be using the term ‘minority’ to refer to ethnic groups that are in a position of political and economic disadvantage, or cultural minorities.

An ethnic group is “any group of people, dissimilar from other peoples in terms of objective cultural criteria and containing within its membership, either in principle or in practice, the elements for a complete division of labour and for reproduction.” Objective cultural markers may include language, dress or other lifestyle differences. Paul Brass defines ethnic groups as including ‘in principle or in practice, the elements for a complete division of labour and for reproduction’ in order to distinguish ethnic groups from other social groups (which he calls non-cultural groups), such as age groups, class, or gender.

---


The concept of a right could use some clarification, but since an adequate discussion of the issues surrounding this concept is far beyond the scope of this paper, I will employ the definition of a moral right adopted by Vernon Van Dyke in his paper "The Individual, The State, and Ethnic Communities in Political Theory." Van Dyke defines a moral right as a morally justified claim. On this view, a minority right is a morally justified claim that can be made by or on the behalf of a minority. A gender right, similarly, is a morally justified claim that can be made by or for either gender.

Having clarified some key terms, let us return to the question at hand: why do the legitimate claims of minority groups conflict with the morally justified claims of women as a group? How are such conflicts best resolved? The answers to these questions will shed some light on why the legitimate claims of Muslims as a group conflicted with the legitimate claims of Muslim women in the Shah Bano case. Therefore, before we turn to discuss the details of Shah Bano, let us further examine the theoretical basis of the problem.

**Minority Rights**

In order to understand how minority rights conflict with gender rights, it is necessary to understand why minority groups *qua* minorities can make any legitimate claims at all. Only then is it possible to explore which (if any) of the legitimate claims that minorities can make conflict with the legitimate claims that women can make.

Most contemporary arguments for minority rights are based on a recognition that culture is central to our sense of identity. Contemporary thinkers are becoming...
increasingly aware of how our ability to make sense of ourselves and others depends on the social context in which we find ourselves. Most recently, writers of the school of philosophy known as communitarianism have focused on how we depend on a cultural context to give our lives meaning and direction.

At the core of most communitarian arguments is an understanding of the self as being constituted by the community. The actions that we perform and the roles that we choose only have significance in so far as they are situated within a social context or narrative which gives them meaning. The way we and others understand our actions depends on the narratives and conventions that we share.¹⁴

The control one has over the shared meanings that arise from these narratives is limited. Individuals cannot control how the actions they perform appear to others. A person’s self-understanding depends partly on how others perceive them. For example, it may be hard for a woman to maintain the belief that she is as valuable and intelligent a person as a man if others do not treat her as if she is.

The narratives an individual shares with others determine which lifestyles or plans seem valuable to her. Becoming the president of the United States, a secretary or a rabbi may or may not occur to a person as a viable career option depending on the stories and characters she identifies with and with which others identify her. The lifestyles or plans from which she may choose are further limited by other historical circumstances in which she may find herself. Individuals may possess little control over what life plans they decide to pursue. As MacIntyre writes, "...we are never more (and sometimes less) than the co-authors of our own lives."¹⁵


¹⁵ Ibid., 135.
Communitarians argue that most contemporary political philosophy, including both liberalism and marxism, overlooks the importance of culture in human lives. Liberalism is a philosophy based on individual choice, but an individual cannot choose whether or not to preserve her or his cultural context, for a culture is necessarily shared with others. Nor can cultural community be reduced to class, since cultural differences cut across class lines. Communitarians argue that political philosophy must be made to recognize how human choices and actions are limited by culture.

Communitarianism is not particularly useful for understanding how minority rights conflict with gender rights, since it focuses on the problems individual rights pose for communities, rather than on conflict between groups within a community. Nevertheless, the communitarian critique of contemporary political theory has been very important in the development of minority rights theories. In particular, Will Kymlicka’s recent attempt to address the communitarian critique of liberalism has resulted in one of the most thorough attempts to justify minority rights from a liberal perspective. Although Kymlicka does not directly address conflicts between minority and gender rights, his views are sufficiently developed that it is possible to flesh out his position on these issues.

A Liberal Perspective

Kymlicka argues that the liberal insensitivity to the importance of community, on which the communitarian critique rests, is a post-World War Two phenomenon. The pre-war liberals, such as Dewey, Mill, Hobhouse and Green all stressed the importance of the community to personal identity and to human happiness. The pre-War liberals valued community for the benefits it offered to individuals. These liberals recognized that a secure community was a precondition for other liberal values, such as individual autonomy.
Kymlicka argues that contemporary liberals should revive this lost concern for community. He argues that a liberal justification for minority rights would be based on the importance of community to individual happiness. Having a stable cultural background or “context of choice” is essential for individuals making meaningful decisions about how to live their lives. The culture to which one belongs determines the different ways of life one considers as options:

...The range of options is determined by our cultural heritage. Different ways of life are not simply different patterns of physical movements. The physical movements only have meaning to us because they are identified as having significance by our culture, because they fit into some pattern of activities which is culturally recognized as a way of leading one's life. We learn about these patterns of activity through their presence in stories we've heard about the lives, real or imaginary, of others...We decide how to lead our lives by situating ourselves in these cultural narratives, by adopting roles that have struck us as worthwhile ones, as ones worth living.16

Individuals who are born into minority cultures face disadvantages that those born into the dominant or majority culture do not face. They must work to secure a context of choice while those of the majority culture take it for granted. Liberals believe that, as much as is possible, no one should be disadvantaged due to circumstances which are beyond her or his control. But what culture one belongs to is not a matter of choice. One can not change one's culture like a piece of clothing. Nor is cultural membership like membership in a club. So if some individuals are disadvantaged because of their cultural heritage, a serious injustice has occurred.

What does protecting minority rights entail? Kymlicka argues that providing a context of choice does not involve preserving the content of the culture as it currently exists, or its character, but rather preserving the existence of a secure cultural community itself:

16Ibid. 165.
I use culture in a very different sense, to refer to the cultural community, or cultural structure, itself. On this view, the cultural community continues to exist even when its members are free to modify the character of the culture, should they find its traditional ways of life no longer worth while.  

This raises the issue of what happens when it is essential to violate individual rights in order to preserve the very existence of the cultural community. Kymlicka argues that it is only justifiable to restrict individual rights in order to protect the existence of the cultural community under certain circumstances. This depends on the seriousness of the violation and the benefit that supposedly accrues from it. In Canada for example, the Quebecois argue that if the majority of immigrants to Quebec choose to educate their children in English, which is probable, the francophones would very quickly become a minority within Quebec. In order to preserve Quebec's status as the political and cultural foothold of Canada's francophone population, French Canadians in Quebec want to be able to restrict the access of immigrant children to schooling in English. This involves restricting the individual rights and opportunities of some (immigrant children) in order to ensure that the francophone cultural community continues to exist. Such a violation of individual rights might be permissible within a liberal paradigm.

Kymlicka argues that these cases must be decided on their merits on a case-by-case basis. There is no principle that is going to dictate what to do in any particular situation:

Assuming that there can be some legitimate restrictions on the internal activities of minority members, where those activities would literally threaten the existence of the community, to find these precise limits would be enormously difficult, and I doubt anything useful could be achieved without reasonably detailed knowledge of particular instances. These are complex issues in which our intuitions are pulled in different directions, and I don't see how any simple formula could cover all the relevant cases.

\[17\text{Ibid.}, 167.\]

\[18\text{Ibid.}, 199.\]
What implications does this view of minority rights have for the problem of conflicts between minority rights and gender rights? Kymlicka does not address this issue directly, but it is possible to piece together the implications of his position for such conflicts.

As discussed above, Kymlicka distinguishes between two reasons for accepting violations of individual rights in order to protect minority cultures. One is that the existence of the community itself is actually threatened. The second is that the current character of the cultural community is threatened. Kymlicka does not accept arguments of the second type. Kymlicka gives the example of Islamic fundamentalists who want to restrict religious and sexual freedoms, among others, in order to protect Islamic culture. He likens the Islamic fundamentalists to Lord Devlin, the famous opponent of homosexuality in England, who argued that public morality is a seamless web, the very fibre of which is threatened when individual members of society reject any of its practices. Kymlicka argues that while minority groups are entitled to take special measures to ensure the existence of their culture, they may not violate individual freedoms to protect the character of their culture. He argues that protecting customs and traditions which violate individual rights contradicts the very reason for protecting minority rights in the first place—to enrich the lives of the individual members of that minority.

It is wildly implausible to suppose that allowing individuals freedom of religion or sexual practices would lead to the breakdown of that community, be it England or Iran...Protecting the homophobic character of England's cultural structure from the effects of allowing free choice of sexual life style undermines the very reason we had to protect England's cultural structure—that it allows meaningful individual choice.  

Kymlicka stresses that minority rights should not be used to justify one part of the minority community oppressing another. From this it seems that Kymlicka would...

19Ibid., 169.
argue that in conflicts between minority rights and the women of that minority, violations of women’s rights usually can not be justified on the basis of protecting the culture.

The difficulties involved in putting this principle into practice come out in Kymlicka’s discussion of the Lavell case in Canada.20 The issue in the Lavell case was that section 12(I)(b) of the Indian Act discriminated against women. Section 12(I)(b) allowed male registered Indians to retain their Indian status even if they married a non-aboriginal woman. Furthermore, the wives and children of these men became members of the band and received the benefits of status Indians. Registered Indian women, on the other hand, lost their own registered status if they married non-aboriginal men.21 Jeanette Lavell took the case to the Supreme Court of Canada. The Native Brotherhood intervened in the case to argue against her. They argued that the reservation system made it necessary to restrict the growth of the population on reserve. This meant that not all members of the band could have their spouses and children living on reserve. Some distinctions had to be made in order to preserve the community.22

Kymlicka raises the Lavell case as an example of some of the issues involved in protecting minority rights in Canada. But he does not directly say what implications his theory would have for this case.23 He does note that while there are more egalitarian models for regulating membership, all such arrangements involve restricting the marriage and/or voting rights of both Indians and non-Indians. In this case, it seems as if there must be some violation of individual rights in order to preserve the actual existence of the cultural community. Kymlicka argues that the acceptability of rights violations depends on the

20Ibid., 148-149, 155.


22Ibid., 35-36.

23Kymlicka, Liberalism, Community and Culture, 149.
severity of the violation and by whom it would be borne. In particular, a violation may not
be acceptable if the group whose rights are violated is disadvantaged in other ways. For
example in Lavell, the fact that women already suffer systemic oppression within aboriginal
communities makes it even less acceptable to violate women's rights to preserve the
community.

The Lavell case highlights another difficulty with Kymlicka's distinction
between the existence and the character of a cultural community. In Lavell, women's
groups argued that simply allowing native women to retain their status in no way threatened
the existence of the cultural community. The Native Brotherhood, however, argued that
the administration of membership in the community, which is central to its very existence,
was at stake. Thus, whether or not it is essential to restrict rights in order to preserve the
existence of the cultural community will often be a matter of contention in itself. The point
is not that the distinction cannot be made, but rather, that there are cases in which drawing
the distinction between existence and character is very difficult.

This approach to minority rights begins to suggest answers to the questions
with which we began this discussion: Why do minority rights conflict with the rights of the
women of that minority? How are such conflicts best resolved? Kymlicka would argue
that many conflicts between women's rights and minority rights result from confusion over
why minority communities are entitled to protection in the first place. In his view, any
special measures to protect minorities must ultimately benefit the individual members of that
community. Furthermore, minority communities are entitled to use special measures only
to preserve the existence of their cultural community, and not to protect specific
characteristics of their culture. In rare cases where the individual rights of some or all of
the members of the minority community really must be violated in order to preserve the
existence of a cultural community, the severity of the violation as well as the social position
of those singled out for disadvantage within the community are relevant factors. This
position would most likely rule out justifying the violation of women’s rights in order to preserve the cultural community.

Autonomy and Patriarchal Minorities

It seems that we have a clear justification for minority rights which offers a reasonable amount of guidance on how to deal with apparent conflicts between women’s rights and minority rights. But this approach is not as useful as one might expect when one examines actual instances of conflict between women’s rights and minority rights. Minority groups rarely argue that the oppression of women is a price that must be paid to protect the community. The issue in many cases is not whether women’s rights should or should not be violated but rather which group, the minority or the majority, ought to decide how minority women should be treated.

For example, in the recent constitutional debate in Canada, aboriginal representatives argued that the Charter of Rights and Freedoms should not apply to native communities. At the same time, the Native Women’s Association demanded that the Charter apply to native communities because they wanted the protection of the sexual equality sections of the Charter. Those who opposed having the Charter apply to aboriginal communities did so not on the grounds that women did not deserve sexual equality, but rather on the grounds that there was a stronger basis for sexual equality in aboriginal traditions. The main objection was not to sexual equality for native women, but to having the alien jurisprudential tradition of the Charter apply to aboriginal communities instead of traditional aboriginal jurisprudence.\textsuperscript{24}

Kymlicka’s justification for minority rights does not address this issue. As Kymlicka himself writes: "In any event, my concern is with what the principles being enforced ought to be, not with who ought to have the power to determine, interpret, and enforce those principles." But who, specifically which group, determines, interprets, and enforces principles is at least as much at issue as what principles ought to be enforced.

Kymlicka argues that whenever it does not threaten the existence of the cultural community, individuals ought to have the right to make decisions about the content of their culture. In this sense, Kymlicka does address issues of who decides. When it comes to choosing between individuals and groups, it is better that individuals decide what the content of their culture should be. But when it comes to deciding which group should decide just principles, Kymlicka does not offer much guidance. For example, Kymlicka touches on the concern aboriginal groups have as to whether or not self-government is delegated to them by the government. If self-government were delegated by the federal government, that would imply that the government had the right to revoke the self-governing status of aboriginal communities. On the other hand, if aboriginal communities are sovereign, they can reject any government proposals which they perceive as threatening. The issue is not whether or not aboriginal communities have special status, but rather, who ultimately controls that special status.

The issue of which group has the right to decide the outcome is central to many conflicts over minority rights. That is why ‘self-government’ is so strongly resisted by some outside the community and why ‘outside interference’ is one of the most common charges a minority levies against a majority community. Yet Kymlicka says little that addresses this problem. In regard to the issue of whether self-government is delegated, he notes that “The question of whether self-government is delegated or not is clearly

25Kymlicka, Liberalism, Community and Culture, 197.
important, but it is somewhat distinct from the questions I am addressing." The failure to address the issue of which group has control is a serious shortcoming in Kymlicka’s theory because the toughest issues in minority rights arise in regard to a minority’s right to self-government.

It might be said that since Kymlicka’s goal was simply to find a justification for minority rights that is acceptable to liberalism, it is unfair to criticise his justification on the above grounds. But if Kymlicka’s justification of minority rights is supposed to be relevant to actual disputes over minority rights, the job is only half done. A justification of minority rights that will be relevant to real conflicts must address not only the minority’s concern that they receive special treatment or benefits, but also their concern that they have control over decisions that affect them directly. Kymlicka’s liberal justification for minority rights should include a justification for minorities’ demands regarding how policies affecting them ought to be formulated, enforced and interpreted, that is, their demand for autonomy.

Why is self-government, or autonomy, so important to minority rights? A key characteristic of oppressed groups is their powerlessness to affect decisions that have a direct impact on their lives. Having control over one’s life has benefits that cannot be measured materially. For example, many people find self-employment less of a hardship than working for someone else, even though they work harder and longer hours as self-employed persons.

When people have control over their own lives, they can make decisions about when and how to protect their own interests. The powerlessness of those groups who are oppressed and marginalized in society at large is reinforced by the fact that they also tend to be underrepresented in democratic institutions. As John Stuart Mill argued:

---

26Kymlicka, Liberalism, Community and Culture, 160.
We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and when looked at, is seen with very different eyes from those of the persons whom it directly concerns.  

This means oppressed groups are at the mercy of those groups who form the majority in democratic institutions. Individuals in these oppressed groups can benefit from increased control on the part of the group.

As Kymlicka points out, the main injustice cultural minorities suffer is the lack of a secure cultural context. Consequently, oppressed ethnic groups usually want to assure the existence of their cultural context by having control over decisions by which it could be affected. For example, the Quebecois demand autonomy mainly in regard to French language and culture. Minorities usually demand autonomy in those areas which are most central to their identity.

A minority’s right to autonomy raises especially difficult questions for those concerned with promoting sexual equality. Despite the legitimacy of certain groups’ demands for autonomy, many problems arise in the attempt to implement this right. In regard to women’s rights, the main problem is that giving autonomy to minority groups often results in reinforcing the disadvantages women already face within the group. Any attempt on the part of the majority community to assure the protection of women’s rights is met with accusations of ‘outside interference’. How is it possible to devolve authority to minority communities while at the same time respecting the rights of those who are oppressed or marginalized within the community?

---

Community or Social Group?

The conceptual tools provided by contemporary minority rights theory do little to help in raising these questions, much less in answering them. In this section, I shall argue that some of the problems that arise in regard to a minority's right to autonomy are best understood through a closer examination of the nature of the minority group itself. Conceptualization of the most difficult issues in minority rights, such as conflicts between gender and minority rights, is facilitated by thinking of minorities in terms of social groups rather than 'cultural communities'.

The term 'community' refers to a particular form of social organization, a grouping of people, usually (but not necessarily) small in size, who are united by feelings of solidarity and shared understandings. But the term community also carries strong positive normative implications:

...Community is both empirically descriptive of a social structure and normatively toned. It refers both to the unit of a society as it is and to the aspects of the unit that are valued, if they exist, desired in their absence. Community... expresses our vague yearnings for a commonality of desire, a communion with those around us, and extension of the bonds of kin and friend to all those who share a common fate with us.\(^{28}\)

The most important problem with the term community in addressing issues of gender versus minority rights is that it does not aid in conceptualizing conflict within the minority group. How do the conflicts within the group relate to the conflicts in society at large? Conversely, how does conflict between 'communities' affect other social conflicts, such as gender and class conflicts? Gender and class conflicts affect relationships within and between 'communities'. Because the term 'community' focuses on the positive aspects

of common identification, it is not particularly useful for exploring the limits of the 'shared understandings' that form the basis of community.

Nor is the concept of community useful for explaining changes in these shared understandings. This is especially important to conflicts between gender and minority rights because introducing women's rights usually means changing traditions. As Judy Fudge argues:

Thus, the concept of community cannot help us to understand conflict, domination, or change because the very use of the term obfuscates the existence of conflict and domination and the continuing process of change. Once community becomes the central focus of political analysis there is a tendency to ignore the fact that all communities are located in a broader political economy which, in turn, conditions the existence and formation of communities.29

In her discussion of group rights, Iris Young advocates rejecting the idea of community and replacing it with the concept of a social group. She argues that the concept of community misrepresents social relations. Furthermore, as a political ideal, the concept of community is not only hopelessly utopian but has undesirable political consequences.

Young argues that the ideal of community implies social relationships which are unmediated, in which people directly and immediately understand and relate to one another. "Whether expressed as a common consciousness or as a mutual understanding, the ideal [of community] is one of transparency of subjects to one another. In this ideal each understands the others and recognizes the others in the same way that they understand themselves."30 Young argues that social relations are never unmediated. People are not transparent even to themselves, therefore it is impossible that they would be transparent to

---


30 Young, Justice and the Politics of Difference, 231.
each other. Thus, the ideal of unmediated social relations misrepresents the possibilities of relations between selves.

As a political ideal, the concept of community has undesirable consequences. The ideal of community is usually seen to require small, decentralized, self-sufficient communities. While Young recognizes that there are certain positive experiences which are only possible in small groups, she argues that privileging face-to-face direct democracy in this way has some undesirable political consequences. In this view, political community is based on mutual identification and shared history. This ideal often operates to exclude those who are different, and to legitimize some groups’ feelings of fear and aversion to groups that are different. “If community is a positive norm, that is, if existing together with others in relations of mutual understanding and reciprocity is the goal, then it is understandable that we exclude and avoid those with whom we do not or cannot identify.”

Thus taking mutual identification as an ideal, and as the basis for political community, legitimates some groups’ exclusion of those individuals or groups who are different.

There is an additional problem with the term community when it is applied to the South Asian context. In South Asia the term has different connotations than in the West. While in the West ‘community’ conjures up images of small, close-knit social units, in South Asia, ‘community’ has strong negative connotations because of its association with communalism. Communalism in South Asia is a derogatory term used to describe violent, politicized conflicts between religious or cultural groups. The different meaning ‘community’ has in the Western and in the South Asian context makes it difficult to use effectively in explaining conflicts between gender and minority rights in India.

Young rejects the concept of community both as an analytical tool and as an ideal. She argues that rather than thinking in terms of the dichotomy of individual or

\[31\text{Ibid.}, 235.\]
community, we ought to recognize both individuals and social groups. By a social group, Young means "a collective of people who have an affinity with one another because of a set of practices or way of life; they differentiate themselves from or are differentiated by at least one other group according to these cultural forms." Such groups are distinguished from interest groups or ideological groups. Interest groups are voluntary organizations which promote or oppose specific interests, such as a movement against the spraying of a specific pesticide. Ideological groups are groups of people who aggregate based on their shared political beliefs. Women are a social group, and feminists are an ideological group.

The concept of a social group is more useful than the concept of a community because identity is constituted by different aspects of the social context in different and sometimes conflicting ways. Not only culture, but also gender, class, and sexuality have an important impact on how individuals understand themselves and others. There is no obvious reason to privilege that aspect of identity constituted by culture over that constituted by class or gender, for example. Thus the concept of a social group is more flexible and can more easily accommodate the complexity of group difference and political identity than can the concept of community.

Thinking of minorities as social groups highlights the divisions within minorities. When the potentially autonomous group—the minority—is thought of in this way, granting autonomy to the group becomes problematic. Just as minorities have rights against the majority, some groups within the minority may have rights against other groups within the minority. How can one be sure that oppressed and marginalized groups within the minority will not be excluded from power? The goal is to grant comprehensive autonomy to the minority group, rather than to leave some groups at the mercy of others without the benefit of the legal protection they would otherwise have enjoyed. Comprehensive autonomy means that no social group is excluded from decision making.

32Ibid., 186.
because of their oppressed status within the minority: the whole group participates in the autonomous decisions of the minority.

_Minority Rights, Autonomy and Difference_

What implications does all this have for how conflicts between women's rights and minority rights are best dealt with? The problem is that giving more autonomy to minority groups on certain issues sometimes allows that group to oppress certain sections of the community, such as women. How, in a democratic society, is it possible to grant some autonomy to minority groups while simultaneously protecting the rights of the women of that minority?

Young's approach to group rights begins to suggest an answer to this problem. Young argues that truly democratic processes must recognize the differences between as well as within groups. For example, women's groups must be careful that in their search for solidarity they are sufficiently sensitive to the differences between women that arise from class and racial differences. Similarly, anti-racist groups should respect the differences in class, gender and sexuality among their members. As Young argues: "Those affirming the specificity of a group affinity should at the same time recognize and affirm the group and individual differences within the group."\(^{33}\)

Young's approach to individual and group rights is one which recognizes and affirms difference. Eliminating group-based oppression does not necessarily entail eliminating group based difference. Young rejects what she calls the "assimilationist

\(^{33}\)Young's critique should not be seen as delegitimizing the efforts of those oppressed groups who are attempting to build solidarity between members in order to fight their oppression more efficiently. Rather, it should be seen as a reminder to such groups that there may be important political differences within the oppressed group itself. *Ibid.*, 236.
ideal," the idea that eliminating group-based difference is either possible or desirable. She argues that:

Since ignoring group differences in public policy does not mean that people ignore them in everyday life and interaction, however, oppression continues even when law and policy declare that all are equal. Thus I think for many groups and in many circumstances it is more empowering to affirm and acknowledge in political life the group differences that already exist in social life. One is more likely to avoid the dilemma of difference in doing this if the meaning of difference itself becomes a terrain of political struggle.34

People have multiple and crosscutting group identities. Any mechanism which attempts to represent social groups accurately must reflect this reality. Both women and disadvantaged minority cultures are oppressed social groups that are entitled to group representation. This means that mechanisms created to ensure that women have input into the political process must include specific mechanisms to ensure that minority women have effective representation. Similarly, mechanisms or organizations which represent minority groups must ensure minority women have effective representation within the organization. Thus, if a minority group is to be given the right to administer certain aspects of its own affairs, the organization to which authority is entrusted must have mechanisms to ensure the effective participation of women. The traditional institutions within minority societies frequently operate to exclude women rather than to ensure they are properly represented. Therefore, the state would have to create (or require the minority group itself to create) a separate institution or mechanism which could include traditional leaders as well as special representatives for women in order to provide more just means of representing and administering the group.

34Ibid., 169. It is worth stressing that allowing that different treatment can be equal treatment does not mean that different treatment is not sometimes unequal treatment. The point is that equality is not a question of sameness and difference but rather is a question of power or disadvantage. There is a whole body of feminist jurisprudence on this subject. See for example, Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law, (Cambridge, Ma.: Harvard University Press, 1987): 32-45.
Recognizing that treating people equally does not always mean treating people
the same has important implications for institutions designed to represent minorities,
women, or other social groups. While there can be a general commitment to certain
individual rights, there may be different ways of implementing these rights. Some leeway
in the way rights are protected should be allowed in order to recognize that different
cultures may have different ways of implementing these rights. For example, aboriginal
communities in Canada have resisted having the Charter of Rights and Freedoms apply to
their communities because certain elements of the Charter are seen as inimical to aboriginal
jurisprudential traditions. Some room for variety should be allowed to such
communities to implement their commitment to groups and individuals in their own way.
Measures which severely disadvantage a group within the social group, such as women, in
relation to other parts of the group should not be allowed without the agreement of the
special representatives for that group.

It is true that some methods of protection of rights will be inferior to others.
But if one method is only slightly less effective, it still may be preferred over others since it
seems more familiar or easily understandable. In other words, individuals might have
more of a sense of ownership and respect towards a rights protection scheme that
originated from their own group than they would towards an alien scheme, even if it
proved to be more effective. Sometimes decisions which are less just or reasonable are
more acceptable to those who are affected by them if they have a sense that they had some
input into the decision. Group oppression can be somewhat alleviated by granting groups
some control over the decisions which have an impact on their lives.

False Consciousness

Of course, this does not address the problem of 'false consciousness'. For example, women’s representatives may support the traditional patriarchal structure since they are as much a part of it as men are. This is a difficult problem, but it may not be insurmountable. While many women may suffer from false consciousness on any particular issue, most women are aware that as women they face special problems and issues that distinguish them and sometimes place them in opposition to men. Even if women do not have a well developed sense of their common interest as a group when women’s representatives are first introduced, it is likely that women will develop a sense of their own interests if they are entitled to separate representation. Thus, even if the representatives are not effective at protecting women’s interests at first, in the long run women will develop a sense of the important political differences between women and men, and group representation for women will become more effective.

A bigger problem with this proposal is that the women’s representatives may use their power to defend class interests. The women most likely to fill the positions of women’s representatives—women university professors, for example—may identify more strongly with middle class interests than they do with poor women. Women representatives might use the power given them as women’s representatives to defend their own class interests.

It is not clear that women representatives would necessarily act to defend ruling class interests. The class status of women is more problematic than that of men. Women’s relationship to class is mediated by their relationship to men. As Catharine MacKinnon argues:

What is the class of a nurse who marries a doctor, continuing to work as a part-time nurse? the woman from an academic family with three children who goes on welfare when her psychoanalyst husband mysteriously disappears? the daughter
of a professional mother and a middle-management father who worked up from 
office boy? the secretary who marries her executive boss? the “Sears card” middle 
class girl abducted into pornography? the steelworker’s daughter in law school? 
the young runaway fleeing rich suburban incest being pimped downtown? These 
examples do not mean that class does not exist or that true class mobility is all that 
significant. They do suggest that women’s class status is significantly mediated by 
women’s relation to men. 36

The point is not that women will not defend middle class interests, but rather, that it is not 
clear which class interests they will defend.

It is possible that initially women representatives would defend middle class 
interests. However, in the long run, it is probable that through the process of choosing 
representatives, women will develop a sense of solidarity strong enough to override a sense 
of identification with the dominant class. Eventually, women’s identification with the 
middle class will prove to be weaker than their sense of solidarity with other women. Thus, 
at least initially, false consciousness as it relates to class and gender could inhibit the 
effectiveness of women’s representatives as a means of protecting women’s interests. 
However, in the long run, false consciousness will diminish as women develop a stronger 
sense of their own interests.

**Opposition by Elites**

A further obstacle to implementing the idea of women’s representatives is that 
such proposals are likely to be opposed by the elite of the minority group. Since new 
institutions, if effective, would take power away from the existing elites in the minority

---

36Catharine MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, Ma.: Harvard University Press, 1989): 48; In India, class relations are further complicated by caste. Unfortunately, it would be impossible to discuss this issue here. Even if there was space to discuss caste in India in general, the operation of caste among the Muslims is even more complicated, since there is disagreement as to whether caste even exists among Muslims. For a discussion of caste among the Muslims see Imtiaz Ahmad, ed. *Caste and Social Stratification Among the Muslims*, (New Delhi: Academic press, 1973).
group, they are likely to oppose the proposal, and as a result any state-created institution is likely to lack legitimacy.

However, one must be careful not to overestimate the power that the elites would have within their own group. Elites can not whip up opposition to whatever policy they choose. In fact elites are significantly constrained by the predispositions of the group they hope to influence. In the book *Ethnicity and Nationalism: Theory and Comparison*, Paul Brass argues that elites who wish to exploit symbols of cultural difference to enrich their own power must be very skillful as well as lucky in order to succeed: "Some symbols are emotionally powerful, but may be dangerous to use—not only because their use threatens civil disorder, but because their use will benefit one elite group rather than another. Other symbols may be useful for conflict with a rival community, but potentially divisive internally."

It should not be assumed that the elite of the minority group will be able to create opposition to the proposed women's representatives. The proposal will no doubt be challenged by the elite as outside interference by the government. But whether or not they succeed in identifying the proposal as outside interference will depend on whether they can make the proposal seem like a credible threat to the bulk of the minority. The government strategy should be to argue that the goal of the proposal is comprehensive self-government as opposed to elite rule. If the government is effective in emphasizing that the proposed mechanism will give the group more control over certain issues, then elites within the minority group may find themselves competing in order to be included in the new representative body rather than opposing the proposal.

Another possible way of getting around elite opposition would be to gradually increase the effectiveness and importance of women's representatives. Initially, the government could require that organizations that wish to be recognized as officially

---

37 Brass, *Ethnicity and Nationalism* 101.
representing a minority group include some women representatives. Then, gradually, the
government could introduce more stringent requirements, such as having a certain
minimum number of women representatives, or giving existing women representatives
more power. Of course, this process of gradually introducing effective representation for
women would have to be completed before control was completely relinquished to the
minority group. Thus, although opposition from elites with vested interests could be a
formidable obstacle to this proposal, it would not necessarily be sufficient to make the
proposal unworkable.

Conclusion

To sum up, then, in conflicts between minority and gender rights, the most
difficult issues arise in regard to a minority’s right to autonomy. The problem is that
increased autonomy for the minority tends to give greater legitimacy to traditional
patriarchal elites while at the same time exempting those elites from any obligation to
respect sexual equality.

Despite the shared interest of its members, a minority group is not a monolithic
entity, but rather a social group which is divided internally. When the divisions within a
minority group are recognized, granting autonomy to that group becomes problematic. Is it
possible to grant comprehensive autonomy to the minority group, rather than to leave some
oppressed groups within the minority without the benefit of the legal protection they would
otherwise enjoy?

I have argued that any organization which is recognized by the State as
representing the minority group must recognize the important differences among the
members of the group by, among other measures, taking steps to enhance the effective
representation of the women of that minority. In addition, in attempting to promote sexual
equality within the minority, there must be some room for variety among cultural groups as different groups may want to pursue that goal in different ways. It is true that some may be relatively disadvantaged as a result of variation in the effectiveness of various measures to ensure sexual equality. These disadvantages would have to be balanced against the benefits that accrue to the minority group from living by rules they have chosen themselves rather than those which have been imposed by another group.

There are several obstacles that will make this solution extremely difficult to implement. In addition to false consciousness arising from gender and class conflicts, this proposal will most likely meet with opposition from elites within this minority group. Despite these obstacles, I have argued that this solution is at least possible. As it is the only defensible solution to conflicts between gender and minority rights, it should at least be tried.

Understanding conflicts between gender and minority rights in this way clarifies the issues at stake in the Shah Bano controversy. Why did the legitimate claims of Muslims as a group conflict with the legitimate claims of Muslim women? How effective would the proposal outlined above have been as a solution to the problems raised by Shah Bano? Let us turn now to a discussion of the conflict between gender and minority rights in the Shah Bano case.
CHAPTER THREE: THE SHAH BANO CONTROVERSY

As previously indicated, Shah Bano was a seventy-three year old Indian Muslim divorcee who sued her ex-husband for maintenance. Her husband, an advocate by profession, appealed all the way to the Supreme Court of India. In April 1985, after a ten year legal battle, the Supreme Court decided in favour of Shah Bano.

The decision provoked massive demonstrations. Muslim fundamentalists protested the Court’s interference in Muslim personal law, and Hindu fundamentalists organized anti-Muslim rallies to celebrate the decision and to protest Muslim backwardness. The political backlash from the decision prompted the government of Rajiv Gandhi, who had initially supported the Supreme Court decision, to do an about face on the issue. Almost a year after the controversy began, the Prime Minister introduced a bill into Parliament, the Muslim Women (Protection of Rights on Divorce) Bill 1986, that effectively reversed the decision.

Why did the Shah Bano decision create such a severe political backlash? On the face of it, it seems strange that so many people could be mobilized to protest an order for a husband to provide a negligible amount of maintenance (which he could well afford) to his seventy-three year old divorced wife of over forty years. The other decisions which set the precedent for Shah Bano occasioned little interest from anyone. But the turmoil that resulted from this case convinced the Prime Minister to introduce one of the most unpopular bills his government ever introduced, a bill which cost him important support even within his own party.

It is clear that Rajiv Gandhi felt he had to make a choice between women’s rights and the rights of a significant minority. What legitimate claims did Muslims make which conflicted with the legitimate claims of women in the Shah Bano case? Why did the Prime Minister make the choice he did, that is, of introducing the Muslim Women (Protection of Rights on Divorce) Act, 1986? How could the conflict have been better
resolved? In order to answer these questions it is necessary to trace the development of the Shah Bano controversy, which began when Shah Bano took her husband to court in 1987 and which culminated in the introduction of the Muslim Women (Protection of Rights on Divorce) Bill, in May 1986.

Muslims in India

In order to understand the Shah Bano controversy it is necessary to review the position and history of Muslims in India, especially in regard to the Muslim personal law, or Shariat. Muslims are a significant minority in India. There are over 90 million Muslims in India, comprising approximately 11% of the population. Despite the fact that "it is undeniable...that no party has been able to win elections at the National level without the support of the Muslim vote," Muslims are a disadvantaged group in India. They suffer discrimination by the Hindu majority, which results in their being economically depressed and educationally backward. Ali Asghar Engineer quotes one survey as estimating that over 70% of Indian Muslims live in poverty. Muslims are underrepresented in technical schools and the civil service. "The Muslim representation in the civil services, army, private and public undertakings is abysmally low and on the decline. They are discriminated in other walks of life as well." It is estimated that 90% of the prostitutes in India are Muslim women.


Islam first came to India with the invasions from the North, and Muslim rule in India lasted from the early thirteenth century to the late eighteenth century. The policy of Indian Muslim rulers towards other religions ranged from "tolerance and syncretism" to "bigotry and fanaticism." Hindus, and even some sects of Muslims such as the Ismailis, were at times subjected to religious persecution and discrimination. Over several centuries, tens of millions of Indians, mostly from the lower castes, converted to Islam.42

The British first arrived in India in the seventeenth century with the British East India Company, which eventually became the colonial government of India. For the most part, the British pursued a policy of non-interference in the religious matters of India. They preserved the existing cleavage between Hindus and Muslims by granting Muslims "a separate political arena, in which they would not have to compete with non-Muslims."43 Muslims were granted political representation proportionately greater than the percentage of the population they comprised in recognition of their status as the class that had ruled India prior to the arrival of the British. In return, Muslim elites were expected to support the colonial government of the British.44

As the struggle for independence from British colonialism developed, Hindu-Muslim tensions grew. In 1906, the Agha Khan headed a Muslim deputation to the British colonial government which demanded that any scheme of representative government in India include separate representation for Muslims. "Against a background of mutual distrust between the two communities, the demand was made by the Muslim minority for separate electorates."45 Separate electorates for Hindus and Muslims were established in 1909.


43Brass, Ethnicity and Nationalism, 91.

44Smith, India as a Secular State, 65; cf. Brass, Ethnicity and Nationalism, 91.

45Smith, India as a Secular State, 85.
Over the next twenty years or so, a coalition was forged between Muslim religious leaders (the *ulema*) and Muslim secular leaders in the form of the Muslim League. The goal of this coalition was mainly to secure satisfactory political representation for Muslims in India. In 1929, the famous Muslim leader Mohammed Ali Jinnah presented his fourteen points as the demands of the Muslim leadership, arguing that Hindus and Muslims were distinct peoples, and that thus Muslims were entitled to separate representation. 46

The Muslim League failed to achieve these goals in India, and at independence, separate elections for Hindus and Muslims were abolished. However, the demands of the Muslim League had led to the creation of Pakistan as a separate state for Muslims. The partition of the subcontinent into India and Pakistan in 1947 led to unprecedented communal violence. 47 Paul Brass argues that partition seriously weakened the Muslim minority in India:

Muslim minorities no longer could depend upon the support of the great Muslim populations of the Punjab and Bengal. Instead of belonging to a Muslim nation 100 million strong, they found themselves reduced to provincial minorities in a predominantly Hindu country in which all provinces but one were also predominantly Hindu. Nor were their demands in any way satisfied by partition. Instead, separate electorates were abolished, no provisions were made in independent India for special representation for Muslims in services and education, and Hindi in the Devanagari script was declared the official language of the Union and of the North Indian provinces. Finally, their most prominent leaders deserted them for Pakistan. 48

Since partition there have been several important rallying points for Muslims in India which have become central to Muslim identity; for example, the Urdu language, Aligarh Muslim University, and the Muslim personal law, or *Shariat*. Each of these

---


symbols is worth discussing, but here I shall deal only with the Muslim personal law, since only it is directly relevant to the Shah Bano controversy.

In 1862 the British established a secular system of criminal and procedural laws in India, the Indian Penal Code and Code of Criminal Procedure, which were applied regardless of religion. However, the British did not interfere with civil and family law. In fact, the personal laws of the Muslims and Hindus were formally recognized and administered by government courts. At Independence, the promulgation of a uniform civil code was formally adopted as a goal of the government in one of the directive principles of the constitution, article 44, which states that "the State shall endeavor to secure for the citizens a uniform civil code throughout the land."49 However, nearly fifty years later, Hindus, Muslims and other religious groups are governed by their own personal law. In family law, Indian Muslims are governed by the Muslim Personal Law (Shariat) Application Act of 1937. The ulema, or Muslims clerics, have long opposed any reform of Muslim personal law. Successive governments have refrained from interfering in Muslim personal law for fear of antagonizing the ulema, who are seen as having a strong influence on the Muslim population. As Paul Brass notes: "Neither the British nor the leaders of postindependence India were willing to antagonize the ulema on the matter of reform of Muslim personal law, for it is believed that the ulema have succeeded in imparting to most Muslims the feeling that any tampering with the personal law would amount to an attack on Islam."50 Thus the Muslim personal law has become an important symbol of the distinctness of the Muslim minority in India.

Muslims see themselves as members of a single international religious community or ummah. The religious community is central to the practice of Islam. It is important to a Muslim to go to the mosque to pray with others. It is said that 'one Muslim


50 Brass, Ethnicity and Nationalism, 81.
is no Muslim at all’. Islam emphasizes the oneness of the believers, and submission to
divine will: “Islamic ritual emphasized unity among the Muslim community, the
brotherhood, the ummah.”

Despite all this emphasis on oneness, Indian Muslims are far from
homogeneous or monolithic ideologically or culturally. Although Muslims are
distinguished from other Indians by their observance of the Shariat, they are also
distinguished from each other in the particular ways that they choose to interpret the
Shariat. As Paul Brass argues:

Internal religious and social differentiation among Muslims in India has
always been great. The sectarian differences between Sunnis and Shi’as in India
are well known and have been frequently bitter and violent, but there have been
other sects in Indian Islam some of them hardly distinguishable from Hindu
religious groups. Caste differentiation among Muslims was in the nineteenth
century and continues in the present to be great.

These social and religious differences among the Muslims also vary according to region.
Thus, despite the ideological emphasis on oneness and brotherhood, there are significant
social, regional and religious divisions among Muslims.

51 Akbar S. Ahmed, Discovering Islam: Making Sense of Muslim History and Society (New

52 For example, one of the most famous sub-communities of Muslims is the Dawoodi Bohra
community. Even this community is divided into reformists and non-reformists. See Uma Prabhu,
“Hearing against Syedna Today”, Times of India (Ahmedabad), June 13, 1992; cf. “Reforming the Faith”,
Times of India (Ahmedabad), June 13, 1992.; See also Brass, Ethnicity and Nationalism, 86-87.

53 Zoya Hassan, “Minority Identity, Muslim Women Bill Campaign and the Political

54 Brass, Language, Religion and Politics, 125.
The Political Context

The Shah Bano controversy occurred at a time when communal tensions in India were running high. In the early 1980's the Hindu-Sikh conflict in the Punjab escalated to the assault on the Golden Temple at Amritsar, in which thousands died. In 1984, the assassination of Prime Minister Indira Gandhi by two Sikh bodyguards sparked communal riots in which thousands of innocent, mostly poor, Sikhs were massacred.55

At the same time, Hindu-Muslim relations were strained as the issue of the mosque at Ayodhya grew into an issue of national importance. In 1986, Hindu fundamentalists began to revive an earlier claim that the Muslim mosque in Ayodhya, the Babari Masjid, had been built on the birthplace of the Hindu god Ram. They demanded the restoration of the site to its original purpose, that is, Hindu worship. In February a district judge agreed to return the mosque to the Hindus. This decision provoked communal violence in various places in India, and Muslims formed a national committee to press for the restoration of the mosque to Muslims. Meanwhile, Hindu fundamentalist groups began drawing up lists of other Muslim mosques allegedly built on sites sacred to Hindus.56

Thus, at the time of the Shah Bano decision, the political context was becoming increasingly volatile as communal conflicts escalated. A sense of the political context in which the Shah Bano controversy developed, as well as an understanding of the symbolic significance of the Shariat to Muslims is essential to understanding the Shah Bano decision and the events by which it was followed. Let us turn now to the details of the decision and the controversy that resulted.


56 Ibid., 193-194.
The Decision

Shah Bano was the first cousin of her husband, Muhammed Ahmed Khan, whom she married in 1932. She had five children with her husband before he was married again, in 1946, to another first cousin, Halima Begum. Apparently, there was an ongoing dispute within the family over a specific piece of property. Shah Bano and her husband began to fight over this same issue and the relationship between Shah Bano and her husband grew strained. In 1975 Khan drove Shah Bano from the house.57

Three years later, Shah Bano filed for maintenance under section 125 of the Criminal Procedure Code. Section 125 reads:

125(1) If any person having sufficient means neglects or refuses to maintain—
(a) his wife, unable to maintain herself,...
A magistrate of the First Class may, upon proof of such neglect or refusal, order such a person to make a monthly allowance for the maintenance of his wife...at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit.58

According to the explanation of the section, the word “wife” in this context refers not only to a person’s current wife, but also to divorced wives, as long as they are not remarried. The most that can be awarded as maintenance under section 125 is Rs. 500 monthly. This upper limit is set because this section is mainly meant to prevent vagrancy, and thus only applies when a woman is unable to maintain herself. This section was not intended to capture the totality of the spouses’ obligations to each other, nor was it meant to be applicable to all cases. It was intended to apply only those cases in which the wife was destitute.

57 Mody, “The Press in India,” 935-936.

Shortly after Shah Bano filed for maintenance her husband divorced her using the irrevocable triple divorce or *talaq* in one sitting. Khan then argued that he had no obligation to support Shah Bano since she was no longer his wife. Furthermore, he argued, he had already paid her Rs. 200 per month by way of maintenance for the previous two years. In the period of *iddat*, a three month period following the divorce, Khan had deposited Rs. 3000 in the court as Shah Bano's *mehr*. *Mehr* is an amount given by the bridegroom to the bride at the time of marriage. *Mehr* is often given in two parts. *Prompt mehr* is given at the time of marriage. *Deferred mehr* may be paid at a later time, but it must be paid to the bride in full upon divorce or death of the husband. Khan argued that since he had paid Shah Bano her *mehr* during the period of *iddat*, he had fulfilled all his obligations to her and could not be ordered to pay any more maintenance. In 1979, the local magistrate ruled in favour of Shah Bano and ordered Khan to pay Rs. 25 per month. A year later Shah Bano filed a revised application for maintenance in the High Court of Madhya Pradesh, and she was awarded increased maintenance of Rs. 179.20 per month.

Her husband then appealed to the Supreme Court of India. The Muslim Personal Law Board sought and obtained permission to intervene on behalf of the husband. In the Supreme Court, counsel for Khan argued that since under Muslim personal law a divorced woman is entitled to maintenance only during the period of *iddat*, he could not be ordered to pay maintenance to Shah Bano beyond that period, since to do so would be contrary to the principles of Islam. Furthermore, Khan argued, since he had already paid Shah Bano her *mehr*, he had fulfilled his obligations to her under Muslim personal law,

---


60 Mody, "The Press in India", 936.
and that therefore section 125 did not apply.61 This last point rested on another section of the criminal code, section 127(3)(b), which reads:

127. (3) Where any order has been under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—
(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order—
(i) in the case where such sum was paid before such order, from the date on which such order was made.
(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.62

Chief Justice Chandrachud of the Supreme Court of India ruled in favour of Shah Bano and dismissed Khan’s appeal. He ruled that section 125 did apply to Muslim wives:

By clause (b) of the Explanation to section 125(1), ‘wife’ includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions...Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. 63

Secondly, Chandrachud C.J. ruled that since mehr was paid with regard to marriage, and not divorce, the fact that Khan had paid Shah Bano’s mehr did not mean he had fulfilled his duties under Muslim personal law as required by section 127(3)(b). In ruling that Khan had not fulfilled his duty under Muslim personal law, the judge drew on two Ayats (verses) of the Quran which (according to one translation) read:

61Ibid., 936.


63Ibid., 25.
For divorced women
Maintenance (should be provided)
On a reasonable (scale)
This is a duty
On the righteous

Thus doth God
Make clear His Signs
To you: in order that you may
understand.64

This particular translation is that of Yusuf Ali. In fact several translations were considered 
by the judge, but this was the one on which he chose to base his decision. There were two 
main points of contention about these two verses. Counsel for the husband argued that the 
word *mataa* should be translated as provision rather than maintenance. Furthermore, it was 
argued that the obligation discussed in these two verses only applied to the particularly 
pious, and not to the general run of Muslims.

The judge rejected both these arguments. While he recognized that several 
authorities on Islamic law contend that the husband’s obligation to the wife extends only 
over the period of *iddat*, the judge argued that these authorities cannot be interpreted as 
speaking to the special case of a woman who is unable to maintain herself.

We are not concerned here with the broad and general question whether a 
husband is liable to maintain his wife, which includes a divorced wife, in all 
circumstances and events. That is not the subject matter of section 125. That 
section deals with cases in which, a person who is possessed of sufficient means 
eglects or refuses to maintain, amongst others, his wife who is unable to maintain 
herself.65

---

64Mody, “The Press In India,” 938.

Controversy, Ed. Ali Asghar Engineer, 27.
The judge ruled that whether *mataa* meant provision or maintenance would make little difference to the case, calling it “a distinction without a difference.” The judge also contended that the verses were addressed not only to the very pious, but to the general run of Muslims. *Ayats* 240-242 describe a husband’s obligation to his wife on death or divorce. Various translations refer to an obligation or a duty on the righteous, god-fearing or reverent. The judge argued that especially since one of the marks of Islam is that there is no clear division between belief and action, between words and deeds, these *ayats* clearly impose an obligation upon the husband to make provision for his wife.\(^66\)

Finally, the judge addressed the issue of whether the order for maintenance could be cancelled under section 127(3)(b). The judge considered whether Khan had fulfilled his obligation to Shah Bano under the applicable personal law, in this case Muslim personal law. Khan had argued that in paying *mehr* he had fulfilled that obligation. Chandrachud, C.J. argued that even if *mehr* is paid “on divorce”, as in the case of deferred *mehr*, it is paid in respect of marriage.

Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression ‘on divorce’, which occurs in section 127(3)(b) of the Code. If *mehr* is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. \(^67\)

Counsel for the husband argued that when sections 125-127 were being composed, Muslim representatives lobbied the government to prevent it from interfering in Muslim personal law, which was why section 127 was worded the way it was. The judge accepted the argument that the government did not wish to reform Muslim personal law,


but rather wished to leave such reform to Muslims themselves. However, the judge argued that even if section 127 was worded the way it was because the framers believed that *mehr* was paid in respect to divorce, such a conception of *mehr* would have been mistaken. “The provision contained in section 127 (3)(b) may have been introduced because of the misconception that dower [*mehr*] is an amount payable “on divorce”. But that cannot convert an amount payable as mark of respect for the wife into an amount payable “on divorce”.”

Furthermore, the judge argued that sections 125 to 127 were not intended to reform Muslim personal law. They were intended to prevent vagrancy and thus applied to all denominations, as is indicated by the lack of reference to any particular group in the section. These sections were intended to operate simultaneously with, and not to replace, Muslim personal law.

However, the body of the judge’s argument did not receive as much publicity or attention as his introductory and closing remarks. In closing, the judge noted with regret that Article 44 of the constitution, which provides that the state will endeavor to secure a common civil code, has remained “a dead letter.” He also referred to a report commissioned by the Government of Pakistan, which drew attention to the plight of many divorced women who were being “thrown into the streets without a roof over their heads and without any means of sustaining themselves and their children.”

In the introductory paragraph of the decision, the judge noted that many issues which arise under civil and criminal law are of broad importance to large segments of society which have traditionally been subject to unjust treatment, such as women. In this context, the judge referred to the


laws of Manu, the Hindu lawgiver, and quoted the Prophet. In addition, the judge quoted a British author to the effect that the “degradation” of women in Islam is its “fatal point”.

*The Reaction to the Decision*

These introductory comments were widely quoted in the press, usually out of context. Combined with the judge’s recommendation for the promulgation of a uniform civil code, many Muslims perceived the decision as being an attack on Islam and on the right of Muslims to be governed by their own personal law. The tendency to see the decision as an attack on Islam was exacerbated by the fact that Hindu fundamentalist groups organized anti-Muslim demonstrations to celebrate the decision and to condemn Muslim ‘backwardness’. In September, 1985, thirty to thirty five thousand Muslim women attended a conference in Malegaon, Maharashtra, and condemned the Supreme Court decision in a resolution. In October, 1985, more than four hundred thousand Muslims attended a conference on Muslim personal law in New Delhi. On November 20, 1985, the All India Muslim Personal Law Board issued a call to observe a *Shariat* protection week. This call received an impressive amount of support; in Bombay, 200,000 people gathered to demonstrate against the Shah Bano decision.

Five women’s organizations—the All India Democratic Women’s Association, the National Federation of Indian Women, the All India Lawyers’ Association, the Young Women’s Christian Association, and the Mahila Dakshata Samiti, responded by presenting a joint memorandum to the Prime Minister. The memorandum read:


Given the fact that the dismally low status of women is a reality for all sections of women regardless of caste or community, the necessity for affording minimum legal protection to all women is self-evident...The unseemly controversy over Section 125 aims at excluding a large section of women from minimum legal protection in the name of religion.\textsuperscript{72}

Muslim members of the ruling party, the Congress Party, were divided on the Shah Bano issue. Arif Mohammed Khan, a prominent Muslim member of the Congress Party who was very close to Rajiv Gandhi, became a prominent supporter of the decision. He was seen by many as representing the ‘progressive’ Muslims. Another prominent Muslim Congress MP and previous Supreme Court Judge, Baharul Islam, also supported the Supreme Court decision.\textsuperscript{73} However, within the Congress Party, there were many MPs who were violently opposed to the decision. Z.R. Ansari, for example, delivered a speech condemning the decision in the Lok Sabha which “inflamed” many members of Parliament.\textsuperscript{74} Thus, initially, the Congress Party had not taken a clear position on the issue.

The Congress Party was not alone in avoiding taking a stand on the Shah Bano decision. Since the Muslim minority is a significant portion of the electorate, most politicians wanted to avoid alienating what they perceived as the majority of Muslims who were opposed to the decision. At the same time, communal tensions made politicians very wary of offending the Hindu majority by seeming too “pro-Muslim”. While there were vocal opponents and proponents of the decision in almost all the parties, only the

\textsuperscript{72} Pathak and Sunder Rajan, “Shah Bano,” 587.


\textsuperscript{74}`Bowing to Orthodoxy,” \textit{The Week}, March 9-15, 1986, 23.; see also Mody, “The Press in India,” 944.
communist parties (the CPI, the CPI(M)) and the Hindu fundamentalist party, the BJP, came out openly in support of the decision.75

Perhaps the most influential opponents of the decision were the Indian Union Muslim League (IUML) and the All India Muslim Personal Law Board. The president of the IUML, Ibrahim Sulaiman Sait, was one of the fiercest critics of the ruling. He argued that “No Muslim will ever tolerate any interference in the Shariat or personal law...It is obligatory to mould personal life according to the Shariat.”76 On July 27, 1985, General Secretary of the IUML, MP Banatwala, introduced a private member’s bill to amend sections 125 to 127 of the criminal code. His introduction to the bill was a blistering condemnation of the ruling.77

The Muslim Personal Law Board (MPLB) was another staunch and influential opponent to the decision. In fact, it was in large part the influence of the MPLB that led to the introduction of the Muslim Women (Protection of Rights on Divorce) Act. On December 21, 1985, a seventeen member delegation led by Maulana Abul Hasan Nadwi, president of the All-India MPLB, met with Prime Minister Rajiv Gandhi to express their opposition to the Shah Bano decision. Among the mullahs, lawyers, academics and politicians, who gathered to meet the Prime Minister, were Congress (I) leaders Najma Heptullah and Begum Abida Ahmed, who came as representatives of Muslim women.78

At this meeting, the framework for the Muslim Women (Protection of Rights on Divorce) Act was laid. By their own account, the members of the delegation found the Prime Minister very cooperative and willing to take up their suggestions. For example, the


Bill's controversial provision to transfer the obligation for maintenance from the ex-husband to the bride's family and then to the community was suggested by members of this delegation.

Part of the reason why the MPLB and the Muslim League were so influential on this issue was the influence they seemed to have on the Muslim electorate. After meeting with the Prime Minister on December 21, the mullahs, maulanas and the Muslim League leaders went to various parts of the country to mobilise opinion against the Supreme Court decision. Shortly after Arif Mohammed Khan voiced his support for the decision, the loss of the sizable Muslim vote in some constituencies cost the Congress some key by-elections. In one case, Syed Shahabuddin, a Janata candidate, defeated the Congress candidate, also a prominent Muslim, in an election in which Shahabuddin campaigned mainly on his opposition to the Supreme Court decision. Meanwhile, Arif Mohammed Khan encountered angry demonstrations opposing the decision and in one of them his car was actually stoned.

On February 2, 1986, the MPLB threatened to use the same tactic again to mobilize opinion against the decision if the demands they had made were not met. While Muslims are a minority in India, the number of Muslims is large enough that the Muslim vote is crucial to any party hoping to win a national election in India. The Congress Party in particular had always relied on the Muslim vote. So the Prime Minister took the MPLB's threat to organize agitations against the decision very seriously.


80 Mody, "The Press In India," 938.

Critiques of the Shah Bano Decision

There were four main aspects of the decision that were cited as offensive by the Muslim Personal Law Board. First, the MPLB condemned the judge's remarks about the status of women in Islam and the husband's unbridled right to divorce. The MPLB argued that these statements were false and that they revealed the judge's ignorance about the Muslim personal law. The judge's comments were often quoted out of context in the press, giving the impression that the judge had singled out Islam as a religion which denied women fundamental rights. Taken in context, however, it is clear that these remarks referred to the problems posed for women's rights by religious personal law in India in general.

The MPLB rejected the judge's suggestion that in Islamic law men can divorce their wives without rhyme or reason. The judge was alluding to the practice of triple talaq, or talaq in one sitting. Some argue that divorce in one sitting is not allowed under Islamic law, or that triple talaq in one sitting may be tolerated, but it is not approved of. Whether or not triple talaq is allowed under Islam, it is apparently widely practised among Indian Muslims without any comment from the religious leaders who opposed the Shah Bano decision.82 It is interesting to note that Mohammed Khan used instant talaq to divorce Shah Bano as soon as she sued him for maintenance.

Second, the MPLB condemned what they perceived as the arrogation on the part of the Court of the right to interpret Muslim personal law. In fact, the Muslim Personal Law Board warned that the interference by the courts in Muslim personal law could mean the death of Islam in India. In an interview, Chief Justice Chandrachud replied that the court had merely interpreted Muslim personal law, and had not interfered in it.

---

Furthermore, the judge argued, the interpretation of personal law is both the function and duty of the courts.83

The main thrust of the judge’s decision left the autonomy of Muslim personal law intact. In fact, the judge stressed that the purpose of sections 125-127 was to prevent vagrancy, not to reform Muslim personal law. The judge stressed that Section 125 was not intended to replace Muslim personal law, or to capture the entirety of the spouses’ legal obligations to each other, but merely to prevent vagrancy, which is a duty imposed on the State by the constitution.84

The judge did investigate the claim that providing maintenance to one’s divorced wife beyond the period of *iddat* is actually contrary to the principles of Islam. He concluded that there is no conflict between section 125 and Muslim Personal law. It should be noted that the issue was raised by the MPLB, which was intervening on behalf of the husband, and that arguments about the content of Muslim personal law were raised by both sides, including the MPLB. In order for the judge to address all the issues raised in the case, therefore, he had to make some comment on the arguments which had been raised. Even if he had decided in favour of Khan (the husband) he would still have been interpreting Muslim personal law.

Third, Chief Justice Chandrachud was criticised for displaying a lack of respect for the intentions of the legislators. Specifically, it was alleged that in dismissing the fact that the framers of section 127 intended to exempt Muslims from section 125, the Chief Justice ignored the clear intent of the framers not to interfere in Muslim personal law. But the judge did not interpret sections 125-127 as reforming Muslim law, and so did not see any conflict between his decision and the intentions of the framers. The judge argued that


the criminal procedure code and Muslim personal law ought to operate simultaneously. So the issue here is not really whether the judge respected the intention of the legislators, but rather whether or not the judge was "interfering in" or reforming Muslim personal law.

Finally, Chandrachud C.J. was roundly criticised by fundamentalists and progressives alike for recommending the promulgation of a uniform civil code as provided in section 44 of the constitution. Many "progressive" Muslims who supported all the other elements of the decision did not support a uniform civil code, arguing that Muslim personal law is crucial to their identity and that it is symbolic of Muslim distinctiveness as a minority group in India.

The Shah Bano decision was handed down at a time when two significant political events made many Muslims in India feel especially threatened. The first event was the controversy surrounding the anticipated opening of the Ram Janmabhoomi temple at Ayodhya in Uttar Pradesh on February 1, 1986. The second event was the petition filed in the Calcutta High Court seeking the banning of the Quran on the basis that it incited violence against non-Muslims. Although the petition was eventually dismissed, twelve people were killed in the demonstrations that the petition provoked. The Chief Justice's comments about a uniform civil code were threatening to the Muslim identity. The judge's recommendation of a uniform civil code also earned him the wrath of many other minority groups such as Christians, Jews and Parsees. In response to the judgement, many minority groups began demanding reassurance from the Prime Minister that no uniform civil code would be introduced.

85 Mody, "The Press in India", 945.

86 Mody, "The Press in India", 950; See, for example, Shariat Rai, "We are Absolutely Against a Common Civil Code", Indian Express, June 29, 1986.
The Muslim Women (Protection of Rights on Divorce) Bill

After two months of consultation with representatives of the MPLB and the IUML, the Muslim Women’s (Protection of Rights on Divorce) Bill was introduced in Parliament. The Bill basically transferred the long-term responsibility for maintaining a divorced wife from her husband to her own family. According to the Bill, a divorced wife is entitled to “a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.”87 In addition, if the wife maintains her children, the husband must make a “reasonable and fair provision and maintenance for a period of two years from the respective dates of birth of such children.”88 After the period of iddat, if a woman is unable to maintain herself her relatives are obliged to support her in the proportion in which they are likely to inherit from her. For example, if a relative is entitled to inherit one quarter of her wealth, he or she would be obligated to pay one quarter of the cost of maintaining the woman. If her own family was unable to maintain her, the waqf or community boards would be obligated to provide for her and her children.

From September 1985 to May 1986, Muslim women throughout India organized various demonstrations against the Muslim Women’s Bill that were attended by hundreds of women. On February 22 1986, a delegation of Muslim divorcees representing a Muslim reformist organization called the Muslim Satyashodak Mandal came to Delhi to oppose the Bill. The following month, hundreds of women gathered in New Delhi to attend a demonstration against the Bill which was organized by fifteen different women’s organizations. In Bombay, two weeks later, a rally for a secular civil code organized by the Women’s Liberation Movement was attended by thirty-five women’s organizations.89

88 Ibid., 85-88.
On March 8, 1986, a statement protesting the bill, signed by 118 prominent Muslims, was published in the journal Mainstream. The signatories included actors, lawyers, journalists, writers, painters and so on. On the first of May, 1986, the Forum against Oppression of Women sent a memorandum demanding the withdrawal of the Bill, signed by over 6,000 people from all over India, to the Justice minister, Ashoke Sen. While the Bill was being passed on May 5, 1986, over a hundred women chained themselves to the iron gates outside Parliament to protest the Bill. In Pune on May 13, 1986, approximately two hundred people, many of whom were Muslim divorcees, demonstrated against the Bill. Three days later, in New Delhi, fourteen Muslim organizations formed a joint action committee to launch an agitation against communal forces and the Muslim Women’s Bill, and to press for a common civil code.90

The Prime Minister presented the Bill to Parliament as a fait accompli, using a three line whip to pass it. Despite the fact that a whip was used, over 40 Congress Party members chose not to comply with the whip directing them to vote. In spite of this opposition from within the Party, the Bill was passed by a comfortable margin in both the upper and lower houses of Parliament.91 The Prime Minister had promised to circulate a background paper on the laws on maintenance in other Muslim countries and to consult the Muslim community. Although the material had been gathered, no discussion paper was ever circulated, and many members of the Prime Minister’s own party felt that they were not adequately consulted in regard to the Bill.92 Many Congress MPs who did show up and vote for the Bill bitterly resented being reduced to “hand raising in Parliament.”93

90 Ibid.


92 In an article on Arif Mohammed Khan, Arun Shourie speculates that the reason the discussion paper was never circulated was that “it showed that one Muslim country after another had in fact modernized its family laws.” See Arun Shourie, “The Arif Mohammed Affair,” in Janak Raj Jai, Shah Bano, Foreword by Baharul Islam (New Delhi: Rajiv Publications, 1986): 141.

introducing the Bill, the Justice Minister, Ashoke Sen, claimed to have consulted every section of the Muslim people. This prompted Arif Mohammed Khan to resign, saying, "You say the fundamentalists are the leaders...But the people voted for the Prime Minister, they voted for you, for all of us, not for the fundamentalists." Thus much of the opposition to the Bill stemmed from the way it was formulated and passed. The government had basically accepted two fundamentalist organizations, the MPLB and the IUML, as the legitimate voice of Muslims without any discussion or consultation whatsoever with Muslims as a group. Furthermore, the Prime Minister neglected to consult with elected Muslim representatives. In doing so he gave legitimacy to the fundamentalists and ignored the concerns of the 'progressive' section of the Muslim community. This failure to consult the more progressive elements of the community particularly rankled those who expected Rajiv Gandhi to fulfill his election promise to bring India into the 21st century.

The main criticism of the substance of the Bill was that it denied Muslim women the recourse to section 125 of the Criminal Procedure Code to which all other Indian women were entitled. In this sense, the Bill discriminated against Muslim women and violated the fundamental rights guaranteed to all women in the constitution. The Bill was also criticised as being too complicated to perform the function of section 125, which was to provide a quick remedy for women, children and elderly people in need. Instead of there being one person who would be responsible for maintaining a divorcee, she would now have to get a court order against the various members of her own family who were obliged to provide some part of her maintenance. Apart from the unlikeliness that any woman


would have the money or the desire to take her own family to court, the Bill was criticised as sending destitute women “from pillar to post” in search of relief.97

Some criticised the Bill as unIslamic because it did not recognise a husband’s obligation to provide for his wife, the obligation to provide mataa. Traditionally, a husband was bound to make a generous provision for his wife, allowing her to continue living in the style to which she was accustomed. A wealthier woman would receive a servant to look after her for the rest of her life. One of the main reasons for giving a woman a generous mataa was to make it easier for her to marry again. But the Bill makes no mention of mataa, and thus eliminates an important obligation of a husband to his divorced wife.98

Indian women’s groups criticized the whole debate for missing the point that neither section 125 nor the new Bill really recognized a woman’s right to maintenance from her husband. According to Madhu Kishwar, this is a problem not only with Islamic law and with section 125, but with all the religious personal laws in India. She argued that a woman, destitute or not, ought to have a right to maintenance by her husband in proportion to the amount of money he makes:

In practice, all the laws of maintenance are highly inadequate. It is not enough to state that a woman should get a “fair” or “generous” payment because the definition of generosity varies widely. Women have too long been dependent on the generosity of men. What is needed is an assertion that maintenance is a woman’s right. She does not have to be a destitute to claim maintenance.99

Finally, the Bill was criticised for making women ultimately dependent on the waqf boards. Many argued that the waqf boards did not have the money to support destitute women and


99 Kishwar, “Pro-Woman or Anti-Muslim,” 8.
their children. In addition, many argued that it was illegal and unprincipled to use the money donated to the waqf boards to support destitute women and their children. Money donated to the waqf boards is intended for religious purposes only. It is not clear why those who give religious donations to the local waqf boards should bear the cost of maintaining a divorced wife and her children rather than the man who is responsible for the woman's condition to begin with. As one commentator put it:

[The Bill] means in effect that a man can marry and divorce at his sweet will and pleasure as many times as he likes and get away with it every time and if the woman finds herself on the street, she can knock at any door for relief but not that of the man primarily responsible for her plight. A greater concession to male chauvinism cannot be imagined. 100

But the Bill drew great praise from the Muslim Personal Law Board and the Indian Union Muslim League. These organizations made statements to the effect that the introduction of this Bill showed that the Congress Party was really committed to protecting the interests of Muslims. The President of the Indian Union Muslim League defended the provisions of the Bill, saying that it protected the dignity of Muslim women by offering them alternatives to begging for maintenance from their former husbands. "The new bill gives the woman more dignity. It only sends her back to the natural family. In [Islamic] divorce the relations are completely cut. In Islam, after marriage a woman's ties with her parents continue to exist."101 Defenders also pointed out that unlike section 125 the new Bill placed no limit on the amount of maintenance a woman could be awarded. So the Bill was defended as improving women's rights, rather than denying them.102

100 K.A. Jaleel, "Driving Her From Pillar to Post", 17.


However, section 125 was not intended to capture the entirety of a woman’s right to maintenance. It was only intended to provide quick relief for destitute women and their children. In this regard, the proponents of the Bill can hardly argue that destitute women are better off trying to hunt down their maintenance from various members of their own family than simply going to their previous husband. Similarly, just because a woman is entitled to more maintenance under the new Bill than under Section 125 does not mean that the Bill is an improvement on the rights women held prior to the introduction of the Bill. In fact, by most accounts, the Bill seemed to have left out or played down a Muslim woman’s traditional right to mataa and thus to have eroded her rights. 103

“A Disaster for the Prime Minister”104

The Prime Minister, concerned about Congress losses of Muslim electoral support, hurriedly introduced a bill which would appease the Muslim fundamentalists, without making a concerted effort to consult or inform women’s groups, prominent members of the Muslim community or members of his own party. These groups were shocked at the lack of importance the Prime Minister attached to their suggestions and input. As a result, the Prime Minister lost support within the Congress party as well as support from traditional Congress supporters such as women’s groups and “progressive” Muslims. In addition, by giving the leadership of the MPLB and the IUML so much legitimacy, the government strengthened the hand of the communal forces in both the Hindu and Muslim camps. The public perception that he was sacrificing principle in a

103Engineer, “The Shah Bano Controversy,” 14; see also Kishwar, Madhu, “Pro-Woman or Anti-Muslim,” 8.

104Elisabeth Bumiller calls the the Shah Bano affair “one of Rajiv Gandhi’s biggest political disasters.” See Bumiller, May You Be the Mother of a Hundred Sons, 165.
scramble to capture the Muslim vote also cost Rajiv Gandhi important support among the Hindu majority.

The Shah Bano controversy brought to the fore the conflict between advocates of Muslim women's rights and advocates of the rights of the Muslim minority over reform of the Muslim personal law in India. Was the Prime Minister faced with an irresolvable conflict, or could the Shah Bano controversy have been better handled? In the next chapter, I shall draw out why the legitimate claims of Muslim women conflicted with the legitimate claims made by the minority as a whole, and sketch a possible solution to the conflict.
CHAPTER FOUR: SHAH BANO AND MINORITY RIGHTS

What legitimate claims did Muslim representatives make which conflicted with the legitimate claims of women in the Shah Bano case? How could the conflict have been better resolved? In this chapter I shall argue that the problem in the Shah Bano case was not so much that Muslims argued that the rights of women had to be violated in order to protect the community, but rather that certain elements of the Supreme Court judgement which granted Shah Bano maintenance were perceived as threatening the distinctness and identity of the Muslim minority. The crux of the problem was not whether the Muslim need for identity was strong enough to justify a violation of women's rights, but rather, how to meet the Muslims' legitimate concern for autonomy with respect to personal law without endangering the rights of Muslim women. In the last part of this chapter I shall sketch a possible solution to this problem.

Personal Law and Muslim Identity

How exactly did gender rights conflict with the rights of the Muslim minority in the Shah Bano case? As we have seen, most Muslim accounts of the Shah Bano controversy linked it to two other important political events which made many Muslims in India feel especially threatened. The first event was the controversy surrounding the opening of the Ram Janmabhoomi temple at Ayodhya in Uttar Pradesh. The second event was the petition filed in the Calcutta High Court seeking the banning of the Quran on the basis that it incited violence against non-Muslims. The escalation of communal tensions in general, and Hindu-Muslim tensions in particular, created a heightened sense of insecurity among the Muslims at the time of the decision.
The Chief Justice’s recommendation that a uniform civil code be promulgated was perceived as yet another threat to Muslim identity. Many Muslims regard the Muslim personal law as symbolic of the distinctness of the Muslim minority. Any threat to Muslim personal law is seen as a threat to the minority’s distinctiveness, and to the Muslim identity. “The issue of personal law is, in fact, closely linked with the Muslim urge for identity.”

The fact that Hindu fundamentalists took advantage of the decision as an opportunity to stage anti-Muslim protests and to emphasize Muslim backwardness contributed to the perception that the decision was an attack on Muslim personal law.

Kymlicka argues that the importance of culture to the ability of individuals to make sense of their lives justifies taking special steps to ensure a minority group has a secure cultural context. This only justifies measures to protect the existence and not the character of the cultural community. However, the Shah Bano case demonstrates the fact that whether it is the existence or the character of the culture that is at stake is often an issue in itself in conflicts over minority rights. In the Shah Bano case, Muslims perceived the Supreme Court decision as directly threatening the existence of their ‘cultural community’. But women’s groups ridiculed the idea that granting maintenance to a seventy-three year old divorcee threatened Islam.

In itself, the decision to grant maintenance to Shah Bano did not represent a threat to the autonomy of Muslim personal law. However, the judge’s call for a uniform civil code was directly threatening to the autonomy of Muslim personal law. At a time when the anti-Muslim efforts of Hindu fundamentalists were intensifying, and when Hindu fundamentalist groups seemed to be achieving some of their communalist goals, the Muslim concern for the autonomy of the Shariat may not have been unwarranted. As such, the Muslim claim to autonomy over personal law seems a legitimate one, according to the

criteria laid out by Kymlicka. How does the Muslim demand for autonomy conflict with the legitimate claims of Muslim women?

Most Muslim leaders who opposed the decision did not argue that women had no rights. Nor did they argue that the violation of the rights of Muslim women was necessary to protect Islam. In fact, many Muslims argued that women have better rights under Islam than those granted by the decision. They argued that Islam has traditionally been more progressive than other religions in regard to women's rights, especially in the areas, for example, of property and divorce rights. This argument is strikingly similar to the argument of aboriginal groups in the recent constitutional crisis in Canada. Aboriginal representatives rejected the Charter of Rights and Freedoms not because they thought that women's rights were unimportant but because, they said, aboriginal traditions would give women a stronger basis for sexual equality than would the Charter.

The decisions which set the precedent for the Shah Bano case aroused little interest from anyone. Both previous decisions, written by Justice Krishna Iyer, granted maintenance to Muslim women under section 125. In both decisions, Justice Krishna Iyer stressed the importance of alleviating the social injustices that women suffer. He argued that payments made to the divorcee by the ex-husband should be taken into consideration when the judge is settling the maintenance. However, if the amount paid by the husband is insufficient to maintain the woman, maintenance must be granted to the woman in order to prevent destitution. The main differences between the two previous decisions and Chief Justice Chandrachud's decision were the Chief Justice's comments about a uniform civil

---

106 See, for example, Badar Durrez Ahmed, "Women's Rights are Far Superior under Shariat to those Provided by Section 125 Cr.P.C." in The Shah Bano Controversy, Ali Asghar Engineer, ed., 97.

107 Sarah Scott, "Aboriginal Men have Learned Sexism, Women Fearing Self-rule on Reserve Say," Vancouver Sun, Mar 30, 1992; On the problem the Charter poses for aboriginal communities in general (as opposed to just women) see Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms", 149-157.
code and his comments directed specifically at Islam. These comments were the parts of the decision that the fundamentalists emphasized in statements to the media in order to create opposition to the decision. Muslim representatives who opposed the Shah Bano decision argued that the Supreme Court did not have the authority to interpret the Quran, and that the Supreme Court was interfering in Muslim personal law. Thus, Muslim opposition to the decision was based on concerns about the autonomy of the group, rather than on opposition to the substantive effects of the decision on Muslim women.

Minority Autonomy and Gender Rights

Why did Muslim demands for autonomy conflict with demands for sexual equality? It is possible that, within limits, different communities can protect women’s rights in different ways without violating the principle of sexual equality. Just as human rights are protected in different ways (albeit some better than others) in Canada, Britain and the United States, women’s rights may be protected differently in different communities. So resistance to specific provisions that protect women’s rights is consistent with a commitment to sexual equality. This is the position that many Muslim representatives took in the Shah Bano case. While recognizing the need for reform and the problems Muslim women faced, many Muslims opposed the Shah Bano decision on the grounds that it represented outside interference.

108 Kishwar, Madhu, “Pro Women or Anti Muslim?”, 4; The two cases which set the precedent for the Shah Bano decision were Bai Tahira v. Ali Hussain Fissalli, 1979, and Fuzlunbi v. K. Khader Vali 1980.

109 Ibid.; See also Mody, “The Press in India,” 950.

110 See, for example, Balraj Puri, “Muslim Personal Law.”
In the Shah Bano case, many women’s groups joined the Chief Justice in calling for a uniform civil code. Similarly, in Canada, the Native Women’s Association opposed native self-government unless the Charter and its provisions regarding sexual equality continued to apply to native communities. In both cases the minority group in question claimed to be committed to sexual equality, but argued that reform had to come from within the community, and had to be consistent with the traditions of the minority group. Why did native and Muslim women continue to demand guarantees from the majority group in the form of a common civil code or a charter?

Actually, these women’s groups have very good reasons to be suspicious of promises for reform from within. This is the real crux of the reason why minority rights and women’s rights so often seem to conflict. Often, increased autonomy for the minority means increased legitimacy for traditional elites who rarely represent women’s interests effectively. In the Shah Bano case the result of giving the minority more autonomy was more power and legitimacy for the Muslim Personal Law Board. This organization has not demonstrated any commitment to reforming Muslim personal law or to improving the status of Muslim women. Previously, women at least had the minimal guarantees of the constitution and the Criminal Procedure Code. Similarly, some native women in Canada fear that self-government will give more power to traditional chiefs, mostly men, who will be unchecked by any obligation to respect women’s rights and their organizations.  

In the Shah Bano case, Muslim demands for autonomy in regard to Muslim personal law conflicted with the concern of some women’s groups that autonomy for Muslims would deprive women of the minimal legal protection they previously enjoyed. Muslim personal law, like other religious personal laws in India, helps to perpetuate sexual inequality. Women’s groups demanded that the government not relinquish its ability to

111Sarah Scott, “Aboriginal men have learned sexism, women fearing self-rule on reserve say,” Vancouver Sun, Mar 30, 1992.
pursue the goal of sexual equality for Muslim women. At the same time, the Muslim Personal Law Board demanded that the government cease interfering in the Shariat. Muslims demanded control over any reform of the personal law. Thus, the central issue in the Shah Bano controversy was which group, the majority or the minority, had ultimate control over the Muslim personal law.

Kymlicka’s account of minority rights outlines a justification for minority rights based on the importance of culture to individuals’ identity, and provides some guidelines as to how to deal with conflicts between minority rights and individual rights. Although this is interesting and important work, it is incomplete as an account of the issues that are involved in minority rights. The toughest issue in conflicts between women’s rights and minority rights is not whether or not women have rights, or whether they are entitled to certain things, but rather, which group decides how conflicts should be dealt with. Any thorough account of minority rights must address the issues that minority autonomy raises. Because Kymlicka’s justification has neglected these issues, it is incomplete, and offers little guidance in dealing with many conflicts between minority rights and women’s rights, such as Shah Bano.

Community or Social Group?

Thus far, our theoretical discussion has shed little light on the Shah Bano controversy. This suggests a gap in minority rights theory. Minority rights theory offers little guidance in dealing with conflicts between groups within a minority as opposed to conflicts between individuals and groups. Earlier, I argued that thinking in terms of social groups rather than communities will help us begin to fill this gap. Recognizing the conflicts within groups highlights the difficulties involved in devolving power to a minority group. Is it possible to grant comprehensive autonomy to the minority group, rather than
leaving some oppressed groups without the benefit of the legal protection they would otherwise have enjoyed?

Thinking of Muslims as a social group rather than as a community helps to explain why giving Muslims autonomy in the area of Muslim personal law was so problematic. While Muslim representatives have often used the rhetoric of community to press their claims, in reality, Muslims as a group fall far short of community. This is not to argue that Muslims do not share a strong sense of identity, or to deny that Muslims have significant common interests as a group. The point is that these commonalities are complicated by other conflicts within the group. Recognition of the interests Muslims share must be balanced by an acknowledgement of the significant differences within the group. As previously argued, Muslims are characterized by deep social, regional and religious differences. In addition, the many Muslim women who demonstrated in support of Shah Bano brought to light the important gender cleavage between Muslims. The term social group, as defined by Young, better captures the limits of the mutual identification between Muslims and makes it easier to recognize how this mutual identification is complicated by gender.

This is not to suggest that Muslims will stop referring to themselves as a community. They almost certainly will continue to use ‘community’ since it is so politically charged. The very reason why this concept is inappropriate for political theorizing about the Shah Bano case makes it especially useful to Muslim elites who wish to represent themselves as the sole legitimate voice of a united group.

Recognizing the importance of the political divisions among Muslims is crucial to understanding why the Shah Bano controversy was such a political disaster for the Prime Minister. By consulting only Muslim fundamentalist groups such as the MPLB, the Prime Minister alienated progressive Muslims, Hindus and women’s groups. Even the Muslims who were elected representatives of the Congress party were not consulted. The Prime Minister’s decision to recognize the MPLB as the official representative of Muslims
without even engaging in consultation with other groups outraged those Muslims who rejected the fundamentalist leadership. Thus, Rajiv Gandhi's failure to recognize the important divisions among Muslims was a key factor in his mishandling of the Shah Bano controversy.

Muslim Autonomy and Sexual Equality

How could Rajiv Gandhi have better handled the Shah Bano controversy? Recognizing that Muslims are a deeply cleaved group explains why simply giving in to the fundamentalists was such a bad decision. But it also highlights the difficulty of resolving conflicts between gender and minority rights. Is it possible to protect a minority's rights to autonomy without compromising the rights of the women of that minority?

Iris Young's approach to democracy and group rights begins to suggest a solution. Young argues that in a democracy, oppressed social groups ought to have special representation. Dominant groups do not need special representation since they are already assured of a voice by virtue of being dominant. However, since people have shifting and conflicting group identities, it ought to be recognized that social groups are not homogeneous, and that the oppressive relations within the society at large are often mirrored in social groups. Racial or cultural minority groups are often riven by gender and class divisions. For example, as a largely disadvantaged minority in India, most Muslims share some common interests. But other equally important interests, such as gender, crosscut the social group.

Young argues that any institution designed to give special representation to disadvantaged social groups ought to reflect the divisions within that group. Any institution designed to give special representation to the Blacks in the United States, for example, ought to provide for a Black Women's caucus to ensure that women are not
excluded. Similarly, any body designed to represent women in the United States should provide special representation for Black Women and Latinas, to ensure that women groups represent all women, and not just white middle class women.

With reference to the Shah Bano case, this would mean that any organization designed to give Muslims autonomy in the area of personal law would have to include a Muslim women's caucus or body of representatives to ensure that the law is being administered in a way which respects the concerns of Muslim women. Instead of treating Muslims as homogeneous, this organization would include all the social groups which had an interest in the matter, especially Muslim women. This would recognize the fact that although Muslims have many interests in common, Muslims may also have divergent interests based on gender.

By recognizing the Muslim Personal Law Board as the authority on Muslim personal law, the Prime Minister alienated many liberal Muslims as well as women's groups who felt that the MPLB did not represent their views. This situation could have been avoided if a new organization was set up to determine Muslim personal law. This new organization could be elected by Muslims only, and could include several female representatives. These women's representatives would have a veto over any changes to the Muslim personal law which concerned Muslim women. This would have the benefit of avoiding situations in which the secular state apparatus (i.e. the Lok Sabha) creates religious personal law such as the Muslim Women's Bill. Muslims would be assured that their personal law was secure from interference from the Hindu majority, and Muslim women would have some control over those decisions which affected their lives and sense of identity.
But would the control of Muslim women as a group be sufficient to guarantee the rights of individual Muslim women? Some may object that education and socialization have made Muslim women incapable of protecting their own interests. Democratic institutions can not be expected to work when the members of that democracy are not adequately informed about the issues they must decide. Muslim women are educationally the most backward women in the country. Thousands and thousands of Muslim women rallied against the Shah Bano decision. The rallies in support of Shah Bano were small in comparison, usually numbering in the hundreds. What explains the opposition of most Muslim women to a decision that is seemingly in their interest? Can Muslim women be expected to protect their own interests through democratic institutions?

The large number of Muslim women who demonstrated against the Shah Bano decision is not necessarily evidence that Muslim women do not support a Muslim women’s right to maintenance. Some commentators argued that the number of women at the demonstrations in the Shah Bano controversy could not be seen as an indication of the level of support for or against Shah Bano because it would have been difficult for a woman to demonstrate against the will of her husband and the local religious authorities. Many women who privately supported Shah Bano may have been afraid to do so publicly for fear of social ostracism.

Even assuming that there were thousands of women who privately supported Shah Bano, but were afraid or otherwise unable to demonstrate, what of the thousands of women who did demonstrate against the decision? As has been pointed out, opposition to


the decision was not necessarily equivalent to opposition to Muslim women's rights. Muslim women, like many other Muslims, opposed the Chief Justice's recommendation of a uniform civil code and were insulted by his references to the degradation of women in Islam.

Many liberal Muslims are convinced that Islam is very progressive in regard to women's rights compared to other religions. As Arif Mohammed Khan argued: "The point is, my faith has always been progressive on matters relating to women." In his time, Mohammed was a social reformer who did bring many important improvements for women, although certain Q'uranic injunctions are far from fair to women. As Balraj Puri argues, "...the only way to judge the spirit of Islam is by the direction it gave to pre-Islamic laws and customs. The attempt to humanise an unjust patriarchal system was indeed revolutionary. It is unfair to measure the reforms introduced by Islam, torn out of its historical context, in terms of the values of today."

Many practices which discriminate against women are customary practices which have survived from the time preceding Islam and which have come to be associated with Islam, rather than practices which derive originally from Islam. Although the ulema, who currently possess the authority to interpret Muslim personal law, do not see reform regarding women's rights as an important goal, many liberal Muslims and Muslim women who support women's rights see reform as pressing and as continuing the traditional role of Islam as a progressive religion. As Zoya Hassan argues, "Every law needs to keep pace with the times and this applies even more to something like the Muslim personal law,

---

114 Interview with Arif Mohammed Khan, in Janak Raj Jai, Shah Bano, 115.

115 For example, while Mohammed made the marriage contract between men and women much fairer for women at the time, there are still glaring inequalities in the laws governing marriage and divorce. In addition, in Islam a son inherits twice as much as a daughter. See Indira Jaising, "The Politics of Personal Law", reproduced in The Law and Gender Justice, ed. Subhadra Patwa, (Bombay: Research Centre for Women's Studies, SNDT Women's University, 1991): 10-11.

which even to begin with was rather liberal for its times. The Prophet was extremely conscious of the need for the uplift of women." Even poor, illiterate Muslim women seem to have the conviction that Muslim women have a right to maintenance. As Asha Bee, a Muslim women living in a slum near Madras argued, “Of course the man should give maintenance to the woman he has divorced. Where will she go, and how will she live?” Thus, the seemingly large number of Muslim women who opposed the Shah Bano decision is not evidence that Muslim women do not support women’s rights, even a Muslim women’s right to maintenance.

While Muslim women are formally educationally backward, they are certainly sufficiently educated to participate in democratic institutions, especially in those designed to protect their own interests. However, it is possible that Muslim women would simply defend inequitable Muslim traditions because they identify more strongly with traditional ideas about women than with more progressive views. This would be a bigger problem initially than it would be in the long run. Involvement in the process of electing women’s representatives to administer Muslim personal law would foster a sense of the important political differences between men and women. In addition, Muslim women’s identity as women would grow stronger if their identity as Muslims was more secure. Thus, it is possible that giving Muslim women some control over the administration of Muslim personal law would enhance sexual equality in the long run.

Class differences between women might also pose a problem for the women’s representatives. For example, the issue of maintenance has different implications for women married to poor men than it does for women married to rich men. It would be little consolation to Muslim women that they had a right to maintenance if their ex-husbands


could not afford to pay it. On the other hand, women married to rich husbands might think the right to maintenance very important.

But since this new organization would only have control over personal law, it would have little opportunity to address class issues. For example, in the case of maintenance, the real problem is that poor men often do not have enough money to support all their dependents. This problem would not be alleviated by reform of personal law. It requires broad social policy initiatives that would be beyond the powers of the proposed representative institution. Since class differences between women could not be resolved by reforming personal law anyway, whether or not the Muslim women's representatives defend class interests in this case is not as pressing an issue as it might be in other situations.

Opposition by Elites

Perhaps the biggest obstacle to implementing this proposal is that any organization created by the government to represent a minority will have to compete for legitimacy with those institutions or organizations by which the minority is already represented. In the Shah Bano case, for example, the Muslim Personal Law Board was perceived as having a great deal of influence among Muslims. This was part of the reason why the Prime Minister conceded as much as he did to the Muslim Personal Law Board. If the Muslim Personal Law Board opposed the idea of women's representatives, they could have brought the same threats against the Prime Minister that they did in the Shah Bano controversy.

As Brass argues, elites of minority groups often exploit political problems to enhance their own political power. It is clear that the MPLB exploited the Shah Bano controversy to this end. But it is important to remember that such political elites are limited
by the real concerns of the members of the group. It would be much more difficult for the
MPLB to organize demonstrations against setting up an instrument specifically designed to
give the Muslim community more autonomy than it would be to stir up discontent over a
Supreme Court decision recommending a uniform civil code. In addition, if organizations
such as the MPLB were entitled to some representation it might not be as difficult to
convince them to agree to participate in the mechanism. Furthermore, the new
representative body would gain significant legitimacy from the fact that it focussed on being
truly representative and provided for the participation of women.

Gradually introducing effective representation for Muslim women is another
way of getting around opposition from Muslim fundamentalists. At first, the government
could consult elected women representatives, university professors and Muslim women’s
groups. The government could then require that the MPLB consult such groups, or require
that such groups send women representatives to attend meetings of the Board and cast
votes. The government could then require that the number of women representatives be
increased, or that existing women representatives be given more power.

In the case of Muslim personal law, one problem with the idea of women’s
representatives is that only certain people have the authority to interpret the law. The non-
traditional female representatives might be objected to on those grounds. But it would be
difficult to argue that female Muslim university professors and elected officials should not
have at least the opportunity to participate in making decisions which affect Muslim
women. It is said that Islam must be adapted to the specific circumstances of the society
which it governs. Who better to advise on the specific circumstances of Muslim women
than Muslim women themselves? I think that the debate surrounding Shah Bano makes
clear that there is fertile ground for reforming Islam from within, including involving
women in the reform process.

This is not to suggest that there will not be serious political obstacles to setting
up a new representative mechanism. But these obstacles may not be insurmountable. And
it is clear that merely giving in to vested interest groups is not an unproblematic solution either. That is precisely what Rajiv Gandhi did in recognizing the MPLB as a group of cardinals for the Islamic religion, and his handling of the Shah Bano controversy has been called "one of Rajiv Gandhi’s biggest political disasters."\textsuperscript{119} Giving in to vested interest groups is at best a short sighted palliative to ethnic conflict. It lends even more legitimacy to the group that makes the loudest demands, confirming the old adage that it is the squeaky wheel that gets the grease. In the Shah Bano case, Rajiv Gandhi essentially intervened in the power struggle that was occurring within the Muslim community between the MPLB and other Muslim organizations and gave the MPLB more legitimacy than it already had. This alienated the Congress Party’s traditional Muslim support among the more enlightened or progressive segment of the Muslim community, which did not see the MPLB as representing them. There are no easy solutions to these conflicts. But it is clear that trying to create a more representative mechanism to administer Muslim personal law would have been less costly politically and more effective in the long term for both India and the Congress Party than giving in to the MPLB proved to be. At the very least, introducing effective representation for women is worth trying.

\textit{Conclusion}

In conclusion then, the problem in the Shah Bano case was that Muslim demands for autonomy in regard to Muslim personal law conflicted with the concern of some women’s groups that autonomy for Muslims would deprive women of even the most minimal legal protection. The issue was which group would have the final word on reforming Muslim personal law. Women’s groups demanded that the government not

\textsuperscript{119} Elisabeth Bumiller, \textit{May You Be The Mother of a Hundred Sons}, 165.
relinquish its ability to pursue the goal of sexual equality for Muslim women.
Simultaneously, Muslims demanded control over any reform of the personal law.

*Shah Bano* is an example of one of the most difficult problems that arises in regard to minority rights: what to do when granting autonomy to minorities threatens to exacerbate the situation of oppressed groups within the minority. Minority rights theories offer little guidance on this issue. Thinking in terms of social groups, rather than communities, helps to fill this theoretical gap. The concept of community does not aid in conceptualizing conflicts within the community. Nor does it help to understand how these conflicts relate to other conflicts in the society at large. The concept of a social group, on the other hand, is quite useful for conceptualizing the nature of conflict within minority groups. In the Shah Bano case, thinking of Muslims as a social group highlighted the problems involved in granting Muslims autonomy in regard to Muslim personal law. The problem is how to grant comprehensive autonomy to the minority group rather than leave some oppressed groups without the benefit of the legal protection they would otherwise enjoy.

I have argued that conflicts over the rights of minority women are best dealt with by creating new representative bodies which have special provisions to ensure that women are sufficiently represented. In the Shah Bano case, this would have meant creating a new mechanism to administer Muslim personal law instead of simply recognizing the Muslim Personal Law Board as the legitimate representative of the Muslim community. Creating a new mechanism is more sensitive to the political reality of Muslims in India, which is that they consist of widely dispersed groups characterized by significant differences. It would also make some provision to ensure that Muslim women have some access to the institutions which make the rules which govern their lives. I have recognized that while creating such a mechanism would be a difficult process, it is at least a viable alternative to the kind of fiasco that followed the Supreme Court decision. In a country which is supposedly committed to sexual equality, it ought to be tried.
Implications for Minority Rights Theory

What does this discussion of the Shah Bano controversy reveal about minority rights theory? As initially noted, there is no political theorist who directly addresses conflicts between minority and gender rights, which itself suggests a gap in the theory. Certainly, the theorists discussed in this paper do not deal with the issue adequately. Because Kymlicka does not thoroughly address the issue of which group should control the outcome in conflicts over minority rights, his approach is incomplete as a theory of minority rights. Young's approach is a general theory of justice rather than a theory of minority rights, although the implications of her general approach to political theory have clarified the issues in the Shah Bano controversy.

Part of the reason why minority rights theories have so little to say about conflicts like Shah Bano is that they tend to focus on the conflict between individual and community. But this framework is not adequate for dealing with conflicts between groups within the 'cultural community', which are some of the most difficult issues in minority rights. This gap in minority rights theory could be rectified by building on some of the principles suggested by Young. Our discussion of Shah Bano suggests that conflicts over minority rights will be easier to understand and resolve if the complexity of the social aspect of identity is recognized. The social aspect of our identity is limited by more than just cultural community. Gender and class, for example, also contribute to our self-understanding in important ways that are not captured by the term 'cultural community'.

Understanding a minority group as a social group clarifies the issues at stake in conflicts over minority rights and gender rights. When the minority is conceptualized as a divided body, which nevertheless shares some extremely important interests, granting autonomy to a minority group becomes a theoretical as well as a practical problem.
the rights of a group, as opposed to those of an individual, are at stake, different solutions are possible. The solution outlined in this thesis recognizes that giving oppressed groups increased control over decision making can help to alleviate group oppression.
BIBLIOGRAPHY

Books and Articles


Newspapers and Periodicals


