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Is Constitutionalism Bad for Intersectional Feminists?

Beverly Baines

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Gender and Constitution: Is Constitutionalism Bad for Intersectional Feminists?

Beverley Baines*

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INTRODUCTION

Constitutionalism promises norms and structures that hold states accountable for their actions. These norms and strategies vary from state to state. In 1982, Canada adopted a Charter of Rights and Freedoms, which entrenched new constitutional norms and strategies.¹ In addition, the 1982 reforms declare that the Constitution, including the Canadian Charter, is “supreme law.”² Throughout the intervening decades, courts have relied on this declaration to judicially review government activity. Thus, the promise of constitutionalism is alive and well in Canada.

Whether constitutionalism’s norms and structures are available to women, however, is debatable. According to feminist scholars, they should be. Helen Irving depicts recent constitutional reforms incorporating bills of rights as “fresh starts.”³ She maintains that in Western countries one of the most striking things about these “fresh starts” is the extent to which they reflect “gender awareness.”⁴ The Canadian Charter is no exception. Although lacking specific reference to gender, it contains two sex equality provisions.⁵ The first is *section 15*, which is treated as rights-bearing, and the second is *section 28*, which is

1. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter or the Constitution Act].

2. *Id.* The Canadian Charter is found at §§ 1-34 of the Constitution Act, 1982. The remaining sections are referred to as the Constitution Act, 1982, including therein § 52 (1) which provides:

§ 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52. (2) defines some thirty plus laws as part of the Constitution of Canada, although only two—the Constitution Act, 1867 and the Constitution Act, 1982—are typically invoked.

3. HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 2* (Cambridge University Press 2008).

4. *Id.*

5. Canadian Charter, *supra* note 1, at §§ 15 and 28:

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

§ 15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or economic origin, colour, religion, sex, age or mental or physical disability.

§ 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The Constitution Act, 1982, *supra* note 1, also contains a third sex equality provision—§ 35(4)—which guarantees aboriginal and treaty rights equally to male and female persons; this section is not part of the Canadian Charter.

construed as interpretive.⁶ In their litigation to date, women have relied mainly on the former with varying degrees of success.⁷

Women do not always agree about the Charter rights that would best protect their interests. Recently I conducted three studies that illustrate some of these rights-based differences among women. The first study focused on the prohibition of polygamy;⁸ the second, on the “ban” on faith-based family arbitrations;⁹ and the third, on the limit on the accommodation of cultural differences.¹⁰ While the recent controversies about polygamy and faith-based family arbitrations began as issues of religious freedom, the question of limiting cultural accommodations took hold as an issue of entrenching sex equality in the provincial constitution. Their origins aside, however, all three issues quickly became contests between religious freedom and sex equality. Moreover, women could be found on each side.

Initially, I referred to the women who support religious freedom as religious women and those who support sex equality as feminists. This characterization, however, poses several dilemmas. On the one hand, it precludes recognition of religious women who self-identify as feminists. On the other hand, it obscures the secularism of the feminists who refuse to give priority to religious freedom. Put differently, abandoning feminist proponents of religious freedom contributes to the feminist deficit; while subscribing to “feminism unmodified” ignores serious fissures among the feminists who support sex equality, a critique addressed to Catharine MacKinnon when she advocated this discourse.¹¹

After some reflection, I re-conceptualized these women as feminists. On the one hand, I chose not to disrespect the feminist credentials of women who support religious freedom. On the other hand, I opted to constrain the open-ended credentials of feminists who support

6. See Beverley Baines, *Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation*, 17 *CANADIAN J. WOMEN & L.* 55-80 (2005).

7. See Beverley Baines, *Using the Canadian Charter of Rights and Freedoms to Constitute Women*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 48-74 (Beverley Baines & Ruth Rubio-Marin eds. 2004).

8. Martha Bailey, Beverley Baines, Bitu Amani, & Amy Kaufman, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, 25 *NAT'L J. CONST. L.* 83 (2009).

9. Beverley Baines, *Must Feminists Identify as Secular Citizens: Lessons from Ontario*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 94-95 (Linda C. McClain and Joanna Grossman eds., 2009) [hereinafter Baines, *Lessons from Ontario*].

10. Beverley Baines, *Must Feminists Support Entrenchment of Sex Equality: Lessons from Quebec*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* 137-56 (Susan H. Williams ed., 2009).

11. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (President and Fellows of Harvard College 1987).

sex equality. Applying this approach in the course of my faith-based family arbitration and cultural accommodation research resulted in recasting religious women as religious feminists and feminists who support sex equality as secular feminists. Applied retroactively to polygamy, it means portraying the women who support or oppose polygamy as religious and secular feminists respectively.

One consequence of adopting these new characterizations pertains to feminist theory. Sharing the same label, even if only in part, suggests religious and secular feminists should seek structures and strategies that enable them to engage with each other. From the perspective of this paper, however, the consequence that matters more involves constitutionalism. Because religious feminists are defined by the priority they give to religious freedom over sex equality, while secular feminists give priority to sex equality over religious freedom, they all subscribe to one of two Charter norms. Therefore, they can invoke these norms to access the constitutional arena.

In addition, religious feminists and secular feminists have at least limited access to constitutionalism's structural terrain. Irrespective of whether they are parties to Charter litigation or whether they must accept religious leaders or government spokespersons arguing on their behalf, their issues will be placed before the courts, however imperfectly. While it is very unlikely that religious or secular feminists would have designed the constitutional regime that the Canadian Charter offers, neither can it be said by either feminist group that its norms and structures lack any utility for them.

Religious and secular feminist accounts, however, do not represent all there is to say about the constitutional challenges that feminists might raise when the state criminalizes polygamy, bans faith-based family arbitrations, or uses sex equality to limit the accommodation of cultural differences. Even though religious and secular feminists monopolized the airwaves, in each case there were other feminists whose narratives were ignored. While varied, these narratives had one feature in common: all refused to give priority to religion over equality or to equality over religion.¹² They denied religious feminists their religious freedom trump card, and they denied secular feminists their sex equality trump card. Instead, these other feminists spoke of wanting both, simultaneously and equally.

Recovering these voices was an unanticipated outcome of the individual research projects that I undertook. This paper presents the first opportunity to assess their collective significance. First, I need to

12. See, e.g., Baines, *Lessons from Ontario*, *supra* note 9 at 97 n.96; Baines, *Lessons from Quebec*, *supra* note 10, at 148-50.

name the feminists who delivered these narratives. There is a tendency to refer to them, or at least to the ones who materialized in the faith-based family arbitrations and cultural accommodations contexts, as multicultural feminists. Canadians have a good reason for using this terminology given the existence of a multiculturalism provision in the Canadian Charter.¹³ Nevertheless I resist it (for reasons that will be revealed in the course of this paper) and adopt instead the discourse of intersectionalism. Thus, I maintain the missing narratives are those of intersectional feminists.

My objective is to explore the question of whether these intersectional feminists should have access to the promise of constitutionalism. I begin pragmatically, setting out the normative and structural barriers that exclude their narratives from existing (polygamy) or potential (faith-based family arbitration or cultural accommodation) Charter litigation. Next, I move to the realm of feminist theory—specifically to exemplars of liberal, postcolonial, and deliberative feminism—to outline the responses of Susan Moller Okin,¹⁴ Leti Volpp,¹⁵ and Madhavi Sunder¹⁶ to the issue of the constitutional recognition of intersectional feminism. I argue that these theories may work for multiculturalism, but they are either too confrontational or not sufficiently confrontational to work for intersectionalism. While deliberative feminism is the most promising, it is also the most illusory given its reliance on dialogue's potential in the political realm, and/or dialogue laced with rules in the legal realm. Ultimately, I conclude that the impermeability of its normative and strategic barriers deprive constitutionalism of utility for intersectional feminists. Given the allure of its promise, in short, Canadian constitutionalism is bad for intersectional feminists.

CHARTER CONSTITUTIONALISM

Like many other bills of rights in Western democracies, the Canadian Charter limits state action but not the activities of private individuals or groups.¹⁷ To launch a challenge, a party must persuade a

13. Canadian Charter, *supra* note 1, § 27:

§ 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

14. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7-24 (Joshua Cohen, Michael Howard, & Martha Nussbaum eds. 1999).

15. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

16. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

17. See Canadian Charter, *supra* note 1, § 32 (1) which provides:

§ 32. (1) This Charter applies

court that state action violates a guaranteed right or freedom. The Canadian Charter does not protect every conceivable right or freedom, some significant omissions being property rights, and social and economic rights. Moreover, unlike the U.S. Bill of Rights, the Canadian Charter explicitly provides governments with the opportunity to justify violating rights and freedoms.¹⁸ When a governmental justification is successful, the constitutionality of the impugned law is upheld.

This part sets out how the three traditional components of any Charter challenge—state action, rights violation, and government justification—function in the context of the polygamy prohibition, the faith-based family arbitration ban, and the limit on the accommodation of cultural differences. It concludes by locating multiculturalism's role in these Charter controversies.

State Action

Canada is a federation of 10 provinces and three territories with a national government. The three controversial laws were enacted by two different levels of government: Canada (polygamy) and two provinces, Ontario (faith-based family arbitration) and Quebec (cultural accommodation).¹⁹

The Crime of Polygamy

Canada enacted the criminal law prohibiting polygamy almost 120 years ago.²⁰ As supportive legislative statements of that day make clear, the intention was primarily religious; it was to keep American Mormons, or more accurately break-away American Mormon sects, out of Canada.²¹ Given the continued existence throughout the intervening years of at least two break-away American Mormon (a.k.a. the Fundamentalist Church of Jesus Christ of the Latter Day Saints)

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of each province.

18. *Id.*, § 1, which provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

19. See Criminal Code, R.S.C., ch. C-46, § 293 (1985); Arbitration Act, R.S.O., ch. 17, § 1 (1991); Charter of Human Rights and Freedoms, R.S.Q., c. C-12, § 50.1 (2010), available at <http://www.canlii.org/en/qc/laws/stat/rsq-c-c-12/latest/rsq-c-c-12.html> [hereinafter Quebec Charter].

20. See Bailey et al., *supra* note 8, at 110.

21. See *id.* at 111.

settlements in the western Canadian provinces of British Columbia and Alberta, this objective was never met.

One of these colonies, Bountiful in British Columbia, is the primary focal point for current anti-polygamy Charter litigation. In early 2009, after nearly 60 years without any prosecutions of the crime of polygamy, the Attorney General in British Columbia charged two Bountiful men—Winston Blackmore and James Oler—with committing this crime, only to have the charges dismissed for prosecutorial irregularities.²² Seemingly pushed to the wall, the provincial Attorney General then turned to the provincial Constitutional Question Act to initiate a reference case.²³ That is, he asked the provincial Superior Court to give an opinion on the constitutionality of the Criminal Code provision prohibiting polygamy.²⁴

The Attorney General had the option of initiating this reference case either at the level of the provincial Supreme Court or at the provincial Court of Appeal. Virtually all previous reference cases in Canada, including those initiated in British Columbia began at the appellate level. Under these circumstances the Attorney General felt compelled to justify his choice of forum. “Pursuing a reference though B.C. Supreme Court,” states a Ministry of the Attorney General press release, “gives us the option to introduce evidence and witnesses, which will put a human face on polygamy in contrast to the more abstract nature of a reference to the B.C. Court of Appeal.”²⁵ This seemed to indicate that the province is open to hearing not only from secular feminists but also from intersectional feminists.

22. *Blackmore v. British Columbia (Attorney General)*, [2009] B.C.S.C. 1299 (Can.).

23. Constitutional Question Act, R.S.B.C., ch. 68 (1996).

24. Criminal Code, R.S.C., ch. C-46, § 293, which provides:

293. (1) Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) 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.

25. British Columbia Ministry of the Attorney General, *Province to Seek Supreme Court Opinion on Polygamy*, Statement 2009AG0012-000518 (October 22, 2009), available at http://www2.news.gov.bc.ca/news_releases_2009-2013/2009AG0012-000518.pdf).

The “Ban” on Faith-based Family Arbitration

The Province of Ontario passed legislation “banning” faith-based family arbitrations three years ago. This law came about because in the early 1990’s a Canadian Muslim lawyer, Syed Mumtaz Ali, began a campaign to establish Shari’a arbitration tribunals to decide family and personal status matters.²⁶ Ontario’s Arbitration Act,²⁷ much to the surprise of many secular feminists, allowed courts to enforce the awards of arbitration tribunals in the context of family matters. Moreover, arbitrators could apply the law of whatever regime the parties agreed upon, including religious law.²⁸ By 2003 the NGO that Ali led, the Canadian Society of Muslims, was pressing forward to set up his proposed private arbitration tribunal—the Islamic Court of Justice—which he and they insisted should be mandatory for all believing Muslims who have to deal with matters consequent upon family breakdown.

A firestorm of protest erupted, led by secular feminists. The controversy escalated to the point where the provincial premier felt compelled to appoint a one-woman inquiry commission. Headed by a former provincial Attorney General, Marion Boyd, the commission issued a lengthy report recommending that faith-based family arbitration tribunals continue but become subject to regulation.²⁹ This report did not quell the controversy, which finally moderated only after the premier announced a ban on faith-based family arbitrations.³⁰

The notion of a “ban” is not precisely accurate. According to the legislation, faith-based family arbitration awards are not enforceable in the civil courts unless they are consistent with the law of Ontario or another Canadian jurisdiction.³¹ Thus what was cast as a “ban” does not mean that faith-based family arbitrations are outlawed. Rather, it means that the parties to such arbitrations are vulnerable to the power dynamics that they import, as critics of the “ban” have been quick to point out.

Since the province passed the legislation limiting faith-based family arbitrations, the requisite state action is in place for a Charter challenge. Despite threats by critics to challenge its constitutionality, no challenge

26. See Baines, *Lessons from Ontario*, *supra* note 9, at 85-6.

27. Arbitration Act, *supra* note 19, § 1.

28. *Id.* at § 32.

29. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

30. Press Release, Ontario, Ministry of the Attorney General, *Ontario Passes Family Statute Law Amendment Act*, (Feb. 15, 2006) available at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20060215-famend.asp>.

31. Arbitration Act, *supra* note 19, § 2.2.

has been forthcoming. Nevertheless, in what follows I develop a hypothetical challenge, one that could follow the precedent set by the polygamy reference, though unlikely. Rather, if there were a challenge, it would probably come from a party dissatisfied by a court's refusal to enforce an arbitration award because of inconsistency with Ontario or Canadian law. Either way it will be difficult to see how intersectional feminists might become parties.

The Limit on Accommodation of Cultural Differences

In 2008, the Province of Quebec entrenched a second sex equality guarantee in the provincial Charter of Human Rights and Freedoms.³² This legislation was the culmination of years of debate over the extent to which the residents of this predominantly francophone province were willing to accommodate the cultural differences of ethnic and religious communities that had grown up as a result of significant levels of immigration.³³ Francophone Quebecers traditionally understood themselves to be a cultural minority in Canada. Their tolerance for the recent claims of cultural difference by other minorities is often sorely tested and stretched thin.

In February 2007 the tensions were such that the premier established a provincial Consultation Commission on Accommodation Practices Related to Cultural Differences with a mandate to make recommendations that would ensure accommodation practices related to cultural differences conformed to Quebec's six core values.³⁴ The Order in Council identified "the equality of women and men" as a core value along with "the separation of church and State, the primacy of the French language, the protection of rights and freedoms, justice and the rule of law, the protection of minorities, and the rejection of discrimination and racism".³⁵ By the time that the Bouchard-Taylor Commission, named after its co-chairmen, issued its Final Report in May 2008, however, the province was in the final stages of amending the Quebec Charter to include the second sex equality provision.³⁶

Both the provincial politicians and secular feminists who supported entrenching the guarantee of sex equality believe it should function as a

32. Quebec Charter, *supra* note 19, § 50.1. This was first passed as R.S.Q. ch. 15, § 2 (2008) and provides, "The rights and freedoms set forth in this Charter are guaranteed equally to women and men."

33. See Baines, *supra* note 10.

34. Quebec, Order in Council, No. 95-2007, Feb. 8, 2007.

35. *Id.*

36. Gerard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation*, (Quebec, May 2008) available at <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>.

limitation on the accommodation of cultural differences. In particular, they think women need protection from the cultural and religious practices of some minorities. Whether the sex equality guarantee will serve this purpose depends on two factors. First, are the impugned practices prohibitive or permissive? To give two examples: Are public school teachers prohibited from veiling, or permitted to veil? Are birthing mothers prohibited from demanding a female obstetrician or permitted to have one? Second, depending on the answer to the first question, who are the women who are entitled to protection under the second sex equality provision?

If public school teachers are prohibited from veiling in classrooms (or in courtrooms,³⁷ or when voting,³⁸ or upon applying for drivers licenses requiring photo-id³⁹), or if birthing mothers cannot demand a female obstetrician, then the government has taken the side of secular feminists, forcing religious feminists to launch a challenge under the Quebec Charter. Alternatively, if the government permits teachers to wear the veil in classrooms and birthing mothers to demand female obstetricians, the challenges would come from secular feminists who believe that these accommodations of cultural differences are unconstitutional because they stereotype women as subordinate and vulnerable. Because there is little likelihood of this alternative occurring, in the remainder of this paper I will address the former (prohibitive) scenario. Moreover, my arguments must be hypothetical because no such challenge has yet been launched. As with the cases of polygamy and faith-based family arbitrations, so too with the amendment of the Quebec Charter to require sex equality in cases involving the accommodation of cultural differences, no self-evident role for intersectional feminists emerges.

37. See *R. v. N.S.*, [2009] Can LII 21203 (ON S.C.) (Can.) available at <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii21203/2009canlii21203.html> (finding no blanket right for veiled Muslim woman who is victim of sexual assault to wear veil while testifying).

38. See Tu Thanh Ha, Igrid Peritz, & Bertrand Marotte, *Lift face veils or don't vote, Quebec tells Muslims*, *The Globe and Mail* (Mar. 24, 2007) available at <http://www.religionnewsblog.com/17804/lift-face-veils-or-dont-vote-quebec-tells-muslims>. This ruling was reversed. See also Barry Artiste, *Quebec Voting Rules: Niqabs, Burkas, Veils Allowed* (Sept. 6, 2007), available at <http://www.nowpublic.com/quebec-voting-rules-niqabs-burkas-veils-allowed>.

39. See *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.C. 37 (Can.) (finding that photo ID requirement for drivers licenses violated Hutterites religious freedom but violation justified by need to protect identity theft).

Rights Violations

In each context, the right asserted will be to freedom of religion.⁴⁰ In a series of cases, the Supreme Court of Canada has kept the test for violating religious freedom very simple. Both belief and practice are protected; the Court will not go behind the assertion that a belief or practice is religious; and the most a claimant might be expected to show is sincerity of belief, but religious obligation is not necessary.⁴¹ It may come as some surprise to lawyers in other jurisdictions, or to non-lawyers, but proving a violation of religious freedom is far from being the most difficult feature of the Charter litigation process in Canada (or Quebec).

Criminalizing Polygamy

Most practitioners of polygamy do so for religious reasons, whether those reasons derive from Christianity, Islam or Judaism. The prime Christian exponents are Mormons and the break-away Mormons known as members of the Fundamentalist Church of Jesus Christ of the Latter Day Saints. In Islam, some Muslims practice polygamy with up to four wives because the Quran permits it. Only a very small ultra conservative Jewish sect admits to polygamy and only under circumstances where the first wife is unable to conceive a child. In addition there are some customary African practices that include polygamy and are likely attributable in their origins if not contemporaneously to religious influences. In the face of such pervasive religiosity, courts would have no basis for denying polygamy the attribute of being a religious practice. And given the practice, the fact that the Canadian government criminalizes it with a sanction of up to five years incarceration qualifies as a violation of religious freedom.⁴²

“Banning” Faith-based Family Arbitrations

When Ontario amended the Arbitration Act in 2008 to deny legal effect to arbitration awards that are not consistent with Ontario or other Canadian law, the impact was felt mainly by religious believers.

40. Canadian Charter, *supra* note 1, § 2 (a) which provides:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

Quebec Charter, *supra* note 19, § 3 provides:

3. Every person is the possessor of the fundamental freedoms, including . . . freedom of religion.

41. *See, e.g.*, *Syndicat Northcrest v. Anselem*, [2004] 2 S.C.R. 551 (Can.); *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can.).

42. *See* *Bailey et al.*, *supra* note 8 at 108.

Christians, Jews and Muslims all require religious recognition of marriage breakdown and, as a consequence, impose a variety of rules pertaining to property division, support, and/or custody of children. Some features of these regimes are not consistent with Ontario or other Canadian law. Thus any religious believers who resort to the civil courts to enforce an inconsistent rule would be denied protection, and hence have grounds for claiming violation of religious freedom.

Limiting Accommodation of Cultural Differences

Although the public discourse in Quebec was of cultural differences and their accommodation, it was obvious from examples given in the press and to a slightly lesser extent in the Bouchard-Taylor Report that the objective was not so much accommodation as limitation of accommodation. It also appeared that the main targets were adherents of Islamic religions; islamophobia was alive and well. Still Jewish differences surfaced, with one private law case going to the Supreme Court of Canada.⁴³ Another Canadian Supreme Court case from Quebec involved a Sikh school boy wearing a miniature kirpan.⁴⁴

Finally, on one occasions even a Protestant (but never Catholics, Quebec is a province of many Catholic adherents) was denied accommodation until she went to court. This case involved the application of a married woman who wanted to change her surname to that of her husband.⁴⁵ Since 1981, the *Civil Code of Quebec* has prohibited women from changing their surname on marriage; a married woman must exercise all of her legal rights under her birth name.⁴⁶ The wife challenged this provision on the grounds of her Christian religious conviction, contending that as a Baptist she had to take her husband's surname to publicly demonstrate family unity. The Quebec Superior Court judge, a woman, decided in her favour, hence accommodating her religious belief.

If we consider the two hypothetical cases mentioned earlier, the school teacher prohibited from wearing a veil in the classroom and the birthing mother denied a female obstetrician, assuming state action was implicated the Charter challenge would rely on the invocation of religious freedom. Both situations derive from religious beliefs about the

43. See *Syndicat Northcrest v. Anselem*, [2004] 2 S.C.R. 551 (Can.).

44. *Multani v. Marguerite-Bourgeois (Commission Scholaire)*, [2006] 1 S.C.R. 256 (Can.).

45. *Gabriel v. Directeur de l'état civil*, [2005] Q.J. no. 145 (Can.).

46. Act to Establish a New Civil Code and to Reform Family Law, 1980 S.Q., ch. 39, § 1 (Can.), now Article 442 of the Civil Code of Quebec ("In marriage, each spouse retains his surname and given names, and exercises his civil rights under this surname and these given names.").

role of women and the requirements of modesty and privacy. Being forced to remove the veil or not teach and to accept a male obstetrician violate these religious beliefs.

Government Justifications

Although it is relatively easy to prove a rights violation, establishing a government justification is more complex. Governments must show that the legislative objective is rational—i.e., compelling, rationally connected to the means, and minimally impairing of the right in issue—and proportional to the rights infringement.⁴⁷ In each case, governments will assert that the justification is the promotion of sex equality. They will, in other words, speak on behalf of secular feminists, whether accurately or not.

Justifying the Crime

Canada, or the British Columbia Attorney General in the reference case, will have difficulty justifying the necessity of criminalizing polygamy. Not only is there a serious question about the objective of the criminal code provision which, when it was first enacted in the 1890s, was aimed at the exclusion of break-away Mormons rather than being expressed in any terms that resembled an understanding of sex equality. But even granting that the government can claim polygamy continues to be criminalized to protect women and children, there is a major controversy over whether polygamy harms them.⁴⁸ And if that hurdle is overcome, there is the further question of whether the better solution is not to criminalize polygamy but simply not to legalize it. Criminalizing a religious belief on the questionable grounds of sex equality may not meet the proportionality test.

At the end of this brief assessment of the polygamy litigation, what can be said with clarity is that both religious feminists and secular feminists will hear their arguments made in the courtroom, even though they may not be the ones expressing them. The Attorney General has the responsibility for advancing the sex equality argument. The provincial Constitutional Question Act under the rubric of which this reference case is lodged, also permits the court to “direct that a person interested, or, if there is a class of persons interested, any one or more persons as

47. See *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

48. See Lori G. Beaman, *Response: Who Decides? Harm, Polygamy and Limits on Freedom*, 10 NOVA RELIGIO 43 (2006); Angela Campbell, *Listen to the Women of Bountiful: In the name of the mothers*, THE GLOBE AND MAIL (Toronto), Jan. 10, 2009; Daphne Bramham, *The hard evidence of polygamy's damage is bountiful*, VANCOUVER SUN, Nov. 14, 2009.

representatives of that class, must be notified of the hearing, and those persons are entitled to be heard.”⁴⁹ Hopefully, this provision mandates notification of the religious leaders in Bountiful (but query whether it would extend to adherents of the other religions that practice polygamy) who would in theory present arguments to which religious feminists might subscribe.

The Constitutional Question Act provision may not be generous enough, however, to extend to notification of intersectional feminists. For one reason, they might be perceived as unable to make a coherent structural argument because they refuse to shelter under only one of the Charter’s rights-bearing provisions. For another, the Court may ignore the normative significance of making connections between religious freedom and sex equality, preferring to treat them traditionally as contested rights.

Justifying the “Ban”

Unlike the government litigators in the polygamy context, those in the context of the limitations on faith-based family arbitrations would have little difficulty convincing a court that the objective of the legislation is to protect women’s equality rights. There is a serious conviction abroad that religious regimes penalize women, particularly in the context of marriage breakdowns.⁵⁰ Proponents of religious freedom would have an uphill fight to convince a court that religious tenets should be civilly enforceable.

As a recent study suggests, there are two different categories of judicial response to religious-based claims for recognition: “diversity as inclusion,” which stands a fair chance of success, and “non-state law as competition,” which in Canada has not found favour with the judiciary.⁵¹ In the context of the faith-based family arbitration controversy, religious feminists would seek the latter, and neither they nor the religious leaders who would express their arguments have laid the groundwork for convincing judges that sex equality would not be disproportionately harmed by permitting competing religious regimes. In fact, the best evidence might come from intersectional feminists, but again, they are without any way of persuading a court to hear their intervention because they refuse to take an either-or position on the contested values.

49. Constitutional Question Act, *supra* note 23, § 5.

50. See M.C. Lam, *Multicultural Feminism: Cultural Concerns*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 10163, 10164 (2001) (referring to belief of many liberal feminists that non-Western immigrant communities oppress or discriminate against women).

51. Ayelet Shachar & Ran Hirschl, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 CARDOZO L. REV. 2535 (2009).

Justifying Cultural Limitations

Like the Ontario government, the Quebec government would have little difficulty with the objective of the entrenched sex equality provision, namely to guarantee rights to women. Nevertheless the hypothetical situations are troubling because they present scenarios of women disagreeing with women.

More specifically, when the guarantee of sex equality is invoked against their wishes, veiled teachers and birthing mothers are told that they do not count as feminists. They are told that secular feminist beliefs trump those of religious feminists, mostly likely in litigation wherein the most audible voices are male—male religious leaders railing against male government spokespersons. What intersectional feminists try to offer in this contest is the connecting or bundling of the rights being fought over, to come to a better understanding of how both can survive. Yet again the question is how they can get into courts that refuse to recognize intersectional rights.

Multiculturalism

Does multiculturalism offer a constitutional podium from which intersectional feminists might speak? While I am reluctant to dismiss any strategy that might open doors for these feminists, I am wary of multiculturalism for three particular reasons.

First, in Canada the history of multiculturalism is a history that focused on ethnicity and race. The concept of multiculturalism was raised initially in the Report of the Royal Commission on Bilingualism and Biculturalism.⁵² Countering biculturalism was on the minds of the politicians who reviewed that Report, not religion. Ultimately these politicians agreed to incorporate a multiculturalism provision in the Canadian Charter, albeit not as a right.⁵³ In addition, Canada subsequently enacted a Multiculturalism Act in 1988 but religion played no significant role in its passage.⁵⁴ Thus, religion is a latecomer to the multicultural scene. When multiculturalism was engaged as a concept, it was primarily to encourage immigrant minorities to celebrate the social features of their cultural diversity while still participating in the larger Canadian society.

52. REPORT OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM, vol. IV, 12-13 (1967) (Can.).

53. See Canadian Charter, *supra* note 1.

54. See Canadian Multiculturalism Act, S.C. 1988, c. 31 s. 3 (referring to multiculturalism policy in terms of the “cultural and racial diversity of Canadian society” without any mention of religion).

The second reason pertains specifically to the multicultural provision that is contained in the Canadian Charter. Courts treat it as an interpretive provision, meaning it does not have the same impact as a rights-bearing provision.⁵⁵ As an interpretive provision, courts treat it as working in tandem with other provisions. While there is little jurisprudence developing the potential of this provision, what there is tends to treat it as working in tandem with religious freedom. This reinforcement may appeal to religious feminists but it does not engage either secular or intersectional feminists.

Thirdly, if multiculturalism is to have potential for intersectional feminists, then it becomes important to understand which model it promotes because there are at least two competing models. As was noted above, one way that has been proposed to describe these models is “diversity in inclusion” and “non-state law as competition.” A simpler depiction would be assimilation (a.k.a. “republican integration”) or diversity. Irrespective of which terminology is chosen, the three religious restrictions examined in this paper are more consistent with the former model, namely “diversity in inclusion” or assimilation. As such multiculturalism might appeal to secular feminists. Religious feminists, on the other hand, would prefer the alternative model, one that decriminalizes (or even legalizes) polygamy, supports civil enforcement of faith-based family arbitrations, and respects cultural accommodations.

In sum, Canadian multiculturalism comes with a history that does not include respect for religious differences. Nevertheless, this neglect has been displaced by recent curial interpretations that align multiculturalism with religious freedom. When this alignment is complemented by modeling exercises that require choice between assimilation and diversity, intersectional feminists have good reason to be wary because their options are too limited. In other words, if multiculturalism is synonymous with intersectionalism, current approaches to multiculturalism would force intersectional feminists to choose between becoming religious or secular feminists.

FEMINIST THEORY

Before explaining how feminist theorists conceptualize intersectionality, I intend to review their responses to the dilemma of feminists who want to have a voice in constitutional conflicts involving religion and sex equality. Not surprisingly, theorists have responded in many ways. Nevertheless, I propose to collapse their responses into

55. Joan Small, *Multiculturalism, Equality, and Canadian Constitutionalism: Cohesion and Difference*, in *MULTICULTURALISM AND THE CANADIAN CONSTITUTION* 196-211 (Stephen Tierney ed. 2007).

three main categories: liberal, postcolonial, and deliberative. In what follows, Susan Moller Okin represents the liberal feminist response; Leti Volpp offers the postcolonial feminist response, and Madhavi Sunder provides the deliberative feminist response.

Although they all theorize multicultural feminism, I argue that only Sunder goes some distance to engaging the concerns of intersectional feminists. Moreover, because they mostly use the discourse of multiculturalism or multicultural feminism, I intend to put aside my reservations about this term to review their theories. Still, I am not convinced that multiculturalism is synonymous or interchangeable with intersectionalism. In the final section, I return to this distinction.

Susan Moller Okin

Susan Moller Okin confronted multiculturalism head-on in a very well-known paper entitled “Is Multiculturalism Bad for Women?” and published in the late 1990s.⁵⁶ She defined feminism as “the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men, and the opportunity to live as fulfilling and as freely chosen lives as men can.”⁵⁷ By equating women to men and seeking to improve their opportunities,⁵⁸ Okin’s discourse placed her squarely in the liberal feminist camp.⁵⁹

She defined multiculturalism as “the claim . . . that minority cultures or ways of life are not sufficiently protected by ensuring the individual rights of their members and as a consequence should also be protected with special group rights or privileges.”⁶⁰ Her objective was to critique Will Kymlicka’s liberal justification of special group rights for cultural minorities.⁶¹ According to her critique, these rights “may not be in the best interests of the girls and women of the culture.”⁶² Okin then argued that they should not be granted unless young women (older women being already co-opted) “are fully represented in negotiations about group rights.”⁶³

Okin believed these young women would argue for sex equality.⁶⁴ In other words, her approach was to juxtapose multiculturalism and sex

56. See Okin, *supra* note 14.

57. *Id.* at 10.

58. *See id.*

59. See Bonnie Honig, *Complicating Culture*, BOSTON REVIEW (1997), <http://www.bostonreview.net/BR22.5/honig.html> (last visited Jan 11, 2010).

60. Okin, *supra* note 14, at 10-11.

61. *See id.*

62. *Id.* at 23.

63. *Id.* at 24.

64. *See id.* at 23-24.

equality.⁶⁵ Typically liberal and secular feminist, her approach offers little recourse to religious feminists and none whatsoever to intersectional feminists. As an aside, those secular feminists who admit to sharing Okin's views should disapprove of the Canadian Charter because it addresses multiculturalism (and religious freedom) without unambiguously ascribing priority to sex equality.⁶⁶ Even those who supported entrenching the second sex equality provision in the Quebec Charter were unable to forestall the possibility of this ambiguity arising in the courts.⁶⁷

Leti Volpp

Okin did not lack critics, and one of the most sustained criticisms was delivered by Leti Volpp.⁶⁸ Volpp rejected Okin's approach of positing multiculturalism and feminism as oppositional.⁶⁹ Not only minority cultures encompass feminist values; "gender-subordinating values are also valued in the dominant culture of the West."⁷⁰

Commenting on the "problematic aggregation of very different assertions about culture"⁷¹, Volpp suggested that it had "forestalled constructive discussion."⁷²

Worse, the discourse of feminism versus multiculturalism to which Okin subscribed represents feminist colonialism.⁷³ Feminists using this discourse assume "that women in minority communities require liberation into the 'progressive' social customs of the West."⁷⁴ Positioning minority women as "other" denies them agency and the "potential to be understood as emancipatory subjects."⁷⁵ Volpp particularly opposes the liberal feminist movement's focus on "violence against women;" her postcolonial roots lead her to advocate turning feminist attention to women's "material well-being."⁷⁶

In sum, for Volpp the binary discourse of feminism versus multiculturalism "obscures the forces that actually shape culture, hides what forces beyond culture impact women's lives, denies that women have agency within patriarchy, and elides the level of violence intrinsic

65. See Okin, *supra* note 14, at 23-24.

66. See Canadian Charter, *supra* note 1, § 27.

67. See Quebec Charter, *supra* note 19, § 50.1

68. See Volpp, *supra* note 15, at 1181-84.

69. See *id.* at 1183-84.

70. *Id.* at 1192-93.

71. *Id.* at 1195.

72. *Id.*

73. See Volpp, *supra* note 15, at 1195-96.

74. *Id.* at 1198.

75. *Id.* at 1205

76. *Id.* at 1210.

to the United States.”⁷⁷ Enhancing our understanding of multiculturalism, she portrayed cultures as not only “patriarchal—no more or less so, but differently patriarchal . . . [and] characterized by resistance to patriarchy.”⁷⁸ And she sought to “broaden and shift”⁷⁹ feminist values by challenging feminists to abandon their notion of the “unitary female subject”⁸⁰ and their “strong desire for innocence.”⁸¹

We are left with a nagging question: did Volpp, the postcolonial feminist, ultimately take the opposite turn from Okin, the liberal feminist? Okin expanded upon the necessity of feminism winning the contest with multiculturalism.⁸² In contrast, did Volpp collapse feminism into multiculturalism, albeit only in “particular contexts?”⁸³ Put differently, did she offer secular feminists any structural possibilities for keeping the norm of sex equality viable in multicultural (or religious freedom) contexts? Absent such structures, intersectional feminists would also have cause for concern.

Madhavi Sunder

Madhavi Sunder was also critical of Okin’s approach.⁸⁴ Unlike Volpp, however, she chose to focus on religion and not on multiculturalism.⁸⁵ In the context of the United States where multiculturalism is not embedded in the Constitution or even in legislation, Volpp was forced to treat its social and communal manifestations as problematic.⁸⁶ Sunder, on the other hand, had the advantage of invoking religion’s legal construction, primarily in the U.S. Constitution.⁸⁷ Rather than appearing to be critical of multiculturalism or religion as they manifest in minority communities, therefore, she was free to define the problem in terms of law’s approach to religion.⁸⁸

More specifically, Sunder attributed most of the difficulty to one branch of law, namely human rights law which treats religion “as a sovereign, extralegal jurisdiction,” that is, as “natural, irrational, incontestable, and imposed.”⁸⁹ Human rights law wrongly defers to this

77. *Id.* at 1185.

78. Volpp, *supra* note 15, at 1217.

79. *Id.* at 1184.

80. *Id.* at 1199.

81. *Id.* at 1214.

82. *See generally* Okin, *supra* note 14, at 10-12.

83. Volpp, *supra* note 15, at 1217.

84. *See* Sunder, *supra* note 16, at 1402.

85. *See id.*

86. *See* Volpp, *supra* note 15, at 1212-14.

87. *See* Sunder, *supra* note 16, at 1402.

88. *See id.*

89. *Id.*

construction of religion as “other,” accepting and expecting inequality.⁹⁰ She argued, “human rights *law*, not religion, is the problem.”⁹¹

Nevertheless, Sunder did not let religious and cultural authorities completely off the hook.⁹² She was critical of those who failed “to imagine religious community on more egalitarian and democratic terms.”⁹³ In this respect her argument resembled that of Volpp, as did her contention that feminists should pay close attention to the work of women’s human rights activists in minority communities.⁹⁴ In particular, Sunder lauded women’s human rights activists in Muslim countries who “increasingly refuse to choose between religion and rights and demand both.”⁹⁵

Is human rights law up to the task of marrying religion and sex equality? After all, if human rights law is problematic because of the way it constructs religion, can it also become part of the solution? This implication is conveyed by Sunder’s reliance on women’s human rights activists to make a difference.⁹⁶ Relying on the fact that these activists are women blurs the question of which legal rights they advocate. Do they represent the norm of sex equality, and hence should be regarded as secular feminists? Or, because their work transpires within religious communities, should they be seen as religious feminists?

Or again, might they embody intersectional feminism and, if so, how would their embodiment manifest legally? Like Volpp, Sunder rejects binaries and, because her work focuses on Muslim countries, it creates the appearance of collapsing sex equality into religion.⁹⁷ Sunder is adamant, however, about the importance of pursuing both freedom and equality “within private, cultural spaces as well as public ones.”⁹⁸ What is required to transpose her arguments for the pursuit of both freedom and equality into diasporic public spaces? Whatever the answer, it cannot be found in Canada’s Charter, as its failure to offer normative and structural accommodation to intersectional feminists exemplifies.⁹⁹ Canada’s Charter would need to be re-designed to accommodate narratives that combine sex equality and religious freedom without collapsing them.

90. *See id.*

91. *Id.* at 1403.

92. *See Sunder, supra* note 16, at 1403.

93. *Id.*

94. *See id.*

95. *Id.* at 1412.

96. *See id.* at 1403-04, 1443-44.

97. *See Sunder, supra* note 16, at 1403-04.

98. *Id.* at 1471.

99. *See Canadian Charter, supra* note 1, § 27.

Intersectionality

The concept of intersectionality was introduced in the United States to address “the multidimensionality of black woman’s women’s experience.”¹⁰⁰ Maintaining anti-discrimination law imposed a single-axis notion of identity that treated black women as either black or female, Kimberlé Crenshaw proposed the concept of intersectionality to account for their multiple identities.¹⁰¹ Others expanded her approach to encompass anti-discrimination claims by Asian women,¹⁰² Latino women,¹⁰³ and African-American men.¹⁰⁴ In Canada, Nitya Duclos applied it to her study of human rights cases involving race and sex discrimination.¹⁰⁵ These studies and others illustrate the rich and diverse history of intersectionality in the context of race.

Should this concept be applied in the context of religion? Put differently, is there any reason to refrain from applying intersectionality to engage religion and gender as intersecting axes? Insofar as intersectionality looks “to forms of inequality that are routed through one another, and which cannot be untangled to reveal a single cause,” religion and gender appear to qualify.¹⁰⁶ In the three contexts elaborated in this paper, the feminists described here as intersectional maintain their inability to disentangle the religious and gendered roots of their inequality. Another way to express the work of intersectionality is by reference to its “challenge to essentialised concepts of identity and disadvantage.”¹⁰⁷

In contrast, multiculturalism is an identity-essentializing concept and not necessarily one that is focused on disadvantage. Multiculturalism takes its direction from and relates to the world around it. The consequence of combining multiculturalism with feminism, that it becomes synonymous with religious feminism, may be idiosyncratic to

100. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-racist Politics*, 1989 U. CHI. LEGAL F. 139.

101. *See id.*

102. *See* Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771, 772-73 (1996).

103. *See* Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 69 (2004).

104. *See* D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: African-American Males and Intersectional Claims*, 86 NEB. L. REV. 552 (2008).

105. *See* Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 CAN. J. WOMEN & L. 25 (1993).

106. INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 1 (Emily Grabham, Davine Cooper, Jane Krishnadas, & Didi Herman eds., 2009) [hereinafter INTERSECTIONALITY AND BEYOND].

107. *Id.* at 5.

Canada. If it is, then multiculturalism may have the potential to perform a different function in other national contexts. Indeed it may be defined as synonymous not with religious feminism but rather with secular feminism. What it lacks, however, is the potential to serve the anti-essentialising function that intersectionality performs. Perhaps the simplest difference between these concepts is that multiculturalism is purely outward-looking, relating to the context around it; intersectionality is inward-looking before it enters the larger frame around it.

Intersectionality's downside, at least in the context of Canada's Charter, is its inability to command a response from constitutional decision-makers. This context is not unique. Many of the scholarly contributors to a recent collection of papers on intersectionality have reservations about its legal efficacy. While it draws "attention away from static conceptions of social life and experience," it nevertheless "presumes the gaps that it attempts to close."¹⁰⁸ Deployed to indicate the inherent limits of law, intersectionality is itself limited by the absence of "an analysis that connects experiences of inequality with structures, institutions and processes."¹⁰⁹ Most seriously, perhaps, intersectionality is vulnerable to co-option because it "can be mobilized within legal structures either in inadequate ways, or in ways that undermine its foundational critical impulse."¹¹⁰

Their critiques notwithstanding, many of these critics are not ready to give up on intersectionality. The editors of the collection conclude that "intersectionality is still useful as an anti-essentialist approach as long as it is used in conjunction with a clear focus on institutions, structural dynamics, and power."¹¹¹ For now, therefore, I conclude that intersectionality highlights a serious lacuna in the Canadian Charter, the absence of normative and structural space for the narratives of feminists who wish to advocate both religious freedom and sex equality.

CONCLUSION

In my earlier research, I concluded that the Canadian (and Quebec) Charter(s) did not protect intersectional feminists. Whether these feminists seek to intervene on the issue of de-criminalizing polygamy, "banning" faith-based family arbitrations, or limiting the accommodation of cultural differences, there are no constitutional norms and structures through which they can express themselves. The Canadian and Quebec

108. *Id.* at 2.

109. *Id.* at 2, 4.

110. *Id.* at 6.

111. INTERSECTIONALITY AND BEYOND, *supra* note 106, at 14.

Charters compel them to choose between their religious beliefs and their belief in sex equality if they wish to intervene. Because they are not willing to make this choice, the Charters silence them, rendering them invisible to constitutional jurisprudence, never mind the world at large. In Canada, constitutionalism does not protect intersectional feminists.

Do all written constitutions force this choice upon intersectional feminists? Are there ways to redirect, even subvert if necessary, these constitutions to secure respect and protection for the citizenship of intersectional feminists whether it is in the context of the veil, obstetrics, faith-based family arbitration, polygamy, etc.? Or must our constitutions be redesigned to yield another fresh start, one in which contemporary “gender awareness” is enhanced by the awareness of intersectionality?¹¹²

112. IRVING, *supra* note 3.

