West Coast LEAF
'working for womens' equality' West Coast Women's Legal Education and Action Fund

WEST COAST LEAF
WOMEN'S EQUALITY AND RELIGIOUS FREEDOM PROJECT

REPORT BASED ON ADVISORY COMMITTEE DISCUSSIONS
NOVEMBER 2006

REPORT PREPARED BY HARSHA WALIA

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AUTHOR'S NOTE

As identities within the global climate are becoming more rigid with certain identities perceived as being antagonistic to each other (e.g. 'Muslim' and 'feminist'), women are being forced to accept narrower- often imposed- definitions of themselves despite occupying multiple locations across gender, citizenship, religion, class, sexuality, ethnicity, and race.

Despite this, women of faith- particularly racialized and indigenous women of faith and spirituality- are creating and sustaining uncompromising spaces. As the action plan of Women Living Under Muslim Laws aptly states "Combined with other factors, the ascendancy of identity politics directly erodes the space available for secular initiatives so that in an increasing number of cases, the secular space has been completely eliminated. Consequently, as women or activists we work across imposed boundaries..." (For full excerpt see pg. 52)

Within West Coast LEAF, this discussion is particularly pertinent as the legal framework of the *Charter* that our work is grounded within imposes similar restrictions upon women's lives and bodies. Much like academia, through the work of Samuel Huntington for example, has given intellectual backing to the idea of a "clash of civilizations", legal arguments typically present the guarantee of freedom of religion (Charter Section 2) as a *competing* right with the guarantee of substantive equality for women (Charter Section 15). Not limited to conservative discourse, many liberal feminists have unfortunately taken the position that the Charter guarantee for women's equality will protect women; not from a system of patriarchy at-large but specifically from the oppression they might face as a consequence of their lives within a particular community of faith.

This report is the culmination of approximately six months of work on these very crucial issues. This is certainly an ongoing dialogue that traverses this current period in time and hopefully this report contributes to the existing bodies of diverse thought and discourse. Some of the common themes that emerged through the discussions of the Advisory Committee of West Coast LEAF's Women's Equality and Religious Freedom Project are outlined below.

Racialization: The most common theme throughout the discussions was the intersection between religion and race. Within the white settler state of Canada, particularly in the post 9/11 climate, society's comprehension of religion- be it Islam, Sikhism, Hinduism- is informed by a racialized understanding. "Muslim", for example, signifies a class of foreign, brown, bearded, hijabi, and uncivilized people; rather than white, middle class converts. Therefore, just as race is understood to be a social construct, religion too operates as an ideological construct dependent on a process of "othering" and stigmatization that serves to target particular communities for greater scrutiny and perpetuates racial hierarchies. A salient example of this is the distinction made between polygamy and polyamory, where polyamory is used to define a relationship

based on mutual negotiation between "independent people", while polygamy refers to an oppressive "religious practice". Such differentiations are based on the premise that racialized cultures are inherently more hostile to women. This racism has very real consequences in the present day context, being used to sell illegal wars and occupations across the globe, and restricting the rights and civil liberties of those perceived to be Muslim within our local borders through profiling, detentions, security certificates, and anti-terrorism legislation.

Gender oppression: Perhaps one of the most pertinent discussions was an attempt to articulate the reality of gender oppression that women of faith face. There was a common understanding that a discussion of gender inequality 'within' religions invisiblizes the universal systems of patriarchy that all women contend with, while homogenizing and fossilizing religions in definitive ways. Furthermore, it is a reality that racialized women of faith and women in other minority communities often face more violence and marginalization as women. However this is not a completely 'internal' affair that is a result of their so-called backward and oppressive communities, but a direct function of external state-regulated forces such as a lack of full immigration status or living within a criminalized relationship that places them in a more precarious position. Therefore the construction of women of faith is a dual and overlapping process of both external and internal forces and the dichotomy that racism is 'from the outside" while sexism 'is from within' is a far too simplistic dichotomy.

Religious right to discriminate: Advisory Committee participants debated the ability for religious institutions to discriminate by refusing to marry same sex couples, refusing commercial spaces to same-sex couples, or individual public officials refusing services such as abortions based on religious objections. While discrimination certainly operates within society at large, at the minimum human rights legislation protects against discrimination in commercial services and within employment sectors. These same human rights legislation, such as s. 41 of the *BC Human Rights Code,* specifically exempts religious institutions from its provisions. Thus this structural ability and sanctioning for religious institutions to discriminate freely- it's *right* to do so- particularly against the queer community, is problematic. Despite the difficulty in raising these issues as they perpetuate racist backlash, the common sentiment shared was that as anti-oppression activists, we have to struggle within these religious spheres and assert 'not in our name', along with the call for the broader social justice movement to create more safe spaces within which women and GLBT folks are able to identify issues and work within their communities to challenge oppression.

Distinction between official religious institutions and the practice of faith or spirituality: Several Advisory Committee participants differentiated between official religious institutions and personal religious beliefs. Like any other official institution, including institutions of the state, hierarchical and oppressive ideologies often dominate and religion can be manipulated to gain and mobilize political power. The political-religious right plays a crucial role in rigidifying

the identities of women and controlling their rights, in particular their rights to their sexual autonomy and reproductive labour. The growth and alliances of such politico-religious groups is a manifestation of a general trend in the rise of conservative forces (including 'secular' conservativism) globally. It is also important to note that certain gender-oppressive ideologies perceived to be 'private' religious practices are a direct legacy of colonial rule and/or foreign interventions that favour particular interpretations of religious and cultural traditions to maintain oppressive power relationships. A clear example of this is the US-supported Wahabi doctrine operating in dictatorial Middle East Gulf States such as Saudi Arabia. Therefore Advisory Committee participants generally agreed that no religion is inherently more oppressive than other ideologies, but since religions operate within particular political and social contexts, they are readily structured and organized along the lines of existing social hierarchies. Advisory Committee participants did however debate whether religious doctrines could be radically transformed. Some participants believed it was possible to expand on feminist and anti-oppressive reinterpretations of theology, while others stated that religious dogma was a tool of control given its deterministic nature and that it served to maintain hierarchies between those thought to be leaders versus those perceived to be followers.

Anti-racist cultural sensitivity: As expected, many of the discussions focused on how to avoid falling into the racist traps that victimize and infantilize racialized women while at the same time maintaining a basic commitment to gender and sexual equality that cannot be breached by religious or cultural justifications. Therefore on the one hand we must avoid a culturally imperialist feminism that seeks to impose Western notions of gender equality and 'sameness' onto other women. We must understand that our understandings of gender equality are not universally shared; they are in fact an Anglo-American construct based on a racialized understanding that conceives Western feminism and the choices of Western women as the progressive path for all women despite the grim reality that Western women face patriarchy on a daily basis. As David Goldberg states moral reason itself has been racialized by "constituting racial others outside the scope of morality". However this does not imply that we become culturally relativist and in the name of the right to difference, begin to support any unjust practice simply because 'authentic leaders' of the community justify it by reference to culture or religion. Cultural diversity or freedom of religion should not serve as a shield to scrutinize against gender-oppressive practices. Walking this line requires us to pay attention to specific contexts, to listen to those women whose rights we purport to stand for, and to understand that we occupy different relationships of power and privilege. All oppressed women equally deplore sexism and misogyny, but women's liberation movements must be culturally sensitive and relevant so as to oppose patriarchical elements without attacking or destroying non-Western cultures, religions, or identities.

Therefore we must actively fight against the dehumanization of racialized communities of faith with a particular understanding of how the narrative of women's rights has actually served as a useful tool in the pro-war and anti-immigrant propaganda machine. Leila Ahmed's seminal

work “Women and Gender in Islam” documents the co-optation of feminism by imperial and colonizing forces, “whether in the hands of patriarchal men or feminists," she writes, "the ideas of western feminism essentially functioned to morally justify the attack on native societies and to support the notion of the comprehensive superiority of Europe.”

Feminists who materially privilege from the colonization and subjugation of indigenous women and women across the global South must contend with the reality that feminism is being abused. Culturally-imperialist feminisms are being forced upon women across the world. Ahmed further writes: "Colonialism's use of feminism to promote the culture of the colonizers and undermine native culture has... imparted to feminism in non-western societies the taint of having served as an instrument of colonial domination, rendering it suspect and vulnerable to the charge of being an ally of colonial interests." Such a theft of feminist principles is advancing everything but genuine and true equality for women across the world.

We must ask ourselves: Where is the evidence to show that war, colonization, and racism has ever liberated women? Women of colour and indigenous women have consistently pointed out that reducing their oppression to their ‘culture’ represents deeply racist and colonial attitudes. Instead, we must choose a path that is feminist as well as anti-racist, anti-militarist, pro-immigration, queer and trans positive, and class conscious. This includes questioning the legitimacy given to state-based responses to advancing women’s equality such as criminalization, prisons, tightening border laws, and the child apprehension system. As the discussions made clear, public interventions within the realms of polygamy and trafficking, for example, are directly linked to the social control of immigrant populations. Just as foreign interventions to liberate women often serve as a cover to further imperial agendas, local government strategies for intervention to protect women often serve an underlying purpose of maintaining racial hierarchies.

Most importantly, we must walk alongside those women who are resisting on the frontlines of their own struggles and are agents of their own transformation. They do not need pity or charity, but solidarity and respect; for us to acknowledge and take leadership from their positions of extreme marginalization that are also positions of strength and agency; and our understanding that the oppression some women face is not simply a result of their own ‘culture’ but directly linked to the privileges that other women carry.

- H.W

[the views expressed in this report are that of the Advisory Committee participants and author alone and do not necessarily represent the views of West Coast LEAF]

WEST COAST LEAF

West Coast LEAF is both the BC branch of the Women's Legal Education and Action Fund and an independent, provincially registered society. Our mandate is to advance women's equality in the law, ensure the promise of the Charter of Rights and other human rights law are fulfilled in a meaningful and substantive way for the women of BC, and support the work of LEAF National. We are committed through our policies, practices, structures and activities to the elimination of all forms of discrimination in order to achieve equality for women in Canada, including intentional, adverse impact and systemic discrimination.

The organization engages in a three-pronged approach to that commitment through litigation, law reform, and legal education. The principles of West Coast LEAF include a belief that the laws of the province and Canada must not only reflect the initial promise of the Charter, in particular Section 15 (the equality rights section), but also act to protect women from discrimination and inequality in a way that reflects the true complexity of women's lives.

Acknowledgements:

Advisory Committee Participants:
Sarah Bjorknas
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Angela Contreras-Chavez
Mandeep Dhillon
Khalida Ebrahimi
Dalya Israel
Sumayya Kassamali
Rabia Kurd
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West Coast LEAF Staff and Students:
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INTRODUCTION TO WERF PROJECT

In 2005, West Coast LEAF initiated the Women's Equality and Religious Freedom (WERF) Project to address the issues that emerge when religious freedom and women's equality intersect.

The overarching question of this Project is: "How should the principles of substantive equality that LEAF has been instrumental in developing be applied when considering the complexities of the rights of individuals, particularly women, within religious and cultural minorities given our commitment to religious freedom, anti-racism, and genuine multiculturalism?"

Specifically, the Project objectives are to analyze the intersections between Charter Section 2(a)- which guarantees freedom of religion[1]- and Charter Section 15- which guarantees equality to disadvantaged groups[2]- in a manner ensures the advancement of substantive equality in a manner that reflects the needs and interests of women of diverse cultural, ethnic and religious experience.

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[1] **Section 2(a)** of the *Charter* guarantees the fundamental right of religious freedom:

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion…

The leading case on section 2 (a) of the Charter is *R v. Big M Drug Mart*. In speaking for the majority of Court, Dickson J. discussed the scope of freedom of religion: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hinderance or reprisal, and the right to manifest religious belief by worship and practice…." Thus, the Court was willing to protect religious belief and practice, since without protection of religious practice, s 2(a) would have no meaning and would be an empty right merely protecting religious beliefs and thoughts.

[2] **Section 15** of the *Charter* reads:

> (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental of physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantages because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The overall purpose of s. 15 is to prevent the violation of human dignity, capturing the difference between formal and substantive equality. In *Law v. Canada (Minister of Employment and Immigration)*, the Court states: "It maybe said that the purpose of s.15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." In a more recent case, *Auton v. British Columbia (Attorney General)*, the Chief Justice articulated this purpose as preventing the "perpetuation of pre-existing disadvantage through unequal treatment".

We strive to take a thoughtful approach to our work by considering the varied perspectives that exist among women of diverse communities and by considering the impact of our arguments. In identifying our concerns about the application of religious principles such as Shar'ia law to family law for example, West Coast LEAF is aware of the ways in which the debate feeds into anti-Muslim and racist rhetoric that have been particularly prevalent in Canada and internationally since 9/11.

The notion that Muslim women are in need of liberation by Western forces from 'backward' Shar'ia courts perpetuates colonialism and racism by infantilizing racialized women through assumptions that they have no capacity for analysis and agency. Furthermore, it homogenizes religions and cultures in definitive ways that excludes pluralism and invalidates the reconstructions of cultures and religions from within. Finally, it relegates patriarchy only to particular religions or cultures without acknowledging the universal systems of gender oppression.

At the same time, however, the reality is that several gender oppressive practices are justified under the name of religion, despite the fact that women of faith often dispute their theological basis. Once such practices become sanctioned by societies and the state as 'private' religious practices, they represent uncontested narratives of religion and are shielded from criticism or scrutiny, often leaving women within these communities in a more vulnerable position. This is particularly evident in the practices of the fundamentalist Mormon community of Bountiful.

Ayelet Shacher describes this reality in *Multicultural Jurisdictions: Cultural Differences and Women's Rights*:

> What makes this situation a truly complex problem is the fact that although they may be subject to such injurious burdens within their communities, women may still find value and meaning in their cultural traditions and in continued group membership. This phenomenon is especially visible in situations where the minority culture as a whole is subject to repressive pressures from the outside society. Under such circumstances, group members feel expectations and often obligations to rally around their cultural membership, rather than any inclinations to struggle for reform from within.
>
> Artificially compartmentalizing the relationship between the group and the state into fixed inside-outside division thus conceals the extent to which both are in fact interdependent. It also permits identity groups to surround themselves with barriers so inviolable that whatever happens inside those groups happens outside the jurisdiction or state law. In other words, if a violation of individual rights occurs within an identity group, the violation is categorized as a "private affair". The state, as an outside entity, has no business intervening. This binary opposition leads us astray, however, not only because it ignores the web of relations between inside and outside, as well as the fragility of these categorizations, but also because it obscures the fact that what constitutes a "private affair" is in itself defined by the states regime of law."

History of Project

West Coast LEAF first began to look at the issues that emerge when women's equality and religion intersect when concerns were raised in Ontario about the proposal to include the application of Muslim personal law, including in family law arbitrations, in that province's Arbitration Act. This proposal raised serious concerns about the impact that it may have on women, given the ways in which particular religious interpretations of Shar'ia law have impacted women's rights around the world. Many organizations, including the Canadian Council of Muslim Women (CCMW), the National Association of Women and the Law (NAWL), and No Sharia were quick to come out against the proposal.

In identifying our concerns about the application of religious principles to family law, West Coast LEAF was also aware of the ways in which the debate contributed to racist anti-Muslim sentiments that have been particularly prevalent in Canada and internationally since 9/11.

> *Presuming innocence, each of us is consistently surprised when we are viewed by other women as agents of oppression.*
> - Marv Louise Fellows

Reflecting this concern, West Coast LEAF began to look at the impact of religious principles on women in another religious community in Bountiful, BC. Bountiful is a self-named community in the Creston Valley that is part of the Mormon church entitled the Fundamentalist Church of Jesus Christ of Latter-Day Saints. Concerns have arisen throughout its history about the community's polygamous practices, marriages and pregnancies of very young girls, education funding, the closed nature of the community, and the trafficking of young girls and women between Canada, the U.S. and sometimes Mexico.

West Coast LEAF therefore determined to bring together women from a diverse range of people of faith, to be involved in the Project and the discussion of such complex issues. We began this process of discussion by hosting a Women's Equality and Religious Freedom Consultation from December 2-5, 2004.

The report from this consultation can be found at:
http://www.westcoastleaf.org/pdfs/werf_consultationreport_aug_2005.pdf.

In addition to the consultation, LEAF staff and volunteers have produced lengthy position papers and research on specific topics such as: the validity of the polygamy laws in the Criminal Code; the impact of criminalization on individuals engaged in polygamous-like relationships in the gay, lesbian, bi-sexual and transgendered communities; and the impact that a redefinition of marriage may have on women's equality rights.

Goals of the Advisory Committee

West Coast LEAF also determined that it was crucial to bring together women of faith, particularly from racialized communities, to discuss several broad questions:

- What is the nature of religious discrimination experienced by women of faith?
- What is the experience of racism of racialized communities who are assumed to be of a particular faith?
- What, if any, are the boundaries between 'cultural' and 'religious' communities, particularly for racialized women?
- How is gender discrimination experienced within religious communities? Is this different than the gender oppression of women within dominant (so-called Western secular) cultures?
- What are the ways in which women balance and navigate the experiences of discrimination and interlocking systems of oppression in their daily lives?

These broad questions were examined within the context of specific policies in order to narrow the focus of the discussion and propose recommendations:

Wednesday March 29 from 4:30-7 pm	Introduction/ Same sex marriage
Tuesday April 4 from 5-7:30 pm	Criminalization of polygamy
Thursday April 20 from 5-7:30 pm	Interaction of family law & religious institutions
Tuesday May 2 from 5-7:30 pm	Use of religious arbitration in family law
Wednesday May 17 from 4:30-7 pm	Immigration law
Wednesday May 24 from 4:30-7pm	Theology and interpretations

To respect the nature of these discussions, LEAF prioritized having these discussions be facilitated by racialized women of faith. The discussions of the Advisory Committee that have been produced in this Report will guide West Coast LEAF in its future litigation strategy, in proposing law reform within family law and immigration law, and in public legal education.

Participants in the Advisory Committee

In the process of working out the details of the Advisory Committee, several specific discussions occurred which are worth mentioning. Firstly, West Coast LEAF recognized that much of the discussion at the LEAF consultation focused on two primary issues: Sharia law and polygamy in Bountiful, which were not reflective of the diversity of faith communities or issues within different communities. Therefore, West Coast LEAF resolved to set a more broad-based agenda of discussion topics and ensure representation and active participation from Sikh, Buddhist, Hindu, Jewish, Muslim, Christian, and indigenous spiritualities. While certainly none of these religions or faiths is monolithic, and no set of individuals can claim any authenticity or representation of an entire community, it was a necessary step to ensure diversity.

Secondly, there was discussion about whether the Advisory Committee would be a women-only or mixed space. It was quickly agreed that a project on Women's Equality and Religious Freedom should primarily involve and take leadership from women of faith, given their particularly marginalized position both "within" their communities and relative to "mainstream" society. Therefore, the participants within the Advisory Committee were all self-identified women of faith.

Thirdly, serious questions and challenges were raised with West Coast LEAF about the possible inclusion of "religious officials" participating in the discussions. As in any community, there exists diversity within communities of faith, and religious officials do not necessarily represent the views or practices of the practitioners of faith. Concerns were raised that religious officials are often powerful gatekeepers and elites within their communities, and as in any community, dialoguing with them does not represent any particular truth, nor is it ethical to lend greater legitimacy to such institutionalized agents of power. This also serves to further marginalize radical dissident voices, particularly of women. Based on this, West Coast LEAF did not invite any official representatives of religious institutions to participate in the Advisory Committee.

During the end of February and first week of March, West Coast LEAF confirmed a 15-member Advisory Committee consisting of a wide range of women of faith, representing distinct views on religion, faith, spirituality, oppression, racism, patriarchy, sexuality, and the role of the state.

Advisory Committee meetings took place between March-May 2006. Participants were provided with readings including extensive backgrounders on each topic, including specifics on law and policy in accessible language. Each meeting was conducted in two parts: the first half of the meeting was dedicated to broader theoretical questions about religion and gender as relevant to the discussion topic, and the second half was spent on discussion with specific policy-based questions relating to the topic at hand, including an attempt to reach consensus on specific recommendations.

Included below in alphabetical order are biographies of most of the participants. Some of the participants chose not to include their personal information.

- **Sarah Bjorknas:** *biography not included.*

- **Da Choong** was born and brought up in Malaysia. She received a colonial Christian education but was raised more or less agnostic at home. Her political and personal development was mostly shaped by her involvement in various political movements in England (feminism, anti-racism, anti-war, lesbian and gay rights) where she lived for several decades. Buddhism has been her spiritual practice for 16 years and she is a certified meditation instructor within the Shambhala lineage. Amongst her multi-faceted and evolving identities, these are constants: she is a lesbian and a feminist who is part of the Chinese diaspora. Her field of work is community development and research.

- **Angela Contreras-Chavez** is a Guatemalan-Canadian racialized woman. She was raised under the teaching of the Roman Catholic Church, but is currently a follower of the Ecumenical and Liberation Theology movements. She has worked as a human rights investigator for the Human Rights Office of the Catholic Archbishop of Guatemala, and holds a Master's degree in Human Rights and Mission Studies from Saint-Paul University in Ottawa. Angela worked as a consultant on the universality of human rights and divorce for the Ministry of Multiculturalism in Ottawa and the Project Diversite culturel. In Vancouver, Angela divides her time between her young family; completing her doctoral dissertation on transitional justice and women's rights in Guatemala; MOSAIC's Board of Directors and Advocacy Group; the Family Court and Youth Justice Committee of the City of Vancouver; war crimes investigations; and the Vancouver Status of Women where she is the Interim Coordinator for the Racialization of Poverty Project.

- **Mandeep Dhillon** is a Sikh woman of South Asian descent, born and raised in Montreal. She is currently a medical intern at UBC and an activist on feminist and anti-racist issues.

- **Khalida Ebrahimi**: *biography not included.*

- **Dalya Israel** was born and raised in Vancouver as a first generation Canadian. She identifies as a white, Jewish, feminist woman. Although she was born into a Jewish family, her faith has shifted as she has become more involved in social justice issues. She considers herself more spiritual at this point in her life but nevertheless connected to her heritage. She recently graduated from UBC with a BA in Women's Studies and Sociology; and has volunteered for years with Big Sisters, PACE Society, and Women Against Violence Against Women. She currently works with WAVAW as a Victim Service Medical Support Worker.

- **Sumayya Kassamali** is a 3rd year student at UBC studying Political Science and Women's Studies. She was raised as part of a family with generations of *ulema* or Muslim scholars, both male and female, and grew up with religion as the central pillar of her life. She has been involved in various types of interfaith work and been active in her local South Asian Muslim community, volunteering, chairing the Youth Group, and teaching at the weekend school. She most recently worked at Women Against Violence Against Women and continues to be active around anti-war, anti-racist, and anti-colonial struggles as she negotiates herself, her faith, and her feminism amidst increasingly volatile political climates.

- **Rabia Kurd:** *biography not included.*

- **Victoria Marie** has worked in parish ministry as the coordinator of adult religious education for six years in the Downtown Eastside of Vancouver. She has a PhD from the University of British Columbia (Educational Studies). Her doctoral dissertation, "Transformations: The Spiritual Dimension of Learning Recovery from Addictions," was a detailed study on the journey into and out of addiction for thirteen research participants. She is a researcher, activist and co-founder of the Vancouver Catholic Worker. Her social

justice interests have taken her to Kenya and Mexico; to Colombia with Witness for Peace; and to Asubpeeschoseewagong Netum Anishnabek (Grassy Narrows First Nation) in north western Ontario with Christian Peacemaker Teams. Victoria is currently an Adjunct Professor at St. Mark's College (Vancouver) and a research consultant with India Residential Schools Resolution Canada. Her recent work includes the evaluation of the Parent Education Programs of Family Services of Greater Vancouver and an evaluation of the Project Welcome Sudanese Refugee Ministry in Omaha, Nebraska. She serves on the City of Vancouver Advisory Committee on Diversity Issues.

- **Nassim Mobasher:** *biography not included.*

- **Denise Nadeau** has a Doctorate of Ministry in International Feminist Theology and works as a practical theologian, movement therapist and popular educator. Much of her work has focused on educating and organizing around intimate and structural violence and in combining expressive art therapies and spiritual practices in the repair of the effects of sexist, racist, heterosexist and colonial violence. Her publications include Counting Our Victories: Popular Education and Organizing and numerous articles on non-violence, decolonization and deconstructing whiteness and imperial violence in Christian practice. Denise has been active in anti-deportation campaigning and in support work with refugee women- before leaving Vancouver in 2003 with DAARE and in the last few years in Montreal with Solidarity Across Borders and the Interfaith Sanctuary Coalition. She is with the Justice, Peace and Social Movements Interreligious Collective in Vancouver.

- **Amina Rai** *biography not included.*

- **Amal Rana** is a queer, South Asian activist with Muslim and Jewish roots. She continues to strive towards finding new ways of relating to faith that move beyond the rigid distinctions of "secular" versus "religious" and "culture" versus "religion" within a feminist, anti-imperialist and anti-colonial context.

- **Kamilla Singh** has been with Women Against Violence Against Women for the past 14 years in various positions. Presently she is a Stopping the Violence Counselor and Victim Service Worker. She is also the Chair of "Vancouver Celebrates Diwali" Committee, a board member of Feminist Research Education Development Agency, a producer of Asian Pulse Television Show, and member of Fiji Canada Association. Her religion is Hinduism.

- **Itrath Syed** has recently completed a Masters degree in Women's Studies at the Centre for Women[1]s and Gender Studies at the University of British Columbia. Her MA work explored the gendered and racialized construction of the Muslim community in the media discourse surrounding the Islamic Arbitration or "Shariah" debate in Ontario. In 1995, she completed her B.A. from Simon Fraser University with a major in Middle East History and minors in Political Science and Women's Studies. Itrath worked for years in the field of anti-violence work: initially at a Rape Crisis Centre and then at Transition Houses for battered

women and their children. Itrath is a social justice activist involved with the local antiwar movement, in anti-occupation solidarity work, and in resisting the erosion of civil rights and the racial profiling of the Muslim, Arab and South Asian communities in Canada. In the 2004 federal election, Itrath ran as a candidate for the New Democratic Party in her home riding of Delta-Richmond East, British Columbia. Itrath is a Muslim and her social justice activism comes from her belief that working towards a more just and equitable society is an integral part of living a life in engagement with the Divine.

West Coast LEAF staff also participated and facilitated in the Advisory Committee:

- **Michelle Hopkins**
- **Kelly Roulette**
- **Harsha Walia**

COLLECTIVE PRINCIPLES OF THE ADVISORY COMMITTEE

The Advisory Committee adopted the following guiding principles in the first meeting:

- Minutes will be anonymous.
- Recommendations to LEAF will be adopted by consensus of those present at the meeting.
- Confidentiality.
- Be non-judgmental.
- Be respectful of others, particularly of others time, so arrive on time.
- Basic anti-oppression principles.
- Use "I" statements to express opinions.
- Take responsibility to share time for speaking and for appropriate silences and listening
- Practice active listening.
- Foster debate and critique respectfully.

Agitate! Queer Women of Colour Network copyleft

EXPLORING CENTRAL THEMES: VOICES OF THE PARTICIPANTS

What is the experience of racism of racialized communities and women within these communities who are assumed to be of a particular faith?

Many participants discussed how religion in the post 9/11 climate, particularly for racialized communities, is an ideological construct. For example 'Muslim' has become a racialized category- in this instance, Muslim does not define a person of Muslim faith, rather it is used as a euphemism for Arabs and South Asians. Those who might not even be Muslim are claimed to be Muslim because they look Muslim, while the imagery of Muslim does not invoke a white convert. A participant shared that "My mother can pass as white and therefore most people do not think she is Muslim."

Other participants agreed, and for example, raised the issue of how what a Jew looks like implies whiteness and erases the visibility of racialized Jews, or they are considered 'inauthentic'. Therefore you can be tacked as not belonging to your religion because of how you look racially. One participant stated, "I think a lot of this is about whiteness and where race comes from. It is also about how race has been constructed and how European Jews have assimilated and that continued assimilation and how white European Jews construct themselves and have been constructed."

Therefore, religion is a highly politicized, racialized, and public identity that has less to do with one's actual beliefs or spirituality but more to do with assumptions about certain cultures and communities, particularly communities of colour. Participants commented about the 'gaze' upon racialized bodies, which perpetuates the white norm of being secular Christian.

Many women commented on how gender equality was itself an Anglo-American construct. As a result, even "internal" experiences of sexism within the community are informed by a non-neutral racialized understanding of patriarchy since what constitutes gender oppression and women's equality is a certain privileged framework that seeks 'sameness'. One participant stated "For example, there is a white feminist backlash to Hijab [3], although Hijab is often seen as a resistance to the way Western culture promotes women and can be a powerful choice for Muslim women. The conversation can be one sided with the Western culture being seen as right and progressive." Furthermore, pointing the finger at other cultures allows Western culture to distract from the gender imbalances that exist within the West.

Participants discussed that as women, there was a double constraint on them and many women talked about often being in simultaneously empowering/isolating environments. As one participant stated "As a racialized, immigrant, I was looking for a community that I could call a

[3] Hijab is commonly understood to mean the headscarf worn by many Muslim women. In Islamic scholarship, hijab is given the wider meaning of modest demeanor and behviour, of which dress represents only one aspect.

safe place that reminds me of home, which is how I connect with Church. Religion became a bridge or a connection to my cultural roots, although I never felt fully at home with the religious aspects of the Church so I primarily identify with the physical space of the basement of churches – the kitchens, social gatherings, human rights development, meetings – this is actually where I met my partner! I was looking for a cultural identity, not necessarily the spiritual aspect. I wanted a place where I could cook and talk about stuff because it is hard to find these spaces." Many participants agreed and commented how they witnessed their families become more religious upon immigrating in order to keep their cultures and traditions alive within a white society so religious spaces became social and community-based spaces.

Another participant shared "I feel deep tensions. On the one hand, I have strong feelings of love and belonging with my community, in particular towards the women. On the other hand, I feel that I can no longer access those spaces because I am critical of the lack of women's structural leadership. But I find it difficult to critique the women because I have immense amounts of respect for their work, although I am not willing to fulfill those roles." Many women shared similar experiences and frustrations about women being deeply involved in their religion but are not publicly visible, are not the people shaping the religion, and are in significantly gendered roles within religious spaces and institutions. As one participant said "There was a huge community of women but it was to maintain the assumed hierarchy of what the women's role should be, for example they should be cooking and doing childcare."

Other participants commented on how the sense of 'community' felt judgmental, oppressive, and policed about who is a good/ pious religious woman. One participant commented, "Going to the mosque was important for a community base. But it is more about going to show you are praying. Personally I would rather be at home in my own room praying on my own, for myself." Many participants agreed about some of the superficiality of institutionalized religious spaces and the community pressures to be visible in religious spaces, rather than ones individual beliefs or values; as long as someone is seen there, they must be a good person. For example, one participant described, "In terms of Sikhism the religious institutions are not meant to be the center of the faith but it has become important to be within the institution in order to be recognized or to gain status."

> *The hardening of borders of inclusion and exclusion, accompanied by fear of the challenges presented by assimilation and secularization, often serve as a ready-made rationale for conservative group leaders to impose a rigid and strict reading of a tradition's personal status laws in the name of collective effort to preserve the group's distinct identity in the face of real or imagined external threats. The conflation of reactive claims of a culture, inter-communal tensions, and gendered images of idealized womanhood has become a focal point for the current global spate of state-and-religion conflicts over foundational collective identity and basic citizenship questions.*
>
> -Ayelet Shachar, *Religion, State and the Problem of Gender*

Another participant shared a particular experience "The community- culture and religion- are imposed and policed. One time I remember the disconnect at a women's meeting, when they

were trying to ban queer positive books around the Surrey School Board incident. I remember being there and the feeling in my stomach, listening to my so-called community wanting to ally with those who were anti-Surrey School Board. I knew that I was expected not to say anything as a queer woman because I had to think of my family and our family name. There are those boundaries that are imposed on us and we might lose one or the other by speaking out."

What, if any, are the boundaries between 'cultural' and 'religious' communities particularly for racialized women?

Some participants stated that definitions of culture include religion as an element of culture. Several participants discussed the example of Islam, which is practiced in many different countries, with the culture of that nation informing the role that religion plays and how the religion is organized. Another participant explained the evolution of Buddhism ""I see Buddhism that has been brought over to western countries very recently, and for religion to be brought over it needs to be rooted in a culture. Therefore in all senses I think religions need to be based in local cultures to take root. And we need to be aware about who these root teachers are: they are men- insightful men- but still men. Buddhism comes from Tibet, through India and has come through male teachers in oral traditions for the past 2500 years. But now religion is in new ground so you can do what you like with it, which I think is an optimistic way of looking at the potential for religious evolution because culture is also constantly evolving."

Thus, when speaking about religious cultures, one should reject simplistic definitions that assume that cultures or religions offer homogenous narratives of tradition that are pure and authentic, as they are deeply influenced by the socio-political context within which they operate.

How do we distinguish between faith, spirituality, and religion?

One participant analogized that "Religion is like a building and spirituality is like a river-it is alive and flowing- and broader than the bounds of religion. Religion is more discrete and it is organized in a hierarchical fashion." For other participants however, spirituality is assumed to be individual and it loses its communal aspect. However, it does not have to be, as is evident through communal spiritual practices within Sufism, Buddhism and indigenous traditions. Furthermore, the notions of 'individual spiritualities' are associated with Western ideas of secularism where religion is the private domain of the individual; for example, the recent trend of "New Age Spiritualities" is often used in a North American context and it is seen as a private expression. One participant summarized that "spirituality in common leads to faith-based cultures and further organization leads to religion. They don't have to follow that evolution but they tend to go there."

Many participants shared that they no longer identify with organized religion but are of faith and belong to a faith-based community. This is hard to navigate but as one participant described "Organized religion represents something to me today. It represents communalism, oppression, patriarchy, and collusion of the state to silence people. For example, organized Hinduism is political. Hindutva is a foundation of a majority of major Hindu temples in North America now and it is highly politicized and represents a right-wing ideology based on casteism, intolerance of other religions, and much more. I no longer identify with organized Hinduism because of this but I am part of the Hindu community." Other participants shared similar sentiments "For me, yes, I stopped going to synagogues because of Zionist revisionist history of Judaism. The political hijacking of religious sentiment is lethal but I cannot leave my community."

The 'right to exit' a religion is further complicated by the reality that racialized communities do not simply practice or believe in a religion, but are also part of a cultural community. Thus the experience for white Canadians to decide to no longer attend Church and no longer claim the Christian self-identity is vastly different than that of racialized women of faith or women of non-dominant faiths.

Therefore, while women struggle with various pressures within their religious or cultural communities, often even rejecting the very nature of religious ideology, they still find value and meaning in their communities and religion. As Ayelet Shachar has written in "What makes this situation a truly complex problem is the fact that although they may be subject to such injurious burdens within their communities, women may still find value and meaning in their cultural traditions and in continued group membership. This phenomenon is especially visible in situations where the minority culture as a whole is subject to repressive pressures from the outside society." [4]

Secularism: Religion and the State

All participants tended to agree that the current understanding of secularism is the separation of state and religion that aims to make invisible any religious expression in the public realm, which is a Western and Eurocentric notion. Furthermore the assumption of North American secularism ignores the deep-rooted foundations of Christianity upon which this society is built.

Several participants commented about how they only came to identify as a person of faith or religion upon moving to Canada. It is assumed that people do not believe in religion in Canada therefore the need to identify as being religious sets one apart from the norm. For example people are frequently asked whether they are religious or not, and those who are religious feel compelled to offer a justification about why or how they arrived to such a seemingly 'irrational'

[4] Shachar, Ayelet "Religion, state, and the problem of gender: new modes of citizenship and governance in diverse societies" McGill Law Journal, February 2005

decision. However in peoples' various countries of origin, people were never asked what religion they practiced or how they practiced it. Furthermore, if religion becomes part of culture how can you leave one behind and not the other? As one participant stated "Having to identify that I have a religion that differs from Western ones is problematic because it immediately leads to a process of Othering. Christianity has informed how we think of ourselves. It is similar to thinking of race and how women of colour are defined. There is a moment of recognizing that we differ."

Another participant commented how "Secularism involves relegating religion to the private realm which is similar to feminizing religion. The state (public realm) then doesn't have to deal with religion. Religion needs to be brought back into the public realm in order to really understand the relationship between religion, faith, culture, politics, and the state. This is where reform, challenge, and dialogue will occur. Capitalism has become the new god due to the vacuum that has been created through the lack of debate in the public sphere. There is no ethics associated with this kind of thought."

"Secularism involves relegating religion to the private realm which is similar to feminizing religion"

Are all religions inherently patriarchal?

There were a number of points of agreement and disagreement in this discussion.

Some participants expressed that religion was inherently partriarchical given the hierachical ways in which religions are structured, the fact that religious institutions are male-dominated, and that many religious ideologies perpetuate the subordination of women particularly on issues of birth control, abortion, reproductive health, employment outside the home, education, and sexuality. One participant stated, "I would say that for me it is about Islam being patriarchal inherently, which is not something I would say outside of the room because often I defend the religion outside of this room."

Other participants asserted that various religions were rooted in matriarchical and feminist values. For example, one participant stated "I just think that from my walk of life I see that particular non-western religions, including Latin America indigenous communities, when you look into history, the original values and principles may not be feminist with that specific brand name, but they still had a sort of feminist ideology." Other participants agreed that various spiritualities and traditions that are very women-centered are considered fringe and are no longer institutionally mainstream or they have been forced to reinvent themselves.

Some participants asserted that religion itself provides no set of values since religion can be interpreted in a myriad of ways. One participant stated, "For me it is hard to talk about religion in the abstract. I see religion as it is structured, in relation to the state, in relation to ideology.

Since society is patriarchal, and if religion is a part of culture and society, then religion is also patriarchical. For me it is not talking about religion as how I want or perceive it to be, or even my theoretical understanding of it, but rather how it is structured and organized." Another participant agreed "As a woman of faith, I find it problematic to think of inherency in religion. I think it is a sign of the times and individuals patriarchal value systems rather than the patriarchal faith."

> *" I see religion as it is structured, in relation to the state, in relation to ideology. Since society is patriarchal, then religion- as a part of society- is also patriarchical. "*

Another participant further stated that women's religious practices are separate from religious dogma, "Women often practice home altars and find other ways women to connect and make sense of their lives. I want to say that I am religious but I do not believe that what I practice is patriarchal, but yes my religion is patriarchical." Several participants commented on various feminist interpretations of theology that exist and the role of feminist intellectuals.

> *" Religious ideology is a means of knowledge production and mass communication that is highly inaccessible. It has can and has served as a form of paralyzing social control. "*

Participants responded to this by discussing aspects of religion they perceived to be different than other societal ideologies. Several participants stressed the essentialist and determinative nature of religion that constructs religion and religious dogma in a way that makes it hard to argue unless one knows exactly how to argue on the basis of theology and doctrine rather than values. One participant stated that "Religious ideology is a means of knowledge production and mass communication that is highly inaccessible. It can and has served as a form of paralyzing social control."

Several participants agreed, noting how textual knowledge has been part of empire building and while reinterpretations of theology are crucial in order to challenge religious thought and practices, only elites- including feminist "intellectuals"- typically have access to such knowledge, thus making it impractical for most to make changes and shifts.

The fundamental question remained: Similar to other strategies and tactics that seek to change other institutions in society, do reinterpretations or reconfigurations of such hierarchies merely reform or do they fundamentally deconstruct and reconstruct and radically transform?

Regardless of whether participants believed that patriarchy was inherent within religions or not, most recognized that patriarchy, sexism, and other forms of oppression were extremely prevalent and dominant in their own religious spaces. One participant stated that it has "hijacked the spiritual religious culture in ways that are totally disenfranchising women. Maybe through this project we can look at women who are individually trying to say that culture is not static, it is dynamic, and I have things I can contribute to the religious/cultural community."

SAME SEX MARRIAGE

The discussion on same-sex marriage and religious-based responses and opposition to same-sex marriages was not intended as a specific policy discussion, rather it was selected because it is a well-publicized public policy issue and was a broad subject area which allowed for discussion without requiring many details about law or policy.

Backgrounder on Same-Sex Marriage in Canada

First, the process of marriage in Canada was clarified. Federal law in Canada establishes the basic requirements for a legal civil marriage. For a religious marriage ceremony to be legally valid it must meet the basic legal requirements for a marriage (i.e. minimum age, consent to marriage). For example, people who do not meet the minimum age requirement set out in the law cannot validly be married through a religious ceremony. Ordinarily, it is the religious official conducting the wedding ceremony who will take care of the registration, which then gives the marriage legal recognition by the state.

In addition to these basic legal requirements, religions may impose additional requirements on the prospective marriage partners. The Roman Catholic Church, for example, will not marry persons who have not received an annulment from a previous marriage. Some branches of Judaism will not marry a previously married woman unless she has undergone a religious divorce by receiving a "get". Some religious officials will not marry two individuals unless at least one is a member of their congregation. Participants mentioned instances of marriages performed through religious ceremonies that were probably not legally valid (i.e did not meet the age of consent, polygamous marriages).

Until recently, the legal concept of marriage was defined as the "union of one man and one woman to the exclusion of all others". In 2003, the Ontario Court of Appeal [5] determined that the Federal Marriage Act was in violation of the *Charter of Rights and Freedoms*, Canada's constitution. They ordered the Government of Ontario to start issuing marriage licenses to same-sex couples immediately. This ruling made marriage available to same-sex couples, but only within the province of Ontario. Subsequent to this ruling, within one year, courts in the territory of Yukon, and six provinces (British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, and Saskatchewan) had all legalized same-sex marriage within their provincial jurisdictions. [6]

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[5] *Halpern et al v. Attorney General of Canada et al*, [2003] O.J. No. 2268

[6] See for example *Barbeau v. British Columbia* 2003 BCCA 2512003 BCCA 251 in British Columbia; *Ligue catholique pour les droits de l'Homme c. Hendricks*, 2004 IIJCan 20538 (QC C.A.) in Quebec; *Dunbar & Edge v. Yukon (Government of) & Canada (A.G.*) 2004 YKSC 54 in the Yukon.

The federal government decided to create legislation, Bill C-38, which would legalize same-sex marriage across Canada. Prior to the introduction of Bill C-38 in the House of Commons, Paul Martin sent the proposed legislation and some questions in the form of a reference [7] to the Supreme Court of Canada in a non-binding ruling. The reference posed four questions:

1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars, and to what extent?

3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the Federal Law-Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

In December 2004, the Supreme Court of Canada ruled in its non-binding advisory opinion on the questions in the following manner: [8]

1. The federal government has the sole authority to amend the definition of marriage. The provinces retain responsibility for licensing and registration, and must give all couples access to the administrative aspects of marriage.

2. The marriage of same-sex couples is constitutional.

3. The *Charter's* protection of freedom of religion grants religious institutions the right to choose not to perform the marriage ceremonies of same-sex couples if they see fit, although because solemnization of marriage is a matter for provincial governments, the proposed federal Bill could not actually guarantee such a protection.

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[7] A reference is a procedure by which the Government of Canada refers important legal or factual questions to the Supreme Court of Canada and asks the Court to give the Government its opinion. Therefore the Same-Sex Marriage Bill Reference was essentially a review of the bill's constitutionality before it was introduced in Parliament.

[8] www.justice.gc.ca/en/news/fs/2004/doc_31342.html

However, the Court refused to give a clear answer to the fourth reference question about whether a provision for same-sex marriage in law is *required* by the Canadian constitution- i.e. whether restricting marriage to a union of one man and one woman violates equality rights of same-sex couples. Therefore, what the Supreme Court did not suggest is perhaps more important; they did not state that the present marriage laws, which restrict marriage to opposite-sex couples, is explicitly unconstitutional.

On February 1 2005, the Federal government introduced Bill C-38 to legalize same-sex marriage. The critical two sections of the Act read:

- "Marriage for civil purposes, is the lawful union of two persons to the exclusion of all others." Previously, the legal concept of marriage was defined as the "union of one man and one woman to the exclusion of all others".

- "It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs."

The Bill was enacted as the Civil Marriage Act on July 20, 2005 and same-sex marriage was legalized across Canada. Upon receiving a minority government, Prime Minister Stephen Harper said he would introduce a motion in the fall session (2006) of Parliament. The motion would ask MP's whether or not they want to re-open up the debate. If the majority of MP's agreed to the motion, the Government would bring forth legislation supporting the traditional definition of marriage.

Freedom of religion and Religious right to discriminate

Freedom of religion is a fundamental right in our society. It means that the state cannot impose activities or practices on religious groups that would violate their religious freedom, except where it can be shown by the state to be demonstrably justifiable in a free and democratic state.

The Constitution and provincial human rights legislation offer broad protection of religious freedom. Provincial Human Rights Codes specifically exempt religious organizations from its provisions. For example, s. 41 of the *BC Human Rights Code* reads: "If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a. . .religion. . .that organization or group must not be

considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons." [9]

Due to the s. 41 exemption cited above, religious institutions and organizations can refuse to employ persons who do not accept their religious belief systems or follow their religious practices. In *Caldwell v. St. Thomas Aquinas High School* [10], the Supreme Court of Canada held that a Catholic school was permitted to terminate Margaret Caldwell's employment after learning that she had married a divorced man in a civil ceremony. The School argued that Catholic doctrine plays a fundamental role in all aspects of school life and that the staff members represent important role models for the students of how to live a Catholic life. The school therefore requires, as a matter of policy, that its staff conform to the Catholic Church's rules concerning matters such as marriage. The Court agreed that such conformity constituted a bona fide occupational requirement [11]. The Court further found that s.41 of the BC Human Rights Code allowed the Catholic school to give a preference in hiring to Catholic teachers, and in failing to renew Caldwell's employment contract, the school was exercising a preference for the benefit of members of the Catholic community.

Similarly, the ability of religious organizations to discriminate includes the right of clergy to continue to discriminate against any couple who requests a marriage ceremony without risking prosecution under Canada's anti-discrimination laws.

Although it is clear in the Supreme Court's reference and the legislation itself that clergy can determine whom they will marry within their "sacred space", it is less clear how other issues might be resolved. For example what if a same-sex couple:

- Asks to be married by a conservative clergyperson in a non-religious setting remote from the officiator's "sacred space" – e.g. in a conservation area or city hall?
- A same-sex couple arranges to be married in a civil ceremony and attempts to rent a conservative church's hall for the reception?

The second question leads to a broader issue because when services are being offered to the public, human rights law does not allow religious belief to play a part in determining to whom those services will be offered. The scenario of refusing a church facility for a commercial purpose is analogous to an event that happened almost a decade ago in Canada.

In 1996, members of the Canadian Gay and Lesbian Archives (CGLA) needed some letterhead printed. Former president Ray Brillinger asked Scott Brockie, the owner of Imaging Excellence, Inc in Toronto to do the printing. Brockie refused and explained if he did this particular job, it

[9] Human Rights Code [RSBC 1996] CHAPTER 210

[10] *Caldwell v. St. Thomas Aquinas High School* (1984), 6 C.H.R.R. D/2643

[11] Human rights legislation typically recognizes that there may indeed be legitimate reasons for employment discrimination on prohibited grounds. A bona fide occupational requirement is a defence to certain allegations of discrimination under Human Rights Codes based on the idea that the policy in question is a genuine necessity for the job.

would help promote behavior that he finds repugnant. It would have conflicted with his conservative Christian beliefs about homosexuality. Brillinger laid a complaint with the Ontario Human Rights Commission. On Feb 24 2000, the Ontario Human Rights Commission ruled that Brockie was guilty of discriminating against a potential client on the basis of his sexual orientation. [12]

Commission adjudicator Heather MacNaughton accepted Brockie's testimony that his beliefs were sincerely held. She agreed that: "Brockie remains free to hold his religious belief and practice them in his home and in his Christian community." However, she decided that "it is reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community." She wrote that, left unchecked, actions such as Brockie's will lead "the spiral of silence where lesbians and gays modify their behaviour to avoid the impact of prejudice. What [Brockie] is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice his beliefs in a manner that discriminates against lesbians and gays by denying them a service that is available to everybody else." The Board commented that Mr. Brockie would still be free to hold his religious beliefs; the limitation prevents him from translating his beliefs into discriminatory behaviour. [13]

Individuals Conduct Based on Religious Belief

There are also some gray areas in the legislation and the Supreme Court's ruling with respect to *civil* officials performing public functions (as opposed to religious officials conducting religious ceremonies). For example, based on their own personal religious beliefs:

- Could a registered clerk of the court refuse to solemnize a same-sex marriage?
- Could an authorized public servant refuse to issue a same-sex marriage license?

It is a basic principle that equal access to the solemnization of same-sex marriages must be guaranteed. The governments of Newfoundland, Manitoba, British Columbia and Saskatchewan have required that all marriage commissioners perform same-sex marriages and a number of commissioners in those provinces have resigned or been terminated. The *Trinity Western* decision of the Supreme Court of Canada, for example, states that public officials are expected to "check their personal views at the door" when providing a public service. [14]

However, it is a long-established principle of human rights law that employers have a duty to accommodate religion by respecting religious objections of employees to the extent that the employers can do so without incurring undue hardship and sacrificing the employer's legitimate objectives. For example, employers must allow employees to be excused from working on the Sabbath for religious reasons. *Moore v. British Columbia* [15] offers another excellent

[12] *Brillinger v. Brockie* (No. 3) (2000), 37 C.H.R.R. D/15 (Ont. Bd.Inq.)
[13] *Supra.*
[14] *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31
[15] *Moore v. British Columbia (Ministry of Social Services)* (1992), 17 C.H.R.R. D/426 (B.C.C.H.R.)

example. Cecilia Moore was fired from her position as a financial aid worker for the Ministry after she refused to grant a client medical coverage for an abortion. In subsequent discussions with her superiors, Ms. Moore made it clear that she would never grant such aid because of her religious-based opposition to abortion. While the Council noted that the complainant could and should have disqualified herself from such a file, it ultimately ruled in her favour because of the Ministry's complete lack of effort to accommodate her and work out a suitable arrangement.

Discussion: Freedom of Religion and Religious discrimination

There was significant debate around the ability of religious institutions to discriminate.

Some participants spoke about the religious sphere existing as a separate or parallel sphere to state-based/ state-regulated spheres that is contested and challenged internally. In the face of increasing scrutiny upon minority religious communities, particularly racialized communities, there is a distrust of state intervention. "Public" intervention is not ideologically neutral as it operates within a framework where social hierarchies are normalized. Therefore, it is extremely difficult to confront discrimination by and within religious spaces without descending into cultural-deficit explanations (i.e they are overly patriarchal and inherently uncivilized) and without inviting extraordinary measures of stigmatization, surveillance and control.

> "*Artificially compartmentalizing the relationship between the group and the state into fixed inside-outside division thus conceals the extent to which both are in fact interdependent. It also permits identity groups to surround themselves with barriers so inviolable that whatever happens inside those groups happens outside the jurisdiction or state law. The state, as an outside entity, has no business intervening. This binary opposition leads us astray, however, not only because it ignores the web of relations between inside and outside.*"
>
> - Ayelet Shacher in "Multicultural Jurisdictions: Cultural Differences and Women's Rights"

Other participants disputed the notions of 'challenges from within' and the relegation of sexism or homophobia as an internal affair. The very ability for religious institutions to refuse to marry same sex couples, refuse commercial spaces to same-sex couples, or to refuse service based on religious objections harkens back to the days of segregation and refusal of services to blacks and other racialized communities. While all individuals have prejudices, the structural ability and sanctioning for religious institutions to discriminate freely, particularly against gay and lesbians, is problematic. The way it is structured leads to the ability of a religion's *right to do this* and begs the question: to what degree can one discriminate, refuse services, and perpetuate oppression based on personal religious objections? As summarized by one participant, "Society at large is oppressive in all its manifestations of sexism, racism, homophobia and we know that. But the ways in which religious institutions become shielded from scrutiny in an exclusive manner is the problem because it allows discrimination blatantly on its face".

Several participants differentiated between official religious institutions and personal religious beliefs. Like any other official institution, hierarchical and oppressive ideologies often dominate. Grassroots groups, such as SALAAM (a queer Muslim group with several chapters across Canada) identify as religious, while being completely opposed to official religious dictates. However, their understandings of religion are not taken into account either by the state or by religious institutions. They, therefore, occupy an extremely precarious and marginal position because of their sexuality and their religion.

One participant stated, "I think when we talk about the different ways in which we practice religion there is each of our personal ways and personal beliefs, but then there is also the larger reality that homophobia is rampant at an ideological and doctrinal level within religious spaces. Certainly homophobia exists in all of society and 'tolerance' is often a façade, but it is not deterministic in the ways that it is within official religious dictates. I may be able to practice and I found my way to do that, but there is a significant impact on others, including many who no longer feel a connection to religion and we cannot simply say they are just 'non-believers' or 'infidels' because these are people, especially gay men, who have basically been forced out and are ostracized. We really do need to come back to the question to see why we are letting this happen? Like in other spaces, we should be asserting 'not in our name'."

Most participants also discussed the difficulty in raising or discussing these issues and the silence that surrounds issues around sexism and homophobia. As stated by one participant "There is a cycle in which racialized women are the case study of academics and it makes it difficult to decipher what I feel myself. I feel like I am being pushed into corners I don't want to be in. Depending on where you are facing you have to begin talking about other things. Often I crave spaces like this where you can talk but there are not a lot of these spaces." Other participants drew parallels to other 'safe-spaces' where women are able to identify issues and work within their communities to challenge oppression, such as indigenous women facing racism and colonization but also internally dealing with sexism, alcoholism, and violence. Participants also challenged the often cited dichotomy that racism was 'from the outside" while sexism 'was from within'; instead they operate together and are interconnected, affecting and reinforcing each other.

CRIMINALIZATION OF POLYGAMY

Backgrounder on Polygamy

There is a long social history of polygamy. Polygamy was practiced by figures in the Tanakh (Hebrew Bible), including Abraham, David and Solomon. The Koran also accepts the practice of polygamy, though it does not require it, as a way to provide care for widows and orphans. "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly, then only one" (4:3). The Koran also recognizes the challenges of living in a polygamous marriage. "You cannot be equitable in a polygamous relationship, no matter how hard you try" (4:129). In an agrarian or hunting-based society with a high male death rate, especially due to war, and economic support only available to those who lived in a household, it is believed that polygamy served useful social functions. Polygamy was widely practiced, especially in Asia and Africa, but also among some Indigenous communities within North America.[16]

Present-day discussions around polygamy are typically presented as a "clash of values": freedom of religion versus women's equality. Regardless of whether the abuses within polygamous relationships are believed to be manifestations of a universal system of patriarchy or particular to polygamy, the reality is that many who practice it have justified gender-oppressive practices within in as 'religious practices', thus shielding it from criticism and often leaving women within these communities in a more precarious position.

Polygamy is defined as the practice or condition of having more than one spouse at a time. Polygyny refers specifically to one man having multiple wives. Polyandry refers to one woman having multiple husbands. Recent commentators use the term polyamory to refer to romantic or sexual relationships involving multiple partners at once, regardless of whether they involve marriage. Although any loving polygamous relationship could also be considered polyamorous, and some polyamorous relationships involve multiple spouses, usage tends to distinguish between the words: 'polygamy' is more often used to refer to codified forms of multiple marriage (especially those with a religious basis), while 'polyamory' implies a relationship defined by negotiation between its members rather than cultural norms.

> *"Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited."*
>
> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendation on Equality in Marriage and Family Relations

[16] Bala, Nicholas "International Review of Polygamy: Legal and Policy Implications for Canada" for Status of Women Canada "Polygamy in Canada" Report 2005

Polygamy in Canada

In Canada, there has been growing concern and controversy about polygamy for a number of reasons that reflect developments in other countries, as well as some developments that are more uniquely "Canadian".

There have been very few convictions for polygamy in Canadian history; the only situations of convictions involve indigenous families. [17] Polygamy remains a criminal offence in Canada, and arguably a serious crime since it is classified as an indictable offence and allows for the possibility of imprisonment. Section 293 of the Criminal Code outlines the ban on polygamy:

> 293 (1) Everyone who
>
> (b) practices or enters into or in any manner agrees or consents to practicing or enter into
> (b) any form of polygamy, or
> (ii) any kind of conjugal union with more than one person at the same time,
> whether or not it is by law recognized as a binding form of marriage, or
>
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. [18]

The first general type of polygamy focuses on a situation where someone actually enters into any form of polygamy or any kind of conjugal union with more than one person at the same time. For the first type of polygamy, there must be proof that the accused practiced, entered into or in any manner agreed or consented to practicing or enter into any form of polygamy or any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage. The second general type of polygamy does not require that anyone enter into any such relationship. The second general type of polygamy requires that the accused celebrate, assists or be a party to a rite, ceremony, contract, or consent that purports to sanction a relationship referred to in the first general type of polygamy.

[17] In the only reported decision decided over 100 years ago, *R v. Bear's Skin Bone*, a First Nations man was convicted for living in a customary polygamous relationship.
[18] Criminal Code of Canada, [R.S., 1985, c. C-46]

The most publicized concern is the practice of polygamy by a group of Mormons in the area of Bountiful, British Columbia. While this group has been practicing polygamy for over 50 years, the issue has received attention only over the past decade and a half, with former members of the community [19] raising concerns about the practice of polygamy and abuse within the community. Uncertainty about the constitutional validity of Canada's laws prohibiting polygamy and concerns about how to enforce the law have made authorities in B.C reluctant to act. There have also been reports about some immigrant families, principally Muslims, practicing polygamy in Canada, and questions have been raised about how polygamy should be taken into account in immigration policy. Further, with the debate about the redefinition of marriage to include same-sex partners has come the question of whether marriage should also be legally redefined in Canada to include polygamy.

> Bountiful is a self-named community in the Creston Valley that is a part of the Mormon fundamentalist church entitled the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS). Concerns have arisen throughout its history about the community's polygamous practices, child marriages, the closed nature of the community, questionable human rights of women and girls, and the trafficking of young girls and women between Canada, the U.S. and sometimes Mexico. In 2004, a series of columns in the Vancouver Sun heightened awareness and concern about the women and girls of Bountiful. Debbie Palmer, who used to live in Bountiful, has been vocal about her experiences as a former member of the Bountiful community, describing her survival from childhood sexual abuse, forced marriages, and domestic violence.
>
> - Alison Brewin, *Excerpt from LEAF 2004 Consultation Report*

Discussion: Is polygamy inherently patriarchical?

The initial question that was raised was whether the harms associated with polygamy such as abuse and child marriages are inherent to polygamy or are broader symptoms of a patriarchical society that are further exacerbated for women in criminalized communities.

A few participants shared personal experiences about growing up in polygamous families; there were mixed memories of these experiences. Many shared the positive nature of having a strong familial support network; however, many also commented that those memories did not include an understanding of the impact it might be having on their mothers.

Many participants warned against judging every polyamorous or polygamous relationship by what is occurring in Bountiful. Many of the harms associated with Bountiful such as child abuse, assault, and domestic violence can be separated out from the practice of polygamy itself. One participant argued that conflating polygamy, which has a history of being oppressive and patriarchal, with instances where it is not, takes away from the agency of responding to the

[19] The personal histories of six women who have left the Bountiful community are reproduced in the report of the Committee on Polygamous Issues. 1993. *Life in Bountiful: A Report in the Lifestyle of a Polygamous Community.*

practice in its oppressive forms. Many other participants pointed out the need to oppose oppressive forms of polygamy while being respectful of the variations in which polygamy can be practiced. Finally, participants noted that it is problematic to generalize all polygamous marriages as abusive. Many women living in polygamy have supported plural marriage and appear to find happiness and satisfaction within their family structures. Participants also noted that violence and patriarchy characterizes many monogamous heterosexual relationships.

Despite this, however, most participants pointed out that the reality is that men having multiple wives, rather than women having multiple husbands, characterizes polygamy. Can such structures that allow men to have multiple wives, but not the reverse, ever exist in harmony with gender equality? How can family structures that allow men to have multiple wives, but not the reverse, be egalitarian? Furthermore, it is necessary to complicate the notion of choice and whether women would ever freely and actively "choose" to be part of such a family structure. Finally, participants emphasized that despite the possibilities of polygamy being practiced freely and without the subordination of women, the factual reality appears to indicate that a majority of polygamous experiences are harmful to the well being of women.

The discussion then proceeded to the available literature on the concrete impacts of polygamy.

Literature Review: What is the impact of polygamous relationships upon women?

A report by Angela Campbell documents the experiences of women who live, or have lived, in polygamous cultures and societies. [20] Her report considers how polygamy affects the lives of women with respect to the women's social status, their economic status, and their health. Campbell concludes that throughout the literature discussing polygamous spousal relationships, it is quite commonly reported that the patriarchal nature of polygamy leads not only to women's subordination, but also to their sexual, physical, and emotional abuse at the hands of their husbands.[21]

The literature on this issue, when viewed as a whole, suggests that while polygamy can be economically beneficial for women, it more often leads to deleterious economic effects. Studies illuminating women's negative economic experiences are based on analyses of specific features within polygamous families and communities that actively detract from women's access to resources. They indicate that women in polygamous families have experienced economic hardship on account of their family structure. In contrast, research suggesting that women stand to gain from polygamy bases this position primarily on speculation.

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[20] Campbell, Angela "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" for Status of Women Canada "Polygamy in Canada" Report 2005

[21] See for example Al-Krenawi, Alean and John R. Graham. 1999. "The Story of Bedouin-Arab Women in a Polygamous Marriage." *Women's Studies International Forum*. 22(5): 497-509; and Hassouneh-Phillips, Dena. 2001. "Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America."

Based on the available literature, it appears that polygamy often bears quite negatively on the health of women. [22] While some women might benefit from polygamous life, most research indicates that women suffer psychologically when their husbands take subsequent wives, when there is intense rivalry between co-wives, and if they perceive polygamy as depriving them of individual freedom and autonomy. Recent studies have also suggested a link between polygamy and women's reproductive health.

Another impact that was discussed was whether women had the choice or even the ability to leave a polygamous family or community. One participant stated that such a "right to exit" or "choice" argument reminded her about the arguments used against women facing violence, thus revealing an over-simplicity of the "right to exit" argument. Furthermore, in closed cultural communities like Bountiful, the "freedom to choose" must be based on an informed choice by women to associate with others in a polygamous arrangement without coercion or peer pressure from others. As one participant questioned "How can there be an autonomous choice by any female, especially a girl of 13 or 14 years, to engage in a polygamous relationship when such choice arises from her indoctrination into a particular belief and value system?"

Discussion: What is the nature of polygamy in different communities?

One of the major problems with the distinction between polygamy and polyamory is that it relies on and perpetuates racist assumptions about group identity and minority culture. While polyamory is used to define a relationship based on mutual negotiation between "independent people", polygamy refers to a "cultural practice". Such a dichotomy reinforces assumptions that women in racialized cultures are being more oppressed, more exploited, and are less independent than "autonomous women" from dominant white cultures. Such differentiations are based on the premise that racialized cultures are inherently more hostile to women.

Furthermore, it universalizes the concept of citizenship as it forces racialized women to choose between their cultures, on the one hand, and their citizenship in a liberal polity that threatens their cultures with extinction if they do not alter their gender relations, on the other hand. Feminist critiques of multiculturalism question the basic assumption that policies premised on a respect for difference provides greater freedom and security for all group members especially where patterns of persistent gender-inequality find support in rigid interpretations of a group's traditions. Simultaneously, however, instances of gender inequality within minority communities creates a backlash by the majority culture in a manner that continues to demonize the minority community without acknowledging that gender oppression is just as prevalent in the majority community. It is crucial to understand this dynamic in order to better comprehend the pressures that are imposed upon women within minority cultures.

[22] Campbell, Angela "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" for Status of Women Canada "Polygamy in Canada" Report 2005

Discussion: What is the effect of criminalization of polygamy on women?

The goal of the current Criminal Code provisions is not to protect women and girls from economic and sexual exploitation. In fact, the legislative history of Bill 65 that outlawed polygamy in 1890 reveals that the Bill was largely motivated by an anti-Mormon sentiment and anti-immigration sentiment to "send a strong message to discourage the settlement of Mormons". In Britain, for example, the case law appears to indicate that the legislation against polygamy has been closely associated with controlling the immigration of Muslims. As written by Prakash Shah, the ban on second wives coincided with the high point of political agitation against the Muslim presence in Britain in education. [23]

The participants reached agreement that criminalization of polygamy, in particular the criminalization of women as the Criminal Code currently stands, is an undesirable position and cautioned against advocating for government action as it could lead to government actions against both men and women in polygamous marriages. The current criminal laws are not sensitive to the positions and needs of women or to the needs of the children who are born of polygamous unions. The indiscriminate arrest of any adult living in a polygamous union is not desirable, particularly if the result is that children would be taken from both of their parents.

The participants then discussed whether criminal laws should be applied at all to polygamous unions. Some participants felt that criminal laws should be selectively enforced against men in order to protect women and children from sexual and economic exploitation. Such selective enforcement would, for example, target male community leaders who live in polygamous unions and have arranged for women to enter into polygamous marriages with other men in their communities.

Most participants, however, felt that any use of criminal laws still creates an environment of stigmatization for women. A criminalization framework is not sensitive to the positions and needs of vulnerable women or to the needs of the children who are born of such unions. If polygamy is oppressive, then is the only solution criminalization to allow women to have a right to exit? Instead, we can consider regulating it and making it public so that it can allow women to leave with rights, while preventing violence against women through the operation of pre-existing laws. The crucial point is to separate out the unjustifiable abuse that occurs in polygamous relationships- such as child marriage and abuse- from the practice of polygamy.

After much discussion, the Advisory Committee reached consensus on several key points.

[23] Shah, Prakash A. 2003. "Attitudes to Polygamy in English Law." *The International and Comparative Law Quarterly*. 52(2): 369-400.

Advisory Committee Principles on the Criminalization of Polygamy

As Angela Campbell has stated "Given that the global community of women in polygamy is so heterogeneous, it appears impossible to draw a single, essential conclusion as to how plural marriage affects their social status and well-being." Any policy recommendations should be based on direct communication with, and the involvement of, women in polygamy.

It is problematic to generalize or stereotype about polygamous relationships, but we recognize that the practice of polygamy exists within a global context of systemic discrimination against women and girls. The very fact that men have multiple wives, rather than women having multiple husbands, characterizes the practice of polygamy as gender oppressive. "Right to exit" and "right to choose" arguments are simplistic and do not take into account that gender inequality for women in any relationship exists within a context of global economic, social, and political inequality that deny women complete freedom in their lives.

While polygamy is often considered a harmful "religious" practice, its roots can be attributed to societal and institutional manifestations of patriarchy and sexism. However, because polygamy is often justified under religion, such practices become sanctioned as 'private' religious practices and become uncontested narratives of religion. They are subsequently shielded from scrutiny, often leaving women within these communities in a more vulnerable position. "Freedom of religion" should not be used as a shield to prevent discussion about polygamy and its effects on women. To defend gender-oppressive acts with the justification of 'religion' merely serves to reinforce the stereotype of particular religions being backward and uncivilized, while distracting from the fundamentally patriarchical nature of such acts.

The current Criminal Code provisions to abolish polygamy do not enhance women's equality; rather they further criminalize women in polygamous relationships. Such criminalization further marginalizes and stigmatizes women who may wish to leave a polygamous relationship and limits their capacity to access social services and benefits. A harm reduction approach that decriminalizes polygamy will prevent the further marginalization of women and is therefore necessary and pragmatic. Such an approach does not suggest legalization or a sanctioning of polygamy. Instances of abuse and violence within polygamous families and communities must be dealt with as in any other situation or relationship without reflecting on the practice of polygamy or polyamoury itself.

IMMIGRATION ISSUES: TRAFFICKING OF WOMEN AND FOREIGN POLYGAMOUS MARRIAGES

Backgrounder on Foreign Polygamous Marriages

In the 1980s, Muslim polygamous marriage emerged as a major issue in Western Europe, particularly in France and the United Kingdom. Given the need for immigrant labour in the post-war era, France was willing to open itself to polygamous families. By the 1990s, there were approximately 200,000 people living in polygamous families in France, and led to a rise in French anti-immigration sentiment that targeted polygamy specifically as a national ill.

New immigration legislation (the Loi Pasqua) was passed in 1993. It stated that just one spouse of each new immigrant could receive a spousal visa and working papers, and be eligible for family allowance; other spouses and their children were excluded. These changes applied both prospectively and retroactively to families who had already immigrated. Thus, polygamous men and their wives were required to divorce and live separately, failing which they risked losing their French working and residence papers and family allowance. Reports indicate that immigrant women in France have suffered immensely as a result of the Loi Pasqua. For many, divorce was not an option both on principle and because it would cause major economic and social upheaval for them and their children. Many women thus ended up homeless or living as squatters in abandoned buildings. Many others were deported. [24]

In the United Kingdom, the somewhat liberal approach to immigration of plural wives in polygamous marriages was restricted with the introduction of the Immigration Act, 1988. This legislation imposed an effective ban on the admission of a wife where another wife or widow of the same man had already been admitted to the country. Although immigration restrictions limiting entry of polygamous spouses have been challenged as a human rights violation, the European Commission found that a state may justifiably limit the entry of polygamous families to preserve "the Christian based monogamous culture" dominant in the United Kingdom. As such, the immigration restrictions were found to be justifiable under the European Convention on Human Rights. [25]

In Canada, there have been reports about immigrant families, principally Muslims, practicing polygamy in Canada, and questions have been raised about how polygamy should be taken into account in Canadian immigration policy.

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[24] Starr, Sonja and Lea Brilmayer. 2003. "Family Separation as a Violation of International Law." *Berkley Journal of International Law*. 21: 213.

[25] Shah, Prakash A. 2003. "Attitudes to Polygamy in English Law." *The International and Comparative Law Quarterly*. 52(2): 369-400.

Parties to a polygamous marriage are not entitled to permanent resident status as a family unit in Canada. Under Canada's 2002 *Immigration and Refugee Protection Act* those in polygamous unions are excluded. Section 5 of the Regulations provides that a foreign national will not be considered the "spouse" of a person and eligible for Family Class entry if the foreign national was, at the time of marriage, the spouse of another person.

As well, subs. 125(1) of the Regulations states:

> s. 125(1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if…
>
> (c) the foreign national is the sponsor's spouse and
>
> (i) the sponsor or the spouse was, at the time of their marriage, the spouse of another person, or
>
> (ii) the sponsor has lived separate and apart from the foreign national for at least one year and (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor.

However, this is not an absolute bar as the Minister of Immigration may grant an exemption, on humanitarian and companionate grounds, for a foreign national who is "inadmissible" or "who does not meet the requirements of the Act." In doing so, the Minister is to take into account "the best interests of a child directly affected." Also, all members of a polygamous family may enter Canada together as refugees. Further, some or all of the parties to a polygamous marriage might enter Canada as independent entry immigrants under the Investor or Skilled Worker classes. Finally, it is also possible for members of a polygamous family to be in Canada by entering as a visitor and overstaying.

A final crucial factor to consider is the impact of non-recognition of polygamous marriages upon women, particularly if they choose to leave such marriages. Given the structure of the labour market which does not value the work that many women do in the home, current Canadian laws has safeguards in place, such as spousal support regulations, so that women who choose to end their common law relationships or marriages are not further economically disadvantaged. The effect of foreign polygamous marriages not being fully recognized under Canadian law is that parties to polygamous marriages, particularly women, are likely to suffer if the legal protections of marriage are not extended to them. Therefore the recognition of existing polygamous marriages of immigrants and providing spouses with the benefits and entitlements- including but not limited to benefits such as spousal support, matrimonial property, succession laws, and custody regulations- is an important issue.[26]

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[26] Bailey, Martha "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? for Status of Women Canada "Polygamy in Canada" Report 2005

Discussion: Impact of non-recognition of polygamous marriage

Participants felt a great dilemma posed by this issue. As noted in the prior discussion on polygamy, it is hard to decipher whether the harms associated with polygamy can be separated out from the practice of polygamy itself, yet polygamy does appear significantly more likely than monogamous relationships to be characterized by physical and emotional abuse of women.

On the one hand, participants argued that the prohibition of immigration of polygamous parties is consistent with prevailing social values about polygamy. It may be argued that allowing immigration by all the parties to a polygamous marriage would operate as an endorsement of the practice of polygamy.

On the other hand, opening immigration to those in polygamous marriages would not be an endorsement of polygamy necessarily but simply the extension of legal rights to women in polygamous marriages. The issue of family status for the purposes of immigration is not a question of whether polygamy should be permitted but rather "the consequences of a marriage that has taken place".[27] Recognizing existing polygamous marriages of immigrants will provide spouses with the benefits and entitlements normally available to spouses. The greatest impact of non-recognition of foreign polygamous marriages will be on the female spouses who are denied entry. Immigration policy should not further harm women who may already suffer disadvantages from being in a polygamous marriage.

Therefore, a harm reduction and pragmatic approach can be applied. For example, the United Nations consistently advocates the elimination of polygamy but at the same time recognizes polygamous marriages for the purposes of its employee benefits program. To avoid placing hardship on those already in a vulnerable position — plural wives and their children — foreign polygamous marriages that were validly entered into are accorded limited legal recognition in Ontario. Under provincial law in Ontario, the definition of "spouse" for purposes of separation and succession law includes those in polygamous marriages if the marriage is valid in the foreign jurisdiction in which it was celebrated. As well, a woman living in a polygamous union in Canada would very likely be able to make child support claims and seek the same property relief as ordinary common-law spouses using the doctrine of the constructive trust. [28]

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[27] Blom, Joost. 2003. "Public Policy in Private International Law and Its Evolution in Time." Netherlands International Law Review. 373.

[28] According to Canadian matrimonial property laws, common law couples are excluded from the statutory regime. Under the statutory matrimonial regime, each spouse is entitled to an undivided half interest in family assets, where family assets are defined as property owned by one or both spouses, and used ordinarily by one or both spouses or the children as an asset. Common-law couples, on the other hand, only have claims in equity based on the doctrine of constructive trust, which is based on the idea of unjust enrichment. Based on this principle, where there is an enrichment to the property holder (e.g benefit from wife's free labour); a corresponding deprivation (e.g if the wife provides free services); and absence of any juristic reason for the enrichment (ie. there is legitimate expectation for shared ownership and no legal reason for it to be otherwise), the court will award a division of assets.

Discussion: how is the ideology of "culture" and "morality" used to crack down on immigration?

Many participants noted how it was interesting that anti-polygamy sentiment historically has been rooted in anti-Mormon and anti-Muslim immigrant sentiment. For example, as noted above, France was initially open to polygamous marriages due a need for immigrant labour, however this led to a rise in anti-immigrant sentiment. Therefore polygamy was used as a tool to legitimize anti-immigrant policy.

Furthermore, as also noted above, the European Commission upheld recent legislation in the UK that has imposed an effective ban on the admission of a wife where another wife or widow of the same man had already been admitted to the country. The Commission found that such immigration restrictions were found to be justifiable under the European Convention on Human Rights because a state may justifiably limit the entry of polygamous families to preserve "the Christian based monogamous culture" dominant in the United Kingdom.

Within Canada there appears to be different standards for white immigrants than racialized immigrants who practice polygamy. According to the 1998 case of *Ali v. Canada* [29], the Federal Court of Canada upheld an immigration officer's decision to deny a man's application for permanent residence as there were reasonable grounds to believe the applicant would practice polygamy in Canada, since he was already in a polygamous marriage. A similar decision was rendered in *Awwad v. Minister of Immigration* [30]. A wife in a polygamous marriage whose husband was a resident of Canada applied for permanent residence under the self-employed category. She also applied on humanitarian and compassionate grounds because her three children were already living in Canada with her husband and his first wife and their children. Justice Teitelbaum held that the immigration officer did not err in taking into account her marriage as a negative factor as polygamous marriages would be contrary to the Immigration Act and other Canadian laws.

In contrast with the *Ali* and *Awwad* decisions, in 1994 Citizenship and Immigration Canada reportedly gave permission to three American women to stay in Canada permanently, even though each woman was a "wife" of prominent Bountiful polygamist Winston Blackmore. Although their applications were at first refused, immigration officials from the national headquarters of Citizenship and Immigration granted permission for the women to stay in Canada permanently. They were not regarded as Family Class immigrants, but were granted permission to stay on "humanitarian and compassionate" grounds as their children with Winston Blackmore were already residing in British Columbia. [31]

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[29] *Ali v. Canada* [1998] F.C.J. No.1640.

[30] *Awwad v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 103.

[31] Bala, Nicholas "International Review of Polygamy: Legal and Policy Implications for Canada" for Status of Women Canada "Polygamy in Canada" Report 2005

"The normative figure in Western feminism remains the liberal autonomous individual of modernity. 'Other' women are those who have their freedom to choose restricted. Typically, 'other' women are those burdened by culture and hindered by their communities from entering modernity. If we remain in the terrain of thinking about women as vulnerable or imperilled, and some women as particularly imperilled, we remain squarely within the framework of patriarchy understood as abstracted from all other systems. A modernity/premodernity distinction will continue to invade any projects intending to help racialized women."

– Sherene Razack

Advisory Committee Principles: Non-recognition of Foreign Polygamous Marriages (Adopted from Dr. Bailey in *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, Status of Women Canada "Polygamy in Canada" Report 2005)

Recommendation: Valid foreign polygamous marriages are not fully recognized under Canadian law. Parties to a valid foreign polygamous marriage, particularly women, are likely to suffer because the public law benefits and protections of marriage are not fully extended to them. The provinces, territories, and federal government should amend the definition of "spouse" for the purposes of public law benefits, marital property laws, spousal support laws, succession laws, and related legislation to include parties to foreign polygamous marriage within the definition of "spouse". The legislation should indicate how rights, obligations, and benefits are to be distributed in the case of a polygamous marriage.

Recommendation: Canadians with connections abroad may wish to marry among family and friends in countries that permit polygamy. However, under the common law, a marriage entered into by a Canadian domiciliary abroad under a law that permits polygamy is void. This common-law rule should be amended to provide that a marriage entered into outside of Canada between parties neither of whom is already married will not be void solely because it took place under a law that permits polygamy and either party is domiciled in Canada.

Recommendation: Parties to a valid foreign polygamous marriage are not able to immigrate to Canada as an intact family unit. This rule prevents immigration by parties in such marriages or breaks up the family unit so the husband and one wife can immigrate to Canada. The parties most likely to suffer from this rule are the wives who are left behind. Permitting immigration by polygamous families would indicate toleration, but not necessarily endorsement, of the practice of polygamy within Canada.

Trafficking: Backgrounder

The term "trafficking in persons" essentially refers to the recruitment, transportation, and harbouring of a person for the purposes of forced service. The traditional images of victims of trafficking are of women and children forced into the sex industry; but trafficked persons also include men, women and children exploited through farm, domestic, or other labour. Many situations are not easily categorized as trafficking. Migrant smuggling – or facilitated migration- is often confused with trafficking in persons. In such a situation, the person being transported pays the smuggler for this desired service. Upon arrival, the person may be simply deposited and have no further contact with the smuggler. In other situations, people may enter of their own volition but afterwards are forced into exploitative labour situations.

One of the earliest international instruments to deal with trafficking was the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted in 1949 by the UN. The Convention was condemned for ignoring other forms of trafficking (domestic workers, mail-order brides, work in the textile industry, and in agriculture) and for failing to consider domestic trafficking or mistreatment in the workplace.

Finally, in November 2000, the UN adopted the United Nations Convention against Transnational Organized Crime (United Nations, 2002a) with two complementary protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations, 2000b) and the Protocol Against the Smuggling of Migrants by Land, Sea and Air (United Nations, 2000c) also known as the Palermo Protocol. Therefore, trafficking has come to be linked with activities of organized crime such as money laundering and drugs.

Article 3 of the Protocol defines trafficking in persons as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]

Under the former protocol on trafficking in persons, signatory countries must prevent and combat trafficking in persons by undertaking to criminalize the organization of, assistance with, or participation in the trafficking of individuals. They must also prevent and combat the problem by endeavouring to establish "measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons." (United Nations, 2000b: 5). Most telling is the return "without undue or unreasonable delay" of the trafficked or smuggled migrant, which remains the ultimate objective of the Palermo Protocol (article 18). It reveals how the main objective of the Protocol is not the protection of individual migrants but both the containment of their movement and their exposure to heightened vulnerability and precarious legal status.

Canada ratified the UN Protocol in May 2002 and currently combats trafficking in humans by relying on certain provisions of the *Criminal Code* and the *Immigration and Refugee Protection Act*.

The *Criminal Code* currently contains sections that target criminal organizations. Those provisions penalize participation in a criminal organization (s. 467.1) and money laundering (s. 462.31), provide for higher sentences for offences committed on behalf of criminal organizations (ss. 31.(6.1) and 718.2(a)(iv)) and provide for the seizure of the proceeds of crime (s. 462.32). The only section of the Criminal Code that specifically addresses trafficking pertains to prostitution. Section 212.1(g) criminalizes any individual who "procures a person to enter or leave Canada, for the purposes of prostitution".

The *Immigration and Refugee Protection Act* also addresses the issues of trafficking. Canada's Immigration and Refugee Protection Act (in force since June 28, 2002) contains increased penalties for traffickers. Along with the provisions that existed in the former Act, namely, organizing entry into Canada (now s.117), disembarking persons at sea (now s.119) and misrepresentation (now s.126), a section has been added that criminalizes trafficking in persons (s.118). Reflecting the United Nations protocol, s. 118 provides: "No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion." Any person found guilty under that section is liable to a fine of up to one million dollars or life in prison, or both.

Furthermore, any person found guilty of possessing property or the proceeds of property obtained through human trafficking is liable to a fine of not more than $500,000 or a ten-year prison sentence, or both (s.130(3). The aggravating circumstances referred to in the statute include participating in a criminal organization and submitting a person to "humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence" (s. 121(1)(d)).

As well, the Immigration Act contains a series of provisions aimed at those responsible for smuggling. They include: organizing entry into Canada (ss. 94.1 and 94.2), disembarking persons at sea (s. 94.4), and making false statements (s. 94.5). Significantly, the Canadian state does not have to prove that harm to persons took place in order to secure a life sentence: the simple act of moving ten or more people across borders without state permission is sufficient.

Importantly, the Act does not include any specific measures for protecting the victims of trafficking. If victims are unable to meet the criteria for obtaining permanent resident status or refugee status, they may appeal to the Minister on the basis of humanitarian and compassionate considerations in order to obtain such status (s. 25(1)). The law actually contains punitive measures for people who have been smuggled or trafficked, including increased powers of detention. There is no legal, policy, or administrative framework to ensure that the rights and dignity of trafficked woman and girls in Canada are respected. In the case of children, the law in fact promotes detention because of: "the risk of continued control by the human smugglers or traffickers who brought the children to Canada" (Immigration and Refugee Protection

Regulations, 249 (c)). Under the guise of "repatriation" many women are deported with the state engaging in a perverse form of reverse trafficking by forcing them to return to their country of origin. [32]

On May 12, 2005 Irwin Cotler, Minister of Justice and Attorney General of Canada, announced the tabling of amendments to the *Criminal Code* that would specifically prohibit trafficking in persons. Bill C-49 attempts to strengthen the ability to criminally prosecute traffickers. In summary, the proposed amendments would create three new indictable offences that specifically address human trafficking. The main offence, trafficking in persons, would prohibit anyone from engaging in specified acts for the purpose of exploiting or facilitating the exploitation of a person and would carry a maximum penalty of life imprisonment where it involves kidnapping, aggravated assault or sexual assault, or death. The second offence would prohibit anyone from receiving financial or other material benefit resulting from the commission of a trafficking offence. It would be punishable by a maximum penalty of ten years of imprisonment. A third offence would prohibit withholding or destroying documents, such as identification or travel documents, for the purpose of committing or facilitating the commission of a trafficking offence and would carry a maximum penalty of five years of imprisonment.

The Politics of Anti-Trafficking Measures

The issues surrounding trafficking are not simply legal ones, there exits a highly contested ideology behind anti-trafficking measures that has significant impacts on how legislation is created to tackle the issue of trafficking. Certain approaches in addressing trafficking lead to repressive strategies while others lead to strategies of empowerment. When the problem of trafficking is defined as a moral, criminal, migration, or public order problem, there is a tendency to opt for solutions that involve control or punishment.

The *Report of the Special Rapporteur on Trafficking in Women and Women's Migration* illustrates this point: "it may be that the only trafficked women who will be provided protection are those who fit into the stereotype of the young virgin "who was snatched off the streets by unscrupulous criminals, drugged, taken across an international border, raped and then chained to a bed or at least severely beaten to engage in sex for money, paid to her captors". [33] Both local and international media tend to feed into this portrayal of the appropriate trafficking victim as a young, virginal girl subjected to extreme violence and cruelty.

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[32] Since the Advisory Committee meetings, the Department of Citizenship and Immigration announced a new policy to provide temporary resident permits specifically targeted towards trafficked persons. Immigration officers may now issue temporary resident permits, valid for up to 120 days, to trafficked persons. Recipients of such permits are exempt from the processing fee, and are eligible for medical and social counseling assistance under the Interim Federal Health Program. There is no obligation on the trafficked person to cooperate with an investigation in exchange for a temporary resident permit. A trafficked person may also be granted a permit for longer period or a subsequent temporary resident permit once an immigration officer determines risk in the country of origin and whether the individual is needed and willing to assist the authorities in an investigation or prosecution.

[33] (United Nations E/CN.4/2000/68), 29 February 2000.

In recent years an increasing number of feminist scholars have expressed concerns regarding various state interventions supposedly undertaken on behalf of the stereotypical disempowered foreign woman. These interventions are undertaken and then justified in the public domain as actions intended to protect women from abuse. For example, feminists have questioned the use of "protecting women" as a rationale for the support of the war in Afghanistan. Similarly, the discourse surrounding trafficking is highly gendered and taps into culturally imperialist notions of foreign women being victimized. Networks of irregular migration, including smuggling and trafficking networks, have intentionally been constructed as high-risk environments for women in order to then justify the call for restrictive border controls. As Catherine Dauvergne has written, "The gendered facts of trafficking underpin the importance of victimization to its narrative." [34]

In reality, most trafficking harm is actually sustained by inadequate migration policy that has not responded to the needs of migrant women. The "protection" of women is sought rather than seeking the means by which women might be empowered to overcome harm or allowing for structural and systemic institutional arrangements to be adjusted in immigration policy to reduce vulnerability to trafficking harms. [35]

Discussion: How is the discourse of "protecting trafficked women" used to tighten borders?

Many participants noted how the issues surrounding trafficking and anti-trafficking campaigns represented highly contested ideology and often result in increased nationalist responses to close the borders to migrants. The use of human rights and women rights becomes the cover for the increasing emphasis on security and anti-immigrant measures in approaches to trafficking, despite the fact that the actual migration agendas of women from countries of origin have been ignored in the designing of restrictive anti-trafficking interventions.

One participant reaffirmed a statement in the reading "When the problem of trafficking is defined as a moral, criminal, migration or public order problem, there is a tendency to opt for solutions that involve control or punishment. For example, trafficking was first associated with the phenomenon of the "white slave trade" that had been vigorously condemned by moral reformers and feminists in the late nineteenth century in which the stereotypical victim was a innocent young girl seduced or kidnapped and forced into sexual slavery." The very first statute on human trafficking, the International Agreement for the Suppression of the White Slave Traffic, was ratified in 1904.

[34] Dauvergne, Catherine, 2003. "Challenges to Sovereignty: Migration Laws for the 21st Century" This paper was presented at the !3th Commonwealth Law Conference in Melbourne, Australia, April 2003. Online at http://www.sisr.net/apo/Challengesfinal.doc

[35] Sharma, Nandita. "Travel Agency: A Critique of Anti-Trafficking Campaigns", *Refuge,* July 2003

Sunera Thobani has written, "there is nothing inherent in the women themselves that makes them prone to being 'trafficked women', as the unproblematic use of the category would suggest. The unproblematized use of this category in mainstream discourse naturalizes their experience; it defines trafficking as the fault of Third World women and their communities, and it seeks to draw attention to the problems of receiving countries as a response to this problem originating elsewhere, and somehow inherent in the women themselves. A much more fruitful approach is to examine how women are "made" into trafficked women, by examining state practices and policies and the underlying social relations within the global economy." [36]

Therefore the Canadian state, rather than the victim of trafficking it aims to construct for itself, actively shapes immigration policy such that the state becomes complicit in and responsible for the trafficking in women. Canadian immigration policy continues to have a discriminatory impact on women because it reinforces a colonial, patriarchal model and women suffer a particularly negative impact simply because of the act of migration.

Furthermore, the impetus towards cracking down on migration demonstrates nations asserting their control over borders. This is further illustrated by the fact that trafficking is typically considered an act that traverses national borders, rather than a migrant who is illicitly moved from a home community within national borders. The International Organization for Migration (IOM) for example has declared that "the Organization is concerned about trafficking, as it poses a migration management problem to governments of sending countries as well as transit and receiving countries, because orderly migration and several types of national legislation, including migration legislation, are violated…" [37]

A final point that arose during the discussions was the notion of "voluntariness" and agency, where *smuggling* typically refers to the voluntary irregular entry into a country while *trafficking* involves some form of forced exploitative/ enslaved migration. However in reality, these terms are also problematic as many state-sponsored programs such as the Live-in Caregiver Program are equally conditions of bonded exploitative labour. Thus, the distinction between smuggling and trafficking still focuses on the act of irregular migration as exploitation, while ignoring the broader patterns of state-based and capitalist processes of exploitation and abuse. Participants acknowledged that irregular movements of undocumented women and children are often marked by violence and exploitation. However many recent studies show that in the majority of cases, smuggling is a service handled without violence. A report by the ILO (2002) discusses how many smuggling operations are "sometimes difficult to distinguish from legitimate work of travel agencies or labour recruitment agencies". Locally, the Canadian Council for Refugees has stated that: People smuggling, despite its evils, has also been life-giving. [38]

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[36] Thobani, Sunera Benevolent State, Law-Breaking Smugglers, and Deportable and Expendable Women: An Analysis of the Canadian State's Strategy to Address Trafficking in Women *Refuge* Vol. 19, No. 4

[37] Anne Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" Human Rights Quarterly 23.4 (2001) 975-1004

[38] Canadian Council for Refugees, 2000, "Migrant smuggling and trafficking in persons," online at www.web.net/~ccr/traffick.html

Advisory Committee Principles: Migrant- Centered Analysis of Trafficking

The criminalization of trafficking, coupled with increasing anti-immigrant measures, raises the stakes for migrant women. The Special Rapporteur has written: "Protective measures are not only problematic because of the reaction of traffickers, but also because of the measures' paternalistic nature that causes women to be further disadvantaged. Deportation continues to be encouraged" [39]

It is therefore necessary to attack both the roots of the problem and the immediate concrete difficulties it engenders by:

1) Critically examining the roots issue that state practices and policies are able to legally, and with great legitimacy, discriminate against migrants and violate their right to free movement.

2) Moving away from paternalistic approaches that seek to "protect" innocent women to more holistic approaches that seek to protect and promote the human rights of all women, including their civil, political, economic and social rights.

Specific Recommendations

- Trafficked persons shall not be detained, charged, or prosecuted for the illegality of their entry or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

- Canada shall not discriminate against trafficked persons or make their status contingent on whether or not they are willing to testify against traffickers.

- Provide trafficked persons with adequate health and social services during their stay and ensure that they are able to return home safely if they so wish.

- Implement a Protected Persons Visa.

- Trafficked persons have access to the refugee determination process.

- Canada adopts and ratifies the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

- Protect the right of all persons to freedom of movement as enshrined in Article 13 of the Universal Declaration of Human Rights and ensure that anti-trafficking measures do not infringe upon this right.

[39] (United Nations E/CN.4/2000/68), 29 February 2000.

RELIGIOUS ARBITRATION IN FAMILY LAW

Backgrounder on Religious Arbitration in Family Law

In 2003, a group of Muslims in Ontario set up an organization called the Islamic Institute of Civil Justice. They suggested that the Institute would provide Muslims with the option to use principles of Islamic law to arbitrate on matters of family and inheritance rather than rely on "secular" courts. The aim of this Institute was to operate as an arbitration body for Ontario's Muslim communities. The idea of private parties voluntarily agreeing to have their disputes resolved by an arbitrator using a different legal system is not new. Ontario's Arbitration Act [40] has allowed parties to resolve disputes outside the traditional court system for some time.[41]

As Natasha Bakht notes in *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, "Several Jewish religious groups have created Jewish arbitration tribunals or *Beis Din* in order to resolve civil matters between individuals using the *Arbitration Act*. Some of these tribunals have been sitting in parts of Canada since 1982." [42] Ismailis were also already using this form of arbitration.

In June 2004 the government appointed Ontario's former Attorney-General Marion Boyd to undertake a review of the existing *Arbitration Act*. Boyd issued her report in December 2004 *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* upholding the Arbitration Act and suggesting that Muslims be allowed to settle civil law and family matters according to Islamic guidelines. [43] From December 2004 there was an intensive and highly public and publicized campaign by supporters and opponents of the Boyd Report. Eventually in October 2005, the Ontario Government moved to ban all religion-based arbitration in family disputes.

The "Shar'ia debate" that ensued for well over a year brought to light the persistence of racist beliefs that manifested through rigid dichotomies of modern/premodern, civilized/uncivilized, enlightened/barbaric. These dichotomies are further manifested by the fact that there was a sudden outcry against Shar'ia courts although Jewish Arbitration Tribunals and Catholic separation agreements had existed without backlash for well over a decade.

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[40] *Arbitration Act*, S.O. 1991, c. 17.

[41] Bakht, Natasha "Arbitration, Religion and Family Law: Private Justice on the Backs of Women," online: National Association of Women and the Law http://www.nawl.ca/ns/en/documents/Pub_Report_ReligArb05_en.rtfat 5 (last accessed: February 26, 2007).

[42] *Ibid* at 5.

[43] Boyd, Marion "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion," online: Ministry of the Attorney General (December 2004) http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/ (last accessed; February 26, 2007).

Distinction between Arbitration and Mediation[44]

Arbitration is distinct from mediation. "In mediation, the parties design an agreement themselves with the assistance of a neutral mediator."[45] Mediation is regarded as a consensual process, from which a party is free to withdraw at any time. Notably however, there has been much feminist critique of mediation, particularly within the context of domestic violence.

"Arbitration is a form of alternative dispute resolution by which people are given a voluntary alternative to the increasingly lengthy and expensive cost of litigation under the traditional court system. Under arbitration, parties agree to have their dispute settled in a *binding process by an adjudicator* agreed upon by both parties."[46] Once an arbitration agreement is signed, it is binding and the parties do not have the option of withdrawing from arbitration.

"Arbitrators are lawyers or private citizens who may or may not make a living through adjudication."[47] "Ontario's Arbitration Act allows consenting parties to have their disputes settled by any mutually agreed upon person."[48] "The Act does not require arbitrators to have any special training since the parties are free to choose whomever they believe will best resolve their dispute."[49] "Arbitrators are required by ss. 11(2) and (3) of the Act to disclose to all parties any circumstances of which she/he is aware that may give rise to a reasonable apprehension of bias."[50] "Generally, private parties appoint arbitrators and they pay the arbitrator's fees."[51]

"Parties to arbitration and sometimes their chosen adjudicator sign a contract called an arbitration agreement that stipulates the time frame, scope of the issues to be adjudicated upon and other relevant matters which the parties wish to submit to arbitration. Some arbitration agreements are very complex and comprehensive including the specific processes by which arbitration will be conducted, while other agreements are very simple."[52] Parties are free to adopt any "rules of law" to govern their arbitrations, so long as the results are not prohibited by law. In other words, the Act has opened the door to utilizing any code including religious principles for resolving civil matters in Ontario.

It is "not illegal to contract out of certain statutory rights" with an arbitration agreement.[53] By its very nature, "the alternative dispute resolution process encourages parties to design their own bargains…"[54] "According to ss. 5(5), an arbitration agreement may be revoked only in

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[44] This section is a summary of Part 1 (pages 7-9) of Natasha Bakht's publication, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*. (See footnote 41 for full reference.)
[45] *Supra* note 41 at 7.
[46] *Ibid* at 6.
[47] *Ibid* at 8.
[48] *Ibid* at 8.
[49] *Ibid* at 8.
[50] *Ibid* at 8.
[51] *Ibid* at 8.
[52] *Ibid* at 9.
[53] *Ibid* at 10.
[54] *Ibid* at 10.

accordance with the ordinary rules of contract law… Thus, if brought to the attention of a court, an arbitral agreement could be challenged on the basis that it was signed under duress, coercion, undue influence, misrepresentation or based on unconscionability."[55] The courts have set a high threshold for the test of duress or coercion in order to uphold parties' private bargains'.

As a practical matter, given the private nature of arbitration a court will be unaware of unfair provisions unless it is challenged in court, resulting in what many have called "the privatization of oppression."

Discussion on the "Shar'ia Debate"

The discussion started with the acknowledgment from West Coast LEAF that in identifying our concerns about the application of religious principles such as Shar'ia law to family law, LEAF fed into anti-Muslim and racist rhetoric that have been particularly prevalent in Canada and internationally since 9/11. The notion that Muslim women are in need of liberation by Western forces from 'backward' Shar'ia courts perpetuates colonialism and racism by infantilizing racialized women through assumptions that they have no capacity for analysis and agency. Furthermore it homogenizes religious and cultures in definitive ways that excludes pluralism and invalidates the reconstructions of cultures and religions from within. Finally, it relegates patriarchy only to particular religions or cultures without acknowledging the universal systems of gender oppression.

It was also recognized that the debate on religious arbitration within family law has focused on Shar'ia law only, with not enough information on how religious arbitration within family law currently operates within, for example, the Catholic or Jewish communities.

There were significant points of debate in this discussion with much of the discussion focusing on the broad nature of whether Shar'ia law (or any other religious jurisprudence) is inherently patriarchical (See first Section of Report "Broad Discussions"). Furthermore, the Committee did not arrive to a clear set of recommendations since the issue was largely over with the announcement of the Ontario Government to ban all religion-based arbitration in family disputes. However, the committee did reach consensus on an anti-racist, feminist framework that they would like to have seen operate during the debates on Shar'ia law.

All participants agreed that the debate around Shar'ia law constructed Muslim women as disempowered, weak, and oppressed women with no agency. This forced many Muslim feminists to engage with the dual oppressions of racism, in particular heightened Islamophobia in the post 911 climate, that relies on Orientalist representations of exploited and politically immature Muslim women, while also contending with oppressive religious discourses that infringe on their rights and limit their expressions of gender equality. As stated by one

[55] *Ibid* at 10.

participant "There is a cycle of which racialized women are constantly under attack and it makes it difficult to decipher what I feel myself. I feel like I am being pushed into corners I don't want to be in. Depending on who you are talking to, you are constantly shifting how to respond and what to talk about."

One participant discussed how Shar'ia is discussed as if though it an unchanging fossilized theological body. Muslim women in different countries for example experience patriarchy differently- even under "Muslim Laws"- therefore justifying the assertion that Shar'ia law operates within specific political and cultural contexts and is not homogenous.

One participant explained that in the Qur'an, for example, it states that wronging someone else or going against his or her rights never sees justice. Therefore, it can be interpreted that the Qur'an prohibits patriarchy as a transgression of women's rights. Increasingly, Muslim feminists are asserting that the Qur'an and the example of the Prophet provide much support for the idea of expanded rights for women. A growing movement is contesting the model of gender rights and duties found in traditional Islamic jurisprudence and discourse and promoting instead interpretations and understandings of Islamic law and justice rooted in notions of gender equality.

Bakht refers to arguments made by Leila Sayeh and Adriaen Morse in *Islam, Law and Custom: Redefining Muslim Women's Rights*.[56] Sayeh and Morse argue that 'Islam mandates a status for women which is equal in dignity with that of men, and that all Muslims are compelled to complete God's plan for such as revealed in his words and lessons.'"[57] Bakht comments that, "In their view, most commentators have focused erroneously on Islam itself as the source of Muslim women's persecution rather than the misinterpretation of Shar'ia law perpetuated by patriarchal societies and leaders. The unfortunate focus on Islam itself as the source of the persecution of women is misplaced and detracts from a true understanding of the nature of the plight of women in Muslim societies."[58]

Some women pointed out that male supremacy- including those instances that seem to be rooted in religion just as stoning or honour killings- is a manifestation of broader society and culture, rather than religion itself. Several participants suggested that the reasons Shar'ia is not interpreted for the benefit of women is because traditional readings have been done by men for the purpose of establishing their superiority. This is intentional and has to be understood in the context of male dominated colonialism, which favoured oppressive readings of Islam to justify colonial rule and conquer.

On the other hand, women discussed the essentialist nature of religion that constructs religion and religious discourse in a certain way that makes it hard to argue unless one knows exactly how to argue on the basis of theology and doctrine rather than values. When gender inequality

[56] (1997) 12 Am. U.J. Int'l L. & Pol'y 1 at 3.
[57] *Supra* note 41 at 50.
[58] *Ibid.*

or patriarchy is normalized through religious doctrine or language, challenging it requires a reinterpretation of theology that is highly inaccessible to most. Despite the possibilities of reforming and reinventing religious law and jurisprudence, the reality is that religion in particular serves as a particularly important tool for conservative forces for the very reason that it is first, easily manipulated, and then, solidified as a realm of the divine that cannot be challenged.

Bakht also notes that "it is impossible to know what version of sharia would have been used for civil matters in Ontario since the *Arbitration Act* allows parties to agree to any legal framework they desire. Parties may agree to very specific interpretations of the sharia or they may agree to submit to the sharia generally, putting faith in the arbitrator's expertise."[59] Bakht goes on to say that "Syed Soharwardy, a founding member of the Islamic Institute of Civil Justice, has written: 'Sharia cannot be customized for specific countries. These universal, divine laws are for all people of all countries for all times.' Yet, by virtue of living in Canada, sharia law can only be applied in a limited way to certain civil matters."[60] "Rabbi Reuven Tradburks, secretary to *Beis Din* of Toronto's Va'ad HaRabbonim notes: 'In this city, we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation.'" [61]

Participants noted for example, that it is revealing that "several Muslim countries have invoked reservations to the CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women] specifically citing sharia law as the motivating force behind these reservations."[62] Reservations serve to exclude or modify the legal effect of the reserved provision(s) in their application to that country. "For example, a country's reservation might read: The Government of the Republic of X will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic sharia, upon which the laws and traditions of X are founded."[63] According to RJ Cook, "the most reserved articles relate to rights of women in the area of family law, which has always been jealously guarded by Muslim countries as being regulated by Islamic law, whereas other fields of life including the running of governments and financial institutions are not so guarded." [64]

One participant noted "we should also not go the extreme where we assert that all Muslim women are politically empowered and are able to resist religious domination. Most poor women of colour, particularly immigrant women, are the most marginalized in our society- not because they are weak but because of oppressive structures and systems that render them so. So

[59] *Ibid* at 24.
[60] *Ibid* at 24-5.
[61] *Ibid* at 25.
[62] *Ibid* at 25.
[63] *Ibid* at 25.
[64] Cook, RJ "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990) 30 Va. *J. Int'l L.* 643 at 252.

it is a reality and we should not forget that. What has appeared to be missing, unfortunately including from the analysis of anti-racist, feminist women, is a fundamental class-based analysis of how religious domination and poverty intersect. We may share the common terrain of being racialized women of faith, but we also have to acknowledge our own privileges within this discussion. There are many women who are unable to articulate a discourse the way we do; their reality is not ours, so let us not speak about *their* agency and empowerment. We have to acknowledge that there is large gap between largely class-based grassroots women of colour activists around the world and university-based feminist theorizing."

Participants also discussed the idea of cultural relativism versus cultural sensitivity, which implicates the left progressive movement. As one participant stated, "In attempting to rightfully distance ourselves from right-wing rhetoric about Islam, we find ourselves silent and falling into a trap that further marginalizes Muslim women. We become silent against unjust practices, which should not be able to be justified under any cultural norm or religion. If anything, it further homogenizes the idea of the 'Muslim community' and presumes that Muslim women or GLBT people are not already resisting such impositions upon their lives."

One participant provided the example from Bakht's paper of Catholicism in Quebec upon women. "In Quebec, in the 1960s and 1970s the women's movement fiercely opposed the domination of the Catholic Church and its right to dictate how women would live their private lives. For example, women vehemently challenged the right of the Church to forbid contraception and to force women to perform their 'conjugal duty' to be continually available for their husbands' sexual needs."[65]

It was suggested that the writings and analysis of groups such as Women Living Under Muslim Laws, [66] who are carving and sustaining radical forms of expression based on feminist, anti-racist, anti-capitalist, and class-based critiques be made more accessible and public. In this vein, an excerpt from a Women Living Under Muslim Laws publication is produced at length below.

Excerpt from Women Living Under Muslim Laws [67]

We agreed that globalisation, i.e. the internationalisation of capital, marked by structural adjustment programmes, relentless privatisation and the growing power of transnational

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[65] *Supra* note 41 at 49.

[66] Women Living Under Muslim Laws (WLUML) is "an international solidarity network that provides information, support and a collective space for women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam." While WLUML challenges the myth of one, homogenous 'Muslim world' and acknowledges that all laws have multiple sources (religious, customary, colonial and secular), WLUML was formed specifically in response to Muslim countries and communities in which women were being denied rights by reference to laws said to be 'Muslim'.

[67] Women Living Under Muslim Laws International Solidarity Network, Plan of Action Dhaka 1997 http://www.wluml.org/english/pubs/rtf/poa/dhakapoa.rtf

corporations; the changing relationship between the state and civil society; the militarization of society, the outbreak of armed conflicts (including between non-state actors) and the rise of the right accompanied by the emergence of extremist political groups organised around identity, all have a profound impact on our lives as women and as activists.

We wage our struggle for space and agency against a background where we are witnessing:

1. The miserable failure of states in many parts of the Muslim world (as elsewhere) to close or even narrow the yawning gap between rich and poor, to provide jobs for burgeoning numbers of unemployed, to stem the insidious corruption that sows disillusionment throughout society, and to provide basic social services, such as health and education, that are essential to a decent life;

2. The formal abdication by states of their obligations to meet the basic needs of their citizens in many of our countries accompanied by an aggressive assertion of state control over society in which democratic rights and freedoms are repressed, not only to ensure the state's grip on power but also to fulfill the obligations outlined in the new trade, finance and re-structuring agreements;

3. The growing sense of insecurity that results from (a) the locus of decision-making shifting further and further away from people and (b) deepening poverty that widens divisions between the haves and have-nots and fuels competition for limited resources, and that pushes people into finding new ways of coping;

4. The ascendancy of collective identities defined by religion, ethnicity or culture, each projecting itself as the only way to protect and/or to access power for its (willing or unwilling) 'members';

5. The pressure this puts on people to accept ever more narrow definitions of self such that their multiple, non-antagonistic identities based on gender, citizenship, class, religion or ethnicity are reduced to one single, imposed identity;

6. The intensification and creation of divisiveness within civil society both between groups and against people who refuse to accept the identities imposed by ethnic, nationalistic, sectarian and religiously defined politics, and the ominous threat posed by those groups involved in identity politics who push their agendas through violence (including even armed violence);

7. The religious right playing a crucial role in identity politics everywhere, and the linkages that exist amongst politico-religious groups and between them and various other right-wing forces from the local to the international levels, both within Muslim countries and communities and outside them;

8. The links between mainstream politico-religious groups of the right and the extremist groups (whether spawned by them or not) working strategically to reinforce each other in pursuit of their common ends - even when these links are denied; and,

9. Women bearing the brunt of identity politics in terms of violence and in terms of control over their life choices:

    - The emergence of armed groups and conflict in many countries that often specifically target women, e.g. the use of rape as a tool of ethnic or religious 'cleansing'.

    - A general brutalization of people that contributes to increasing violence against women in all spheres of life, and is facilitated by an easy access to the means of violence (be it arms or acid), and manipulation of the law.

    - Definition of collective identities increasingly being hinged on definitions of gender so that the construction of a 'Muslim woman' is therefore integral to the construction of 'Muslimness', explaining in part the emphasis on controlling women's sexuality and other aspects of their lives.

Combined with other factors, the ascendancy of identity politics directly erodes the space available for secular initiatives so that in an increasing number of cases, the secular space has been completely eliminated. Consequently, when as women or activists we work either across imposed boundaries or outside the frame of religion, we are often accused of betraying our community, ethnic group, country or religion.

Though the use of the term 'fundamentalism' has been debated within WLUML for many years we are in agreement about the broad nature of the phenomenon we refer to here as 'fundamentalism' i.e. the use of religion (and, often, ethnicity and culture as well) to gain and mobilize political power.

We recognise that in each county or community, unique circumstances of history and economic, political and/or social development fertilize the soil into which fundamentalism drops its roots. Yet it is increasingly evident that fundamentalism is fuelled by international forces as well.

Finally it is very clear that fundamentalist movements often stoke each other's fires, either through collaboration or through confrontation. We have seen how, for example, the Vatican and other conservative Catholic groups found common ground with right-wing Muslim forces in their opposition to women's health and assertions of human rights.

On the other hand, in the context of ethnic or religious conflict, the dominance of fundamentalist movements on one side contributes directly to the strengthening of fundamentalist movements on the other side. This we see in situations such as India, where the

power of Hindu fundamentalist groups to spark communal violence ultimately fuels fundamentalist positions within the Muslim community as well.

We believe that fundamentalist movements thrive by encouraging people to link their identity exclusively to membership of a collectivity defined by supposedly immutable characteristics of religion, ethnicity or nationality; then by erecting the barriers between such collectivities; and finally by intensifying the threat deemed to be posed by the 'other'. The resulting ethnic or religious confrontations underlie some of the most brutal conflicts of our time. Thus our struggle against fundamentalisms flows directly into our work on militarization.
Control over sexuality is a central theme of the social programs promoted by fundamentalist movements everywhere. It has also been a painfully visible element in recent armed conflicts in which mass rapes and forced pregnancies - the tools of ethnic and religious 'cleansing' - are deliberately designed to rob women of control over their sexuality and reproduction as well. Closely linked with the issue of control over sexuality is the imposition of dress codes. Although frequently justified as either 'religiously correct' or 'traditional', the newly imposed dress is in fact alien to that particular context, and an attempt to create a new international 'Muslim' uniform.

We recognise that much of the dynamic involved in the construction of 'Muslimness' is generated from within Muslim societies themselves - albeit with reference to the threat of external forces. However we strongly believe that concepts of 'Muslimness' are also built through images and through social/political forces operating from outside Muslim societies. For example, there are striking similarities in the way some in human rights groups, donor agencies, and the media react to the rise of fundamentalisms.

Our discussions yielded multiple examples of well-meaning donor agencies providing funds for Qur'anic schools, madrassahs and social work organised by fundamentalist groups, despite the attendant conditionalities imposed by them: the pressure for the men to attend mosques, for women to cover themselves, discrimination against girls, the end of coeducational schooling, the banning of girls from sciences, sports and arts, educational programmes that promote a hatred of others and forcibly impose a particular brand of religion on all.

The more progressive press, which in principle should be our natural allies, presents a different type of problem. Wanting to distance themselves from Islam hatred and the colonial past, well-meaning people fall into the trap of cultural relativism. In the name of the right to difference, they are prepared to support any practice, be it totally unjust and against the common understanding of human rights, if so-called 'authentic leaders' of the community justify it by reference to culture or religion. The progressive media therefore give a platform to fundamentalists as the sole representatives of Muslims. Beautiful concepts such as freedom of expression or cultural diversity, become distorted from their original meaning and are used to endorse the right to seclude women, to mutilate them or more generally to control and restrict all aspects of their lives. For instance, several countries in Europe have debated whether to

allow FGM 'for the concerned sections of the population' on their soil, or to allow polygamy for men or repudiation/unilateral divorce for men only.

All too often, in the media as elsewhere, Muslims - or those so labeled - are constructed as 'the other', radically - even ontologically - different from other human beings fighting the same struggles against fascism and patriarchy. Because we as women's human rights activists so blatantly challenge the stereotypes, they react much like fundamentalists do: they worry about our legitimacy, doubt our analysis, question our premises and challenge our conclusions. We are presumed to be 'westernized' and not authentic enough, we are not really 'Muslim'. Meanwhile, fundamentalists who fit into the stereotype of 'otherness' can be heard.

Advisory Committee Principles on the "Shar'ia Debate" and Religious Arbitration in Family Law

The Shar'ia debate feeds into anti-Muslim and racist rhetoric that have been particularly prevalent since 9/11. The 'clash of civilizations' belief that Muslim women are in need of protection from the West from 'backward' Shar'ia courts perpetuates colonialism and racism by infantilizing racialized women by assuming that they have no capacity for analysis and agency.

The lack of uniformity in interpreting Shar'ia law poses a difficulty in assessing the impact on women of Shar'ia arbitration tribunals in Ontario.[68] It is possible that a regressive interpretation of Shar'ia will be used to seriously undermine the rights of women. If so, this is a reflection of male domination within society at large, rather than anything inherent within the religion itself. It is also a reflection of the rise of certain politically-favourable ideologies (or "fundamentalisms") that are globally on the rise. It is also possible that a feminist interpretation of Shar'ia law will result in arbitral awards that deal fairly with women. We should foster and facilitate the space for such feminist interpretations.

The fact that the Shar'ia proposal was for arbitration (which is binding) rather than mediation was the most problematic part of the proposal as arbitrators are given broad powers to decide their own jurisdiction and process. In general, the court will not review or overturn an arbitration decision unless there is an error of law.

In general, the increasing trend toward the privatization of justice (whether in 'secular' or 'religious' law) is problematic and perpetuates the oppression of women. The very basis of arbitration- private contracts- allows for a process whereby women are able to 'contract' out of their statutory rights and maintains systems of unequal bargaining power for women.

[68] *Supra* note 41.

RELIGION, STATE, AND CHILDREN

Backgrounder on Religion, State, and Children

Similar to the ways in which the liberal state is seen as "protecting women" from their own communities, the ideology of the "child's best interests" is a highly contested ideology dependent upon presumptions of how what constitutes good versus bad parenting. Constructions of parenting are frequently understood in terms of the values it raises in opposition to religious value systems: free choice versus conditioning, individual liberty versus social will. The view that secularism- as defined by white dominant society- offers a factually accurate vision of the world, while religion is often irrational and senseless, has a profound effect on what courts decide. A liberal understanding of religion, although tolerant, may miss the fact that a religious community comprehends public good, life, and equality in a fundamentally different way. Therefore custody decision-making in which religion plays a role is significant from the perspective of parents, children, religious communities, and the state.

In this discussion, participants discussed two scenarios where such issues are most evident. One is in the situation of divorce/separation where there are disputes around religious upbringing and the effects it has upon a custody battle. The second situation involves a parent's refusal of medical treatment for their child. In such cases, the claims of religious freedom versus autonomy of the child are heightened.

There were no specific policy considerations within this discussion; therefore the Advisory Committee generated no specific recommendations. Instead, the discussion was intended to explore the particular issues that impact children when freedom of religion is seen to be contrary to the liberal secular understandings of freedom of choice and the complex issues that arise when addressing issues such as identity, agency, community, autonomy within a framework of gender equality and children's rights.

Custody of Children after Separation/ Divorce

Divorcing parents often wish to expose a child to her or his own religion or to prevent the other parent from doing so. It is important to note that in these areas of decision-making courts do not understand themselves to judge the content and value of particular religious beliefs; rather judgments are rendered based on the "child's best interests." However, the courts can still be thought to be directly or indirectly involved in examining religious practices in the guise of evaluating the behaviour of the individual parent. In this manner, a judgment rendered on the basis of the "child's best interests" may carry an implied assessment of the religion in question.

Two Supreme Court of Canada cases that resulted in contradictory results provides a contextual background against which to articulate the issues raised by the instances of religion in custody

decision-making. In 1993 the Supreme Court of Canada handed down judgments in two similar cases relating to religion and custody: *Young v. Young* [69]and *P.(D.) v. S.(C.).*[70] Both cases involved appeals of the trial judge's decision to curtail the extent to which a Jehovah's Witness father could share his religion during periods of access. The restrictions imposed ranged from not being allowed to discuss religious beliefs to being prohibited from taking children to meetings or door-to-door during proselytization efforts.

In *Young*, the father converted to the Jehovah's Witness faith two years before separating from his wife. The couple's three children remained in the custody of the mother. During periods of access the father read his children Bible stories, discussed his beliefs with them, took them to Jehovah's Witness meetings, and sometimes took them on door-to-door canvassing. At the custody trial the lower court granted access to the father but ordered him not to engage in any such religious activities with his children. In view of his children's objections to attending meetings and going canvassing, the father undertook not to involve them in those activities. He appealed the remaining restrictions that prevented him from discussing religion with his children and, in a 4-3 decision the Supreme Court removed them.

All members of the court agreed that in custody disputes under the *Divorce Act* the issue of access had to be decided in light of the best interests of the child, taking into account that a child should have as much contact with each parent as is consistent with his or her best interests.

Justice Sopinka, for the majority, wrote that the "best interests of the child" test could only override *Charter* guarantees of religious expression if risk of substantial harm to the child is shown to arise. He warned against an overly broad definition of harm:

> Anything from starting school to having to go to bed may evoke a strong emotional response. This does not mean that these experiences are not in the long-term best interests of the child. Similarly, conflict between parents on many matters, including religion, is not uncommon, but in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere. [71]

In contrast, Justice L'Heureux-Dubé, writing for the minority, argued that the doctrine of the best interests of the child required that the best conditions for rearing the child be found, which necessitated the restrictions to access in order to remove the source of conflict and stress the children were experiencing upon becoming involved in their father's religious practices. She further wrote "where there is conflict over religion, courts must secure the longstanding authority of the custodial parent [in this case, the Roman Catholic mother] to make decisions over religious activities." [72]

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[69] *Young v. Young* [1993] 4 S.C.R. 3
[70] *P.(D.) v. S.(C.),* [1993] 4 S.C.R. 141
[71] *Young v. Young* [1993] 4 S.C.R. 3 at 182
[72] *Young v. Young* [1993] 4 S.C.R. 3

In the other child custody case *P.(D.)*, however, the Court upheld the trial judge's finding that the parents' conflicting religions would harm the child and approved the judge's order prohibiting the father from sharing with his child his practices as a Jehovah's Witness. The majority argued that the child's best interests did not include merely a lack of harm or experiencing conflict between the parents. Rather, as per L'Heureux-Dubé J., "it means that the child is entitled to the best possible conditions in order to protect its best interests" and it was held by the majority that the father's actions were not in the best interests of the child. [73] Particularly distressing to critics is L'Heureux-Dube's J.'s reference to 'religious fanaticism'.

Justices McLachlin and Sopinka in dissent argued that the evidence failed to show that the child suffered from her father's religious practice. They argued that "[t]here was nothing in the evidence to suggest that the conflict between her parents' religious beliefs was creating any problems for the child or that the child would be adversely affected."

Refusal of Medical Treatment for Children

In such cases, claims are heightened: the state's interest is in the preservation of life, whereas the person refusing treatment is concerned with the salvation of a soul. The dominant view in the Court is that religion is fundamentally an arbitrary choice, in comparison with the state's rational emphasis on life and health.

The jurisprudence on the refusal of medical treatment in Canada suggests that a competent adult individual's desire to follow his or her own beliefs, including the religious obligation to refuse life-saving medical treatment, will prevail over the state's interest in preserving that person's life. Where children are involved, however, the courts are likely to adopt the view stated by Rutledge J in an early decision of the Supreme Court of the United States: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." [74]

The Supreme Court of Canada in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [75] depicts some of the conflicts and tensions. S.B. was born four weeks prematurely. At the parents request the attending physicians avoided the use of a blood transfusion because, as Jehovah's Witnesses, the appellants objected to it for religious reasons; they also claimed it was unnecessary. When S.B. was a month old, her haemoglobin level had dropped to such an extent that the attending physicians believed that her life was in danger and that she might require a blood transfusion to treat potentially life-threatening congestive heart failure. Following a

[73] *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141
[74] *Prince v. Massachusetts* 321 U.S. 158
[75] *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, 176 N.R. 161, 26 C.R.R. (2d) 202, 78 O.A.C. 1, 122 D.L.R. (4th) 1

hearing on short notice to the parents, the Provincial Court (Family Division) granted the Children's Aid Society a 72-hour wardship and S.B. received a blood transfusion as part of the examination and operation for the suspected glaucoma.

The majority of the Court found that the parents' religious freedom had been infringed, calling the right to rear one's child according to religious beliefs, including choosing medical treatments, a "fundamental aspect of freedom of religion". However the Court justified limiting the parents' freedom by using s. 1 of the Charter, which allows the Court to justify violations of the Charter, in this case on the basis such an intervention to save the child's life was a justifiable violation of freedom of religion. The minority in the Court found no violation of the parents religious freedom. They argued that "the right of freedom of religion itself must have a definition and there must be an outer boundary. The parents proceed on the assumption that Sheena is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, Sheena has never expressed any agreement with the Jehovah's Witness faith, nor, for the matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief." This opinion indicates the Court's continuing inclination to view religion not as a cultural phenomenon or (at least for some adherents) communitarian activity, but as a matter of individual choice.

In *Children's Aid Society of Metropolitan Toronto v. K.*, [76] a 12-year old shared her parents' view that she should not undergo chemotherapy, which would involve blood transfusions. The Children's Aid Society applied to have the child declared in need of protection to ensure that the treatment would take place. Acknowledging the sincerity of the child's religious views and her reluctance to undergo chemotherapy in any case, the judge accepted her and her family's wish that she try a mega-vitamin therapy at home, "where she would be surrounded by her family and … be free to communicate with her God." The Court found L.D.K. to be "intelligent, mature and capable of forming a rational judgment as to her own condition and the treatment options open to her." The Court also found that a forced treatment would be regarded as a violation of her Charter rights, including her freedom of religion.

Discussion: How do understandings of religion influence political and legal policy about children and family decisions?

Many participants found the readings for this session really interesting and revealing about assumptions around religion and secularism, in particular comments made by the judges about 'religious fanaticism'; whether children share their parents' religion; and an assumption that conflict over religion is more detrimental than other normal parent-child conflicts.

[76] *Children's Aid Society of Metropolitan Toronto v. K* .[Ontario Provincial Court, 1985]

One participant commented that "Secularism- as Canadians understand it- has led to a liberal incapacity to comprehend religion. Secularism may have originated in the efforts to separate the church and state and disentangle politics and religion, but is now essentially a complete incapacity to understand religion. Actually worse, it is a demonization of religion and religious cultures- particularly non-dominant ones."

Participants discussed how Eurocentrism seemed to play a role in the cases discussed. Many of the sentiments expressed by the judges stems from the possibility that the impact of non-mainstream or 'different' religious beliefs and practices may be exaggerated in order to deny custody, particularly to women of colour from a non-Christian or dominant religious background, who may have been primarily responsible for childcare during the marriage.

Other participants noted the irony in rejecting the authority of religion, but yet capitalism, consumerism, and liberal secularism are equally authoritative discourses- the difference is just that these discourses are normalized in Western society. The notion of "rationality" and "objectivity" of secularism is just as much a single, uniform authority as religious authority, leading to its own form of intolerance.

Several participants noted that it seemed like the court are willing to accept freedom of religion as a private individual right, but does not want to recognize religion as part of a larger faith community. The language of 'choice' applied to religion suggests that the religious belief or practice is no more essential than any other autonomous individual choice, thus devaluing the reality that religion plays a significant role in informing an essentially immutable community and group affiliation in a diverse society. As long as religious practices are private and minimally intrusive, they are accepted; but where these beliefs interfere with the liberal understanding of the public good, the liberal state views religion as a choice that is wrong, unreasonable, or dangerous.

On the other hand, participants discussed how to challenge the imposition of essentialist religious beliefs. Do we allow religious acts that violate others' rights- like denying a child life-saving medical treatment, anti-abortion arguments, or violating sexual freedom through homophobic beliefs and practices because of the need to defend against state infringement upon minority communities? One participant for example discussed the ways in which pro-life discourse is dominated by religious beliefs "Right-wing Christians use the Bible in assertive and dogmatic ways to assert that abortion is against the Bible. For example, they quote from the Genesis that Rebekah's unborn twins, Jacob and Esau, are referred to as children and stating that it is biblically unacceptable to kill an unborn child, including in instances of rape. They even go so far as to claim that pro-choice arguments are led by the Devil and that Satan is behind the lies. Such arguments, which are disguised under the authority of religion, cannot be tolerated from a feminist and social justice perspective. More fundamentally, it is does even allow for the basic free exchange of views if you are thought to be 'Satan'."

Discussion about state intervention: Aboriginal children in the Child Welfare system

Indigenous women discussed the ways in which state intervention in indigenous communities has been a form of colonization and racism. Despite being framed in a discourse of 'human rights' and 'protection', interventionist government policies have been Eurocentric and perpetuated the loss of control and autonomy for indigenous communities.

Colonialism has created harsh social conditions: continued underdevelopment, racism, and a devastating culture of poverty. The theft of Native lands and the forceful segregation of Natives away from mainstream society into reservations or into impoverished urban ghettoes have succeeded in ensuring their continued deprivation and degradation. Violent military occupation, employed through the so-called "civilizing" influences of the Christian church, sought to annihilate indigenous cultures and identities. Racism against Natives is not simply an outcome of cultural misunderstanding but rather a deliberate ideology.

As a result of forced assimilation through residential schools, Native children were forced to adopt foreign ways of doing things and to abandon much of their heritage and way of living. The very reason for residential schools was to assimilate indigenous peoples and to try to "civilize" them. The child welfare system similarly reflects white dominant mainstream ideas and ideals and it perpetuates colonization. Professor Marlee Kline noted that the child welfare system focuses on the individual caregiver (mother) without connecting the challenges of supporting children to the problems of poverty, violence, and the legacy of racism, and the way in which these compounding experiences of oppression affect women's lives. Kline further states that "The focus on individual "bad mothers" as the source of difficulties in First Nations child welfare cases effectively blames First Nations women for the effects of social ills that are largely the consequence of this history and present. Vivid illustrations of this individualized mother-blaming focus can be found in child protection cases, involving First Nations women who are dependant on drugs or alcohol, or involved in a relationship with a violent man." [77]

Of the total number of children in care by 1977, over 20% were native. The proportions were even larger in western provinces where Aboriginal populations were usually higher, with estimates reaching as high as 60% in Manitoba. [78] One study in 1980 assessed that status Indian children were placed into state care at a rate of four and a half times that of other Canadian children. The attempt to assimilate Aboriginal children into becoming "race-less" children has a tremendous impact on the children themselves, their families and their communities as a whole.

As one participant stated "The child welfare system in its application to Aboriginal people has been an exercise in cultural genocide and racism. Its practices have been a continuation of a previous tradition of assimilation including the residential school system that preceded it."

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[77] Kline, Marlee "Ideology of Motherhood: Child Welfare Law and First Nations Women," *Queen's Law Journal* 18 (1993)

[78] Kelly MacDonald, Missing Voices. British Columbia Children's Commission (Commissioner: Cynthia Morton), 1998 Annual Report (Victoria: Queens Printer, 1999).

The continual recurrence of liberal visual and textual representations of Afghan women sensationalize their plight and conflate third world women "over there" with third world women "over here."

- Shahnaz Khan in Feminist Solidarity and Afghan Women, Genders 33 2001