The Adjudication of Otherness in Constitutional Liberal States

Professor Pascale Fournier

University of Ottawa

FACULTY OF LAW

CML 4110 / DCL 5304 *Studies in Legal Theory I and II*

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Type: Seminar
Class Meetings: Monday, 16:00-18:00; Thursday, 16:00-18:00
Professor: Pascale Fournier
Office: Human Rights Center (556)
Phone: (613) 562-5800 (3083)
Office Hours: Thursday, 10:00-12:00
E-mail: Pascale.Fournier@uottawa.ca

Course Description and Objectives

This seminar will provide a forum for the critical examination of the role of law in culturally producing and rigorously disciplining individuals within particular systems of power. The overall objective of the course is to ask whether strong political emphasis on issues of recognition may result in a corresponding inattention to economic and redistributive issues at large, as well as to those structures and practices in which socioeconomic inequality is rooted and reproduced. In exploring the distributional effects of multiculturalism, we will try to render visible what otherwise would remain hidden, i.e. inquire into whether identity politics (giving rights to the "Other" based on identity) does, in fact, intensify and legitimize what is supposed to be eliminated by egalitarian movements (material inequality and weak bargaining power). What are the social costs at stake in the legal monopoly of identity politics as the hegemonic emancipatory discourse? Does recognizing the "Other" *as* the "Other" simultaneously obscure the institutional arrangements that distribute powers and desires in the form of background legal rules and background social norms?

In the first part of the seminar, we will discuss key texts on identity politics, liberalism, Marxism, and critical legal studies. Some of the questions we will ask are: What is and what should be the role of law in the constitution, production, and regulation of identities? How does one translate plural, multiple identities into the language, formalities, and structural nature of the law? Can law regulate without recourse to categories that produce and reify preconceived identities? Why is the legal recognition of the "Other" a good thing, and what would a distributional analysis of identity politics entail? Does recognition of law's constitutive effects leave any hope for constructive empowering action? The second part of the course will be dedicated to "multicultural controversies" in a variety of liberal democracies, such as: the enforcement of the Islamic custom of *Mahr* (Canada, the US); the desirability of creating an Islamic court in Ontario (Canada); Muslim women against Islam in Western states (Canada, the Netherlands, Germany); the recognition of the Jewish divorce contract—*the Get* (Canada); gender and the "intervention/non-intervention debate" in Aboriginal cultures (Canada, the US); schooling and the Amish (the US); sexy dressing and legislating the hijab in public schools (France, Turkey, Germany, and Quebec); and crimes of honour vs the defense of provocation (Turkey, Canada, and the US). While approaching theories of power, class, ideology, and the representation of the "Other" through adjudication, we will simultaneously read and examine the case law material through the lens of the recognition-distribution debate.

Evaluation

- **Class Participation (10%):** regular attendance and active participation in class discussion are required.
- **Six Reaction Papers (90%)** of two pages each (single space), consisting of your critique or comments on the reading for that week. No external research is required. Your paper should involve, in some direct way, two or three of the critical readings discussed during the session. You must contrast, critique, or work to reconcile the positions of the authors you have chosen to analyze, by using an actual case law discussed in the course. You are of course invited to think "outside the box". The reaction paper must be sent to me by email (Pascale.Fournier@uottawa.ca) 24 hours before the session you have chosen to react to.

Detailed Course Outline and Readings

1. Oppression, Stigma, and Consciousness: Identity As Prior to Law
(February 5, 2007)

> *"The history of his city becomes for him the history of himself; he reads its walls, its towered gate, its rules and regulations, its holidays, like an illuminated diary of his youth and in all this he finds again himself, his force, his industry, his joy, his judgment, his folly and vices. Here we lived, he says to himself, for here we are living; and here we shall live, for we are tough and not to be ruined overnight. Thus with the aid of this "we" he looks beyond his own individual transitory existence and feels himself to be the spirit of his house, his race, his city."*[1]
>
> *Friedrich Nietzsche*

Identity is widely held to be a primary political value. But what is identity? Why is it valuable? How does identity function in relation to societal norms and to social struggle more generally? And what form of state intervention (if any) is required to protect it?

Charles Taylor argues that the modern identity is characterized by an insistence on its inner voice and capacity for authenticity, that is, the ability to find a way of being that is somehow true to oneself. In our first session, we will try to assess what is at stake by talking about identity as prior to law; identity as stable, self-identical, and real. We will examine key texts that explore issues of gender, race, and nationhood as part of this quest towards the "real"—the ambivalent reading of the (maternal) female body, the (injured) black body, and the (pure) defined nation. Through her complex, lyrical, meditative piece, we will familiarize ourselves with **Luce Irigaray**'s preoccupation with issues of boundary breakdown between the inside and outside of the female body, and the role of mother-daughter relationships in a representational over-determination of natural "inner space". We will compare her approach to **Ralph Ellison**'s Invisible Man and to **Renan**'s definition of the nation. "Knocking against the walls of a narrow passage", the invisible man's blackness is reflected and distorted through aesthetic prisms that grotesquely mirror the white, dominant society's vision and attribution of meaning. This signifying unit—external, colourful, authoritarian, and loud—produces the black (invisible/mute) man's identity. In defining what a nation is, **Renan** does not "imagine communities"[2]: he speaks, knows, and feels the nation as a fixed, stable, and proud entity.

[1] Friedrich Nietzsche, "The Uses and Disadvantages of History for Life", in *Untimely Meditations* (1983, translation by R.J. Hollingdale), at 73.

[2] I borrow this expression from Benedict Anderson's term in *Imagined Communities* (rev. ed.1991).

Whereas the question of what constitutes "identity" within specific marginalized groups almost always centers on the question of how "representative" the group is towards its members, the question we will explore during the first session will be rather different: to what extent does legal discourse replicate, affect, or regulate identity formation and the internal coherence of the subject? **Plessy** and **Ewanchuk**, in projecting chosen, particular images of African Americans and women, may shape the way such groups are viewed by the larger society. Law may in fact characterize these groups in ways that ultimately filter into popular understandings and counteract, or reinforce the assumptions and stereotypes that already exist.

The readings in this session will help question the power and hopes of legal discourse as a site of struggle and a possible means of social change. While approaching these writers, ask yourself the following questions: To whom does the law address itself? Whom does the law fail to address? What does the law say, and what does it leave unsaid? Is there a subject who stands "before" the law, awaiting representation by the law? Or is the subject rather constituted by the law as an imaginary entity? By policing identity, does legal discourse reinforce a normative core? Is law just one of many social discourses? Or is legal discourse a more distinctive part of our culture? By drawing boundaries and by allowing coercive powers to enter some spheres of life but not others, does law define particular forms of subjectivity in a way that other social formations cannot achieve?

Reading List:

- Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989) at 27-30.
- Luce Irigaray, "And the Other Doesn't Stir Without the Other" in Diana Tietjens Mayer, eds., *Feminist Social Thought: A Reader* (New York: Routledge, 1997) at 320-327.
- Ralph Ellison, *Invisible Man*, (New York Random House: 1952) at 3-33.
- Ernest Renan, "What is a nation?" in Omar Dahbour and Micheline R. Ishay, eds., *The Nationalism Reader* (Humanity Books, 1999) at 143-156
- *Plessy v. Ferguson,* 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)
- *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (excerpts)

2. Social Justice in the Age of Identity Politics: Recognition, Redistribution, or the Clash of Two Solitudes?

(February 8, 2007)

> *"It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. Can he? (…) This again is the law of property. (…) It is with unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining."*[3]
>
> *Robert Hale*

> *"The law may not be able to make a man love me, but at least it can keep him from lynching me."*[4]
>
> *Martin Luther King, Jr .*

What makes identity politics so peculiar is its demand for recognition on the very grounds on which recognition has previously been denied. For proponents of the politics of recognition, the demand is not one of inclusion, of sameness; rather, what is demanded is respect for other spaces, for difference. In this session, we will discuss the fluid construction and ambivalence of identity and inquire into how different categories of "identity" are produced and restrained by the very structures of power through which emancipation is sought. More specifically, we will track the tensions identified by **Nancy Fraser** between the theories of recognition and distribution.

E.P. Thompson and **Hale** will provide us with two different distributional approaches. Marxist historian **E.P. Thompson** attempts to clarify the potential of law and legal thought for realizing progressive social change. He embraces the concept of the rule of law as "an unqualified human good." "To deny or belittle this good," he warns, "is, in this dangerous century, when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction." For him, law and its social subjects are bound together in a mutually constitutive relationship, rather than presenting themselves as distinct and hermetically sealed entities. **Hale**'s realist coercion analysis contains an insight into the role of legal rules in preserving and reproducing social injustice in capitalist societies. In fact, property, contracts, torts, labour laws constitute the "rules of the game" of the economic struggle and as such, differentially and asymmetrically empower groups engaged in

[3] Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 1946 *Colum. L. Rev.* 470.
[4] Martin Luther King, Jr., quoted in Alan F. Westin & Barry Mahoney, *The trial of Martin Luther King,* 41 (1974).

bargaining over the fruits of cooperation in production: both the constraints imposed by the rules, and by the other parties in the negotiation, make it reasonable to call the outcomes of negotiations/transactions "chosen" or "free", thus ignoring the power of "coercion". Further, in defining and enforcing rules which affect the outcome of this bargaining process, the state has an interventionist role with a distributive impact: it is "an author of the distribution even though the distribution appears to be determined solely by the 'voluntary' agreement of the parties".

This session will provide an opportunity to critically examine what identity politics can and cannot do, particularly with regard to redistribution. What are the boundaries of identity politics? What is the relationship between recognition and distribution? What are the social costs and shortcomings at stake in the legal monopoly of identity politics as the hegemonic emancipatory discourse? Does recognizing the "Other" *as* the "Other" simultaneously obscure the institutional arrangements that distribute powers and desires (**E.P. Thompson** and **Marx**) in the form of background legal rules and background social norms (**Hale**)?

Reading List:

- Nancy Fraser, "From Redistribution to Recognition?: Dilemmas of Justice in a 'Postcolonial' Age" in Nancy Fraser, ed., *Justice Interrupts: Critical Reflections on the 'Postcolonial' Condition* (London, Routledge, 1997) at 11-41

- E. P. Thompson, "The Rule of Law" in Dorothy Thompson, ed., *The Essential E.P. Thompson* (New York: The New Press, 2001) at 432-442.

- Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 1946 *Colum. L. Rev.* 470, at 470-477

3. Liberal Constitutionalism as Ideology: When Adjudication Masks or Distorts the "Other"

(February 12, 2007)

> *Behold the good and the just! Whom do they hate most? The man who breaks their table of values, the breaker, the law-breaker; yet he is the creator.*
>
> *Friedrich Nietzsche, Thus Spoke Zarathustra*

Liberal constitutionalism, with its emphasis on the rule of law, formalism, neutrality, abstraction, and individual rights, has been the dominant method of analysis employed in legal discourse. The power of liberal constitutionalism, both in its promises and dissimulations, depends on evoking these characteristics. Yet by relying on an aspiration to a *de*politicized and *a*political discourse, liberal constitutionalism masks the ways in which formal equal protections and guarantees both hide and perpetuate existing relations of power. In this session, we will discuss two key pieces of American legal realism and ask to what extent is judicial-making an ideological, political gesture.

As you are reading ***Kaddoura***, ***M.(N.M.)***, ***Aziz***, ***Habibi-Fahnrich***, and ***Vladi***, try to think of the two parallel discussions that we have begun to explore: the first is conceptualizing the "Other" through the lens of identity, difference, and group affiliation (the politics of recognition); the second is viewing the "Other" through the lens of class, bargaining power, and socio-economic goods (the politics of distribution). How do these political theories play out in ***Kaddoura***, ***M.(N.M.)***, ***Aziz***, ***Habibi-Fahnrich***, and ***Vladi***? In the narrow issue of the enforcement of Mahr, the same Muslim woman will get different outcomes (i.e. be better or worse off economically), depending on the position adopted by the judge within the frame of identity politics. Given that actual decisions on the enforceability of Mahr by courts in Canada produce disparities in economic outcomes, and confirm (both implicitly and explicitly) their connection to underlying ideological positions, what does this entail for progressive lawyering? While reflecting on **Michelman**'s "plea for disenchantment", ask yourself what is, and what should be, the relationship between constitutional adjudication, politics, and social justice? Do you agree with **Von Jhering** and **Holmes** that adjudication, with its "unfaltering belief in the supremacy of concepts and abstract principles", is in fact about judges' "duty of weighing considerations of social advantage"? Can the politics of recognition truly be divorced from the politics of distribution? What are the costs and benefits of identity politics for the Muslim women involved in these cases?

Reading List:

- Oliver Wendell Holmes, "The Path of the Law (1897)" (selections), in William W. Fisher III, Morton J. Horwitz, Thomas A. Reed, *American Legal Realism*, New York, Oxford University Press, 1993, at 15-24.

- Rudolf Von Jhering, "In the Heaven of Legal Concepts: A Fantasy" (1884) (selections), in Morris R. Cohen & Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy*, Boston, Little, Brown and Company, 1951, at 678-689

- Frank Michelman. "Bringing the Law to Life: A Plea for Disenchantment", 1989 *Cornell L. Rev.* 74:256

- *Kaddoura vs Hammoud* (1998) O.J. No. 5054 (Ont.Ct.J.)

- *M.(N.M.) v. M.(N.S.),* 2004 BCSC 346, 26 B.C.L.R. (4th) 80

- *Aziz v. Aziz,* 488 N.Y.S.2d 123 (Sup.Ct.1985)

- *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388, (N.Y. Sup. Ct. July 10, 1995)

- *Vladi v. Vladi*, Nova Scotia Supreme Court, 1987 CarswellNS 72

4. Ideology, Power, and the Representation of the Subaltern "Other"

February 15, 2007: Althusser
February 16, 2007: 13-15h Spivak

> *I confront a nonexistent object, a fetish, an ideological form which cannot be grasped in reality, except through its effect, whose existence lies in the lives of people, but in a way that affects their whole life, the way they act, the way they move, the way they think. So we are dealing with an object both imaginary and real.*
>
> *Monique Wittig, On the Social Contract*

In the fifth session, we will take from **Althusser** and **Spivak** a method for problematizing the subject/object relationship in the move to representing the "Other". While our primary focus will be on the ways in which ideology and representation have been theorized by these two thinkers, we will approach their texts with an eye toward questions of mediating cultures and arbitrating family law disputes. In assessing the legitimacy/desirability of establishing an Islamic court in Canada, can we voice the subjectivity of Muslim women? What does this entail? Can we speak *about* them? Can we speak *of* them? Can we speak *for* them? Can we speak *on behalf* of them? If we can, do we want to? If we want to, can we?

In "Ideology and Ideological State Apparatuses", **Althusser** attempts to develop a Marxist theory of ideology without relying on a top-down subordination approach to the State, but on a much more fragmented, decentralized model. He replaces the generic "State apparatus"—defined primarily by its repressive power operated in the interests of the ruling classes in Marx—with a distinction between an explicitly Repressive State Apparatus (the police, the criminal justice system and the prison system) and the Ideological State Apparatus (religion, family, school). For **Althusser**, the ideological state apparatus is crucial because it generates ideologies which individuals internalize, and act in accordance with as obedient subjects. He defines ideology as a system of representation, composed of concepts, ideas, myths, or images, in which people live their imaginary relations to the real conditions of existence. Hence, every individual subscribes to a variety of ideologies, which serve as filters for everything that is seen, heard, felt and experienced, such that each experience of the real becomes reduced to a mere representation of reality. However, the ideological state apparatus does not simply produce ideas, but also subjects by constantly interpellating them in the realm of the Imaginary. **Althusser** argues that we experience ideology as if it emanates freely and spontaneously from within us, as if we were its free subjects. Yet the function of ideology is to reproduce the social relations of production, i.e. a kind of labour which is willing, morally and politically, to be subordinated to the logic of the capitalist mode of production. In his view, labour is not reproduced inside the social relations of production themselves, but outside of them, i.e. produced in the domain of the superstructure.

Instead of speaking the language of "dominant ideology portrayed as universal and the production of false consciousness" (Marx) or "the interpellation of subjects through ideology" (Althusser), **Spivak** uses the language of "representation" to explain the phenomenon of postcolonial/nationalist domination of the subaltern. She wants to reject both the idea that "the masses" are known to themselves and able to make their interests manifest politically; and the idea that intellectuals can fulfill their political responsibility by standing back and allowing this self-sufficient display to occur. In examining *sati*, the Indian practice of widow sacrifice, Spivak asks: *"Can the subaltern speak?"* She concludes that the subaltern she investigates (the precolonial, colonial, and postcolonial Indian woman) cannot speak. The obstacle lies in the series of layers that have buried her into permanent silence: on the one hand, the Indian nationalism has (mis)represented the post-colonial subaltern (the nationalistic romanticization of the purity, strength, and love of these self-sacrifying women); on the other, the British imperialism has (mis)represented the pre-colonial subject (this representation is that of coercion, i.e. *sati* is defined not as superstition but as "crime"). The subaltern Indian woman is an empty shell: she cannot speak because her "truth" is caught up in the representation of her "will" by two systems of domination: nationalism/imperialism; Indian/western; traditional/ modern etc.

We will tie these discussions over ideology and representation to the legal debate of Jewish, Muslim and Aboriginal women negotiating identity in the Canadian or American context. In approaching adjudication as representation (and ideology), possible scenarios include: the judge pictures the liberal system as devoid of representative role for Jewish, Muslim and Aboriginal women (contract law is not a matter of identity politics); or the judge assigns a depositary of the essence of Jewish, Muslim or Aboriginal womanhood out there (the male religious figure as an expert witness); or the judge engages in liberal identity sexual politics (family law aims also at protecting the category of Women). Can the Jewish, Muslim or Aboriginal woman speak? Who is speaking on behalf of *that* particular woman in the court house? How do we critique the law as a site of overrepresentation through a distributional analysis? How do we understand the idea of representation as itself a representation that serves the purpose of ideology?

Reading List:

- Louis Althusser, "Ideology and Ideological State Apparatuses," in Althusser, *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (Publisher 1971) at 85-126

- Gayatri Chakravorty Spivak, "Can the Subaltern Speak?", in Patrick Williams and Laura Chrisman, eds., *Colonial Discourse and Post-Colonial Theory* (Columbia University Press, 1994) at 66-112

- *Marcovitz c. Bruker*, Québec Court of Appeal, 2005 QCCA 835 (Québec)

5. Aboriginal and Amish Women and the Intervention/ Non-Intervention Debate in the United States

(February 26, 2007)

> *"Indian Law is a law for Indians, intended to control them, and not a law of Indians. If you look between the pages of any major work on Indian affair law, you see that (1) it is not written or made by Indians (2) it does not speak to tribal traditions; and (3) it advocates barriers to tribal governments and traditional ways."*[5]
>
> *Robert Yazzie*

In this session, we will discuss how, in the American context, claims of gender equality have come into conflict with claims of groups seeking cultural recognition or autonomous self-governance. In ***Santa Clara Pueblo v. Martinez***, the US Supreme Court decided "not to intervene" in a discriminatory Pueblo membership ordinance that was challenged by a Pueblo woman. The ordinance stipulated that female members of the Pueblo who married Non-Pueblo men would be excluded from membership in the Pueblo, while a similar sanction did not apply to male members who married Non-Pueblo women. Julia Martinez, a Pueblo member who married a non-Pueblo man, argued that the ordinance denied her the equal protection of the laws under the fourteenth Amendment. According to the Court, personal status matters, including membership definitions, are within the sovereignty of the Pueblo. A distributional critique would see beyond the static dichotomy of intervention (directly challenge and work to modify the minorities' culture and beliefs) / non-intervention (neutrality; respect of the "Other"): in fact, the "non-intervention" approach is only possible in so far as it denies that a colonial encounter has *already* penetrated the religious/cultural sphere. As demonstrated by **Judith Resnik**, the court ignored that the discriminatory membership rule of Santa Clara Pueblo was not created in the Pueblo's tradition, but rather as a result of Anglo-American influences. In fact, the rule was enacted following a new policy of the State to limit the application of Aboriginal benefits. Despite this background, the Supreme Court in this case viewed its options for decision in stark terms – 'intervention' in the Pueblo rule as opposed to 'non intervention'. In ultimately choosing the "non-intervention" route, the court failed to recognize the extent to which state intervention in the Pueblo's culture had already occurred and influenced the development of the status of women in the Pueblo.

[5] Robert Yazzie, "Law School as a Journey", 46 Ark. L. Rev. 271, 271-72 (1993).

In ***Wisconsin v. Yoder***, the US Supreme Court also decided "not to intervene" in the Amish culture and way of life. A law adopted by the state of Wisconsin required all children to attend school until the age of sixteen. The Amish community, claiming that the Amish religion called for a way of life tied to the local farming activities, challenged the law as violating the free exercise of religion under the First Amendment: "Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs." Concerned with the preservation of minority religions, the U.S. Supreme Court approved in ***Yoder*** an exemption to state law, even at the expense of mandatory schooling for Amish children. What is the role and legitimacy of the experts on Amish society that testified in this case? Given that the majority of the Court specifically insisted that "The children are not parties to this litigation", do you agree with Justice Douglas (dissenting) that "the children should be entitled to be heard"? Are children of minority groups "children of a lesser State"[6]? Should the right to education be constitutionally protected? Is the fact that Amish girls must "acquire Amish attitudes favoring (…) the specific skills needed to perform the adult role of an Amish (…) housewife" of any relevance to your approach of the decision? Are there situations in which constitutionalism would be better developed by not protecting religion? What does ***Yoder*** tell us about "religious dissenters"?

Reading List:

- *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) (excerpts)
- Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts" (1989) 56 *U Chi L. Rev.* 671
- *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (excerpts)

[6] I borrow this expression from Ayelet Shachar in "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws," in *NOMOS XLVI: Child, Family, and the State*, ed. Iris Marion Young and Stephen J. Macedo (New York: NYU Press, 2003), 345-397.

6. Aboriginal Women and the Intervention/ Non-Intervention Debate in Canada

(March 1, 2007; March 8, 2007 (Memee Lavell-Harvard); March 12, 2007 (Roméo Saganash)

> *"Can the theatre exist without an audience? At least one spectator is needed to make it a performance. So we are left with the actor and the spectator. We can thus define the theatre as what takes place between spectator and actor."*[7]
>
> *Jerzy Grotowski*

Roundtable discussion by **Romeo Saganash** (member of the Cree Nation of Waswanipi in Northern Quebec and Director of Québec and International Relations for the Grand Council of the Cree) and **Memee Lavell-Harvard** (Ojibway woman from the Wikwemikong First Nation, Trudeau Scholar, President of the Ontario native Women's Association, Vice President of the provincial Aboriginal HIV/AIDS Strategy and Director of the Native Women's Association of Canada).

Western liberal states are often required to decide how to treat cultural or religious norms of minority groups that are considered by their female members as discriminatory. In such cases, courts view their options for decision as either "intervention" into a minority group personal law in the name of gender equality, or "non-intervention" in the name of respect and commitment for multiculturalism. In this session, we will continue the dialogue between "recognition" and "redistribution" by posing the very critical question of whether non-intervention is always, inherently a form of intervention.

Canada's ***Indian Act***, the principle instrument for the federal government's regulation of and control over Canada's First Nations, constitutes those persons in a number of powerful ways. In 1971, **Memee Lavell-Harvard**'s mother became the first woman to challenge the notion (found in the *Indian Act* of 1876) that a woman who marries a "non-Indian" "shall cease to be an Indian", and loses all associated rights, privileges or identity therein. ***Canada v. Lavell*** thus concerns a challenge under the equality provision of the *Bill of Rights* to a rule that Indian women lost Indian status upon marrying a white man, whereas Indian men's status was unchanged irrespective of whom they married. In many ways, the decision upholding the law (re)produces a hierarchy in the identity-forming characteristics of Indian women: gender trumps native identity. As you read the ***Lavell*** case, ask yourself who speaks on behalf of Aboriginal culture and what are, if any, the distributional consequences and socio-economic costs of this decision for Aboriginal women.

[7] Jerzy Grotowski, *Towards a Poor Theatre*, (Holstebro, 1968), at 32.

Wendy Moss' review of the historical "sex discrimination" embedded in the *Indian Act* will help us identify how law is a constitutive element of race itself and captures the complex, constantly changing reality of "intersectionality" for Aboriginal women, an expression used by **Kimberley Crenshaw** to describe and address the multiple discriminations and sets of identities that affect women of colour. Following this, we will read **Patricia Monture-Angus**' view of Aboriginal women's identity presented as a conflict between Aboriginal (collective) customs and gender (individual) equality. How is this dichotomy constructed and justified through a liberal framework? What problems does such dilemma pose to those who wish to contest cultural or religious norms from within?

Reading List:

- *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349 (excerpts)
- *Indian Act*, R.S.C. 1985, c. I-5, ss. 1-17
- Patricia Monture-Angus, "A First Journey in Decolonized Thought: Aboriginal Women and the Application of the Canadian Charter", in *Thunder in my Soul, A Mohawk Woman Speaks*, (Fernwood Publishing, Halifax), at 131-151.
- Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights", 1990 Queen's Law Journal, Volume 15, No. 2, at 279 - 305
- Kimberley Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour", in *After Identity, A Reader in Law and Culture*, Ed. Dan Danielsen and Karen Engle, (Routledge: New York, London, 1995).
- D. Memee Lavell-Harvard and Jeannette Corbiere Lavell, "Thunder Spirits, Reclaiming the Power of Our Grandmothers", in *"Until Our Hearts Are On the Ground" Aboriginal Mothering, Oppression, Resistance and Rebirth*, (Demeter Press: Toronto, 2006)

7. Muslim Men, Muslim Women, and the Ontario Islamic Court Debate--an Unhappy Marriage?

March 5, 2007

> *The popular element "feels" but does not always know or understand; the intellectual element "knows" but does not always understand and in particular does not always feel.*
>
> *Antonio Gramsci*

In Ontario, the *Arbitration Act 1991* does not exclude family-related disputes from the scope of arbitration. In October 2003, the *Canadian Society of Muslims* established *The Islamic Institute for Civil Justice*, a Sharia-based tribunal set up as an arbitration board for family and business matters. The thirty member committee which established the Institute was comprised of 29 men and one woman. The proposed Sharia tribunal gave rise to strong reactions in the mainstream press and Muslim community. In response to these concerns, the Attorney-General of Ontario appointed Marion Boyd to review the *Arbitration Act* and the "impact that the use of arbitration may have on people who may be vulnerable including women, persons with disabilities and elderly persons. The review will include consideration of religious based arbitrations."

From July until November 2004, Marion Boyd met with several interested parties. The *Canadian Council of Muslim Women* (CCMW) issued a statement with a number of substantive concerns about the proposed arbitration tribunal and recommended that family matters be excluded from the scope of the *Arbitration Act.* According to the submission, separate arbitration tribunals to settle family matters under Sharia/Muslim family law will ghettoize and further marginalize vulnerable women. Homa Arjomand founded *the International Campaign Against the Sharia Court in Canada* and called for a moratorium on family arbitration, whether in existing Rabbinical courts or new Islamic tribunals. The *National Association of Women and the Law* (NAWL) established a working group made up of various women's groups and academics concerned with the impact of the proposal on women, including participation from *The National Organization of Immigrant and Visible Minority Women, Rights & Democracy*, and *Women Living Under Muslim Laws*. It released its report, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on Women", on September 15th, 2004.

The problems identified by marginalized groups and individuals included the concern that Muslim women may feel compelled to go to a Sharia tribunal by virtue of their strong religious affiliation and family/community pressure. Other critiques emphasized that while the right of appeal exists under the *Arbitration Act*, most arbitration agreements include a section on "opting out of appeal rights". Furthermore, in cases of judicial review, courts will afford a high degree of deference to the arbitrator's decision, particularly where an arbitrator

can claim a highly specialized expertise, such as religious knowledge and experience in interpreting religious texts. Others have argued that Islamic schools of jurisprudence are complex and contested and it is not clear which laws will be applied by the Institute. Finally, some commentators worry that, as the Act currently stands, any conservative, fundamentalist or extreme right wing standard can be used by the arbitrator to resolve family law matters, thus reflecting or perpetuating circumstances of oppression and discrimination against women.

As you read the ***Arbitration Act*** and the different **submissions made to Marion Boyd**, ask yourself the following questions: What role does the religious or cultural paradigm play and what role does state law play in these negotiations? Given the different background rules (remember **Hale**'s analysis) that may define the Muslim woman's situation in the community in which she finds herself, what is the impact of allowing Sharia-based arbitration on the bargaining power of the Muslim woman involved? Is the Muslim woman better off economically as a result of the Sharia-based arbitration? Is the Muslim woman truly free to choose arbitration to resolve her family law dispute? Should family law matters be excluded from the *Arbitration Act* altogether, much like the case of Quebec which has declared under section 2639 of the *Quebec civil Code* that family arbitration is not permissible? Is it better to include safeguards to the arbitration process that will adequately protect Muslim women, and if so, what would you suggest? As you study **Madhavi Sunder**'s piece, try to identify what exactly is meant by "piercing the veil" of religious sovereignty in the particular context of Canadian Muslim communities.

Reading List:

- *The Arbitration Act 1991*, S.O. 1991, Chapter 17, available online at: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm
- Terms of Reference, Marion Boyd's Review of Arbitration Process
- The Canadian Council of Muslim Women, "Review of the Ontario *Arbitration Act* and Arbitration Processes, Specifically in Matters of Family Law", Submission to Ms Marion Boyd
- Women's Legal Education and Action Fund (LEAF), Submission to Marion Boyd in Relation to her Review of the Arbitration Act, September 17, 2003
- Mr. Mubin Shaikh, "Shariah Tribunals and Masjid El Noor: A Canadian Model", Submission to Ms Marion Boyd, August 24, 2004
- Mr. Mubin Shaikh, "The Shariah—Divine or Man-Made?"

- Muslim Canadian Congress, Review of Arbitration Process", Submission to Ms Marion Boyd, August 26, 2004

- Marilou McPhedran, "Privatised Muslim "Sharia" Law : Lessons from South Africa", Submission to Ms Marion Boyd, September 11, 2004

- Madhavi Sunder, "Piercing the veil", 112 Yale L. J. 1399 (2003)

- Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion", Report on the Arbitration of Family Law and Inheritance Matters and its Impact on Vulnerable People, December 2004, available online at: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/

8. Muslim Women against Islam: A Comparison of Necla Kelek in Germany, Ayaan Hirsi Ali in the Netherlands and Irshad Manji in Canada

(March 15, 2007: Guest Speaker)

Presentation and discussion by **Gökçe Yurdakul** (assistant professor in the Department of Sociology at Brock University; co-editor of *Migration, Citizenship, Ethnos* (Palgrave Macmillan, New York: 2006) and author of numerous articles in edited books and journals, such as *Journal of Ethnic and Migration Studies*, *Soziale Welt* and *Violence Against Women*)

In Western Europe and North America, Muslim immigrant women recently started to raise their voices against practices that are associated with Islam and Muslim communities. This movement poses the question of compatibility between treatment of women in Muslim immigrant communities and the multicultural policies of the immigrant receiving states. In this session, Professor Yurdakul will compare and contrast three Muslim women's reactionary writings about Islam, gender relations and Muslim immigrant communities: Necla Kelek, a German-Turkish sociologist who received the prestigious *Scholl Award* in Germany for her book "the Foreign Bride" (*die Fremde Braut*); Ayaan Hirsi Ali, a Dutch-Somalian parliament member in the Netherlands, author of *The Caged Virgin*; and Irshad Manji, a Canadian woman from a Pakistani family who received public attention with her book *The Trouble with Islam*. In exploring the reactions these women got from their own communities as well as the receiving societies, Professor Yurdakul will present the discussions around gender equality and multiculturalism that took place in Germany, in the Netherlands and in Canada in response to these writings, interviews and biographies. While comparing their texts, ask yourself what reasons urged these women to raise their voices against Muslim practices in the immigration context. In your opinion, do these Muslim women's discourses reify the racialized immigrant integration? If so, how can one challenge the patriarchal family system in Muslim communities without re-inscribing end encouraging racist statements and remarks?

Reading List:

- Ayaan Hirsi Ali, *The Caged Virgin: A Muslim Woman's Cry For Reason*, (London: Free Press, 2006), at pp. 1-34.
- Irshad Manji, "How I became a Muslim Refusenik", in *The Trouble with Islam: A Muslim's Call for Reform in her Faith*, (New York: St. Martin's Press, 2004), at pp. 5-27.
- Laila Lalami (2006) "The Missionary Position", in *The Nation*, available online at: http://www.thenation.com/doc/20060619/lalami

9. Identity Politics, Veiling, and the Rhetoric of Sexy Dressing: Stories of the sexed and asexualized female body

(March 19, 2007)

> *"What constitutes the fixity of the body, its contours, its movements, will be fully material, but materiality will be rethought as the effect of power, as power's most productive effect."*[8]
>
> *Judith Butler*

The ninth session will be dedicated to thinking about the nature of power in producing subjectivity, and questioning its relation to sexuality in general, and to the sexed/asexualized female subject in particular. We will ask the question of what generates power, where is it held, and how does it move. A central theme that we will explore during this session is the **Foucaultian** understanding of power as diffuse in nature, circular in action, and generative of subjects already-always constituted as effects of power. In *Sexy dressing*, **Duncan Kennedy** describes power, not as a top-down coercive imposition, but rather as an open-ended series of constitutive relations in which men participate and contribute in a self-interested manner to the eroticization of female domination. Law is thus conceived as a system of incentives rather than seen as a system of values. **David Kennedy**'s and **Lama Abu-Odeh**'s distinctively pro-sex pieces will help us examine the relationship between normalization, subjectivity, and knowledge as effects of power.

In reading these texts, we will focus on the ways in which legal rules in constitutional liberal states have attempted to discipline, punish, and regulate the body of the Muslim woman, thereby producing her as the subject of an anxious sexuality. In discussing the anti-veil rhetoric, we will try to uncover the implicit assumptions embedded in this normalizing discourse, such as the production of human categories like "the veiled oppressed Muslim woman", "the free sexy dressing woman" etc.

[8] J. Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993) at 2.

Reading List:

- Michel Foucault, *The History of Sexuality, Volume One,* trans. Robert Hurley (Vintage Books 1978), at 92-114

- Duncan Kennedy, "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination", in 26 *New England L. Rev.* (1992) at 1309-1393

- David Kennedy, "The Spectacle and the Libertine", in *Aftermath: The Clinton Impeachment and the Presidency in the Age of Political Spectacle*, ed. Leonard V. Kaplan & Beverly I. Moran, (New York University Press: New York, 2001)

- Lama Abu-Odeh: "Post-Colonial Feminism and the Veil: Considering the Differences," 26 *New Eng. L. Rev.* 1527 (1992) at 1527-1537

10. Turning the Gaze Back Upon Itself : Crimes of Honour in the East, the Defense of Provocation in the West, and Post-Colonial Unread Scripts

(March 22, 2007: 12h30-14h30 room 416 + March 26, 2007)

> *"We always knew that the dismantling of the colonial paradigm would release strange demons from the deep, and that these monsters might come trailing all sorts of subterranean material. Still, the awkward twists and turns, leaps and reversals in the ways the argument is being conducted should alert us to the sleep of reason that is beyond or after Reason, the way desire plays across power and knowledge in the dangerous enterprise of thinking at or beyond the limit."* [9]
>
> *Stuart Hall*

In the tenth session, we will re-think comparative law by suggesting a critical approach that recognizes the existence of perspectives as a central and inescapable element in the very discourse and act of comparing disciplines and borders. We will use **Brenda Cossman**'s methodology of "turning the gaze back upon itself" in viewing and understanding crimes of honour in the East, i.e. the killing of a woman by her father or brother for engaging in, or being suspected of engaging in, sexual practices before or outside marriage. We will first discuss **Gökcecicek Yurdakul** and **Lama Abu-Odeh**'s approach to the cultural obsession with virginity as a regulatory practice of gender within Arab/Turkish societies. As you read their analysis, try to identify the interaction between state violence, social violence and crimes of honour, and ask yourself whether the legal enforcement of crimes of honour can be deemed to have *asymmetric* effects *among* different groups of women.

In comparing "crimes of honour in the East" and "the defense of provocation in the West", we will try to transcend the colonial binaries of us/them, here/there, west/non-west, colonizer/colonized in an attempt to assess the "differences within" of comparative law's encounter with feminism. **Lama Abu-Odeh** examines the ways in which crimes of honour have created different categories of women, such as "the sexy virgin", "the virgin of love", "the coquette", "the GAP girl", "the slut", and "the tease"; if you were to do the same with regard to the defense of provocation in Canada, along what lines would you break down the "Canadian woman" category into several sub-categories? While analyzing the excerpts from ***Krawchuck***, ***Taylor***, ***Galgay***, ***Thibert***, ***Stone***, and ***Parent***, outline for yourself the scope of application of the defense of provocation in Canada and compare it with that of "crimes of

[9] Stuart Hall, "When Was "The Post-Colonial?" Thinking at the Limit", in *The Post-Colonial Question: Common Skies, Divided Horizons* 259 (Iain Chambers and Lidia Curti, eds., 1996).

honour" in the East. What are the ideological assumptions that inform such legal regulations of women in both the East and the West, and to what extent are those related to conceptions of the family? Who exactly is standing behind the "ordinary or reasonable person" deprived of self-control? Do you agree with **the National Association of Women and the Law** that the defense of provocation should be abolished?

Reading List:

- Brenda Cossman, "Returning the Gaze? Comparative Law, Feminist Legal Studies and the Postcolonial Project" (1997) Utah Law Review 525

- Lama Abu-Odeh, "Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West'," 1997 *Utah L. Rev.* 287

- Sev'er, Aysan and Gökcecicek Yurdakul. 2001. "Culture of Honor, Culture of Change: A Feminist Analysis of Honour Killings in Rural Turkey," in *Violence Against Women, (Sage)* 7(9): 964-998.

- *R v. Krawchuck* (1941) 75 C.C.C. 219 (CSC) (excerpts)

- *R . v. Taylor* (1947) S.C.R. 462 (excerpts)

- *R. v. Galgay* (1972) 6 C.C.C. (2d) 539 (Ont. C.A.) (excerpts)

- *R. v. Thibert* (1996) 1 S.C.R. 37 (excerpts)

- *R. v. Stone* (1999) 2 S.C.R. 290 (excerpts)

- *R. v. Parent* (2001) 1 S.C.R. 761

- Andrée Côté, Elizabeth Sheehy & Diana Majury, *Stop Excusing Violence Against Women (*National Association of Women and the Law, 2000), available online at: http://www.nawl.ca/ns/en/documents/Pub_Report_Provoc00_en.pdf

11. Legislating the Veil in France and Turkey: Reflections on the Public/Private Divide of "Laïcité" and the Rhetoric of Choice/Coercion

(March 29, 2007 & April 2, 2007)

> *"All destructive discourses . . . must inhabit the structures they demolish."*[10]
>
> *Jacques Derrida*

In France and Turkey, the strict separation of Church and State is explicitly affirmed by the constitutional document, respectively in section one of the ***French Constitution of October 4, 1958***, and in section two of the ***Turkish Constitution of 1924***. In many ways, the existing conception of "laïcité" marks identity as necessarily "private", and thus demands on the part of the state to preserve the "neutrality" of the public sphere by excluding in advance any sign of religious beliefs. In fact, both the ***French law on secularity and conspicuous religious symbols in school*** adopted on March 15, 2004, and the European Court of Human Rights' decision of 29 June 2004 in ***Case of Leyla Sahin Turkey*** are to this effect.

In this session, we will explore the complex semiotic of the *hijab* by familiarizing ourselves with the power struggles and competing negotiations that have occurred over the symbolic dimension and function of this item of clothing (**Nazira Zein-ed-Din; Benazir Bhutto; Fatima Mernissi; Leila Ahmed**). After having discussed the relationship between the *hijab*, subjectivity and power, we will investigate the veiling behind legislating against the veil in constitutional liberal states. More specifically, we will ask whether identity politics, by so perfectly capturing the multiple meanings of the *hijab* ("the veil as a threat", "the veil as a symbol of gender oppression", "the veil as a religious sign", "the veil as a form of terrorism"), has, in fact, rendered invisible the distributional stakes of such a display of identity ("the veil as related to socio-economic conditions").

While reading the legal material assembled for this session, ask yourself the following questions: Does legislating against the veil produce "docile subjects"? What would a cost/benefit analysis of legislating against the veil entail? How effective is banning the veil? Could it possibly have the counter-effect of more veiling? In advocating for a non-discriminatory system of education, is legislating against the veil creating and reinforcing the very discrimination that it so hopes to eradicate, that is indirectly exclude Muslim women from the public school system and hence infringe upon their right to education? Is the public/private binary a useful categorical opposition (remember the feminist slogan "the private is political")?

[10] Jacques Derrida, La Parole Soufflee, in Writing and Difference 194 (Alan Bass trans., 1978).

Reading List:

- Nazira Zein-ed-Din, "Unveiling and Veiling" in *Liberal Islam, A Sourcebook*, Charles Kurzman Ed., (Oxford University Press, 1998), at 101-106

- Benazir Bhutto, "Politics and the Muslim Woman" " in *Liberal Islam, A Sourcebook*, Charles Kurzman Ed., (Oxford University Press, 1998), at 107-111

- Fatima Mernissi, "A Feminist Interpretation of Women's Rights in Islam" in *Liberal Islam, A Sourcebook*, Charles Kurzman Ed., (Oxford University Press, 1998), at 112-126

- Leila Ahmed, "the Discourse of the Veil" in *Women and Gender in Islam*, (Yale University Press: New Haven & London, 1992) at 144-169

- *French Constitution du 4 octobre 1958,* Article 1

- *L. n° 2004-228, 15 mars 2004, art. 1er et 3,* March 15, 2004

- *Commission de réflexion sur l'application du principe de laïcité dans la République*, Rapport au Président de la République, France, 11 décembre 2003 (excerpts)

- *France : Headscarf Ban Violates Religious Freedom by Disproportionately Affecting Muslim Girls, Proposed Law is Discriminatory,* Human Rights Watch, New York, February 27, 2004

- *Case of Leyla Sahin Turkey* (Application no. 44774/98), European Court of Human Rights, Fourth Section, 29 June 2004, available online at: http://www.worldlii.org/eu/cases/ECHR/2004/299.html

12. Legislating the Veil in Germany and Quebec: Reflections on the Public/Private Divide of "Laïcité" and the Rhetoric of Choice/Coercion Part II

(April 5 & 9, 2007)

> *No, no the word "anti" annoys me a little, because whether you're anti or for, it's two sides of the same thing.* [11]
>
> *Marcel Duchamp*

In this final session, we will pursue the conversation undertaken over the power/knowledge of the Muslim woman as a subject, by comparing the highly secular model developed in France and Turkey with that of Germany and Quebec. On September 30th, 2003, the German Supreme Court in ***BVerfGe, 2BvR, 1436/02*** upheld a Muslim woman's right to wear the *hijab* as a teacher in a public school, but solely on the ground that Baden-Wuertemberg lacked, at the time, any statutory law explicitly authorizing the school-board to ban the *hijab*. While the Court's opinion emphasized the importance of freedom of conscience as a principle, the Court nevertheless transferred the final say on the matter to the democratic legislatures: "However, the *Land* legislature responsible is at liberty to create the statutory basis that until now has been lacking, for example by newly laying down the permissible degree of religious references in schools within the limits of the constitutional requirements. In doing this, the legislature must take into reasonable account the freedom of faith of the teachers and of the pupils affected, the parents' right of education and the State's duty of ideological and religious neutrality." In April 2004, the state government in Stuttgart enacted a law forbidding the *hijab* in its schools, a move promptly taken by a handful of other states on the basis of state's religious neutrality. Equally relevant is the Supreme Court's depiction of the *hijab* as a possible danger and threat that "may lead to a disturbance of the peace of the school and may endanger the carrying out of the school's duty to provide education." While reading the German Supreme Court's judgment in ***BVerfGe, 2BvR, 1436/02***, you should keep the following questions in mind: what role did the constitutional text play in that decision? Should the German Supreme Court protect minority rights against the will of the democratic legislatures? Can neutrality truly be neutral?

In September 1994, Émilie Ouimet, a 13-year-old girl, was excluded from the Montreal high school *Louis-Riel* for wearing the *hijab* in contravention with the school's dress code. In February 1995, *the Québec Commission des droits de la personne* embraced the rhetoric of "choice" in concluding that the ban was discriminatory: "For many people, the veil signifies and even serves as a vehicle for the oppression of women in the Muslim world. … Many people have expressed concern about the right to equality of young Muslim women who, consciously or not, might not wear the veil entirely of their own will. Some clarification is needed here. Beyond differences in Koran interpretation and out of respect for the people who choose to

[11] Marcel Duchamp, quoted in Francis Roberts, "I Propose to Strain the Laws of Physics," Art News, Dec. 1968, at 46.

wear the veil, we must assume that this choice is a way of expressing their religious affiliation and convictions. In our view, it would be insulting to the girls and women who wear the veil to suppose that their choice is not an enlightened one, or that they do so to protest against the right to equality. It would also be offensive to classify the veil as something to be banished, like the swastika, or to rob it of its originality by comparing it to a simple hat." Compare the German approach to multiculturalism to the Québec approach. Is the "anti" and the "for" rhetoric behind legislating against the veil "two sides of the same thing"? Does the choice/coercion dichotomy presuppose something like its opposition which it hides? This last session will end on a note about critique and disenchantment. In applying **Janet Halley**'s critical moves in "How and Why to Take a Break from Feminism", we will ask ourselves whether it is time to "take a break from Identity Politics" and if so, how and why.

Reading List:

- *BVerfGe, 2BvR, 1436/02*, Judgment of the Second Senate of 24 September 2003 (on the basis of the oral hearing of 3 June 2003), Germany

- Bosset Pierre, Cloutier Gisèle, Garon Muriel, Lortie Monique and Rochon Monique, *Religious Pluralism in Québec : a Social and Ethical Challenge*, Québec Commission des droits de la personne, 1995, available online at : http://www.cdpdj.qc.ca/en/publications/docs/hidjab_anglais.pdf

- Janet Halley, "The Costs and Benefits of Taking a Break from Feminism", in *Split Decisions: How and Why to Take a Break from Feminism*, (Princeton University Press, 2006)