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## GRANTING REFUGE FROM ISLAM: THE CANADIAN REFUGEE DETERMINATION PROCESS AND THE CASUALTIES OF ISLAMIC POLICIES

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A number of key divergences between Islamic and Canadian legal regimes are generating a growing stream of refugees into Canada. There is every sign that this trend will grow as political forces on both sides map out their ideological position in law with greater precision. Recent years have seen the introduction into the normative legal system of many Islamic states' "Islamization" laws. In Canada, the refugee determination process has seen a correlating, but opposite, movement to recognize persecution in its more systemic guises.

This paper will focus on those refugee claims from Islamic states which have been accepted on a ground that is related to either Islamic law or Islamic culture. The resulting set of cases illustrates a number of key distinctions between some Islamic regimes and Canadian law which are only litigated in the context of refugee claims. A picture thus emerges of the conflict between the refugee determination procedure in Canada, which embodies Western human rights discourse, and Islamic law, as expounded by Islamic resurgence movements in a number of states.

The rift between Western and Islamic legal cultures draws on a history of mutual misunderstanding, including a hundred years of ill-will created by the brutality of European colonialism. The fact that Islam is still struggling with modernity adds a further layer of complexity. Taking a broad view, it is clear that the differences between Islamic and Western legal cultures are not amenable to ready conciliation. It is also clear that the debates engendered by the issues highlighted in the refugee cases that follow continue to be live ones on both ends of the refugee track.

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The definition of a Convention refugee is laid out in subsection 2(1) of the

“Convention Refugee” means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person’s nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person’s former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country . . .<sup>1</sup>

Before reflecting on the application of this definition, it is important to note that there are two structural components to determining refugee status. The above definition points out the criteria required by the accepting state, but it is also useful to think of refugees as created by the accepting state. The refugee determination process is one of matching the life experience of individuals with the public policy of an accepting state. In a sense, no refugee is created if no one (state or NGO) is willing to label (and extend protection to) a person as such. Viewed from this perspective, refugees are produced by differences between Canadian and Islamic public policy systems. There are clearly observable public policy sectors which are responsible for the creation of refugees in the originating state and their corresponding acceptance in the receiving state. The policy of the refugee-creating state is observed in the statements of claimants and the policy of the receiving state is reflected in its reasons for granting refugee status.

In reflecting on the operation of Islamic religion, culture, or law that one sees in the cases described below it is helpful to recognize that Islam encompasses a diversity of views and practices. Moreover, the following study displays some of the shortcomings

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<sup>1</sup> *Immigration Act*, R.S.C. 1985 c. I-2, as am. by R.S.C 1985, c. 28 (4th Supp.), s.1(2).

of a typically western mode of analyzing Islam according to its flaws, a habit which distorts the larger picture of Islam.<sup>2</sup> This study should thus not be taken as a general illustration how Islamic governments function, but instead as an illustration of the most significant consequences of the policies of a number of Islamic governments in terms of Canadian refugee law. The discussion below groups cases where Islamic immigrants to Canada have been successful in obtaining refugee status around seven key issues.

### I. GENDER DISCRIMINATION

Canada's Gender Guidelines, which acknowledge the fact of gender-based discrimination in the refugee context, were introduced in 1993.<sup>3</sup> In 1994 an estimated 195 women were granted refugee status under these Guidelines, among them are a number who fled some form persecution in the guise of Islamic religion, culture, or law.<sup>4</sup> Three cases where the Gender Guidelines were applied to give women refugee status are helpful to illustrate the serious legal disabilities that women in some Islamic states suffer.

In *Re Y. (J.Z.)*,<sup>5</sup> the claimant, a young woman from an affluent background, identified herself as a non-practising Muslim and as belonging to the group of Iranians who oppose the post-revolutionary Islamic government. Having been educated in Europe and westernized in general, she found the obligation to wear the Hejab and Islamic dress oppressive:

As a woman in Iran I have [been] forced to wear unbearable, degrading clothes, which [make] a woman feel shame and oppression. I was harassed on the streets by the guards, stopped several times, harassed, insulted, detained and interrogated because of my clothes, make-up and nail polish. I was forced to wear dark colours in

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<sup>2</sup> Hammudah 'Abd al 'Ati, *The Family Structure in Islam* (American Trust Publications, 1977) at 281–282.

<sup>3</sup> *IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Immigration and Refugee Board, 9 March 1993).

<sup>4</sup> *Canadian Press* (9 March 1995) (QL).

<sup>5</sup> [1993] C.R.D.D. No. 335 (QL).

the heat of Iran which often reaches 40 degrees in the summer.

She was detained a number of times including once while shopping with a male cousin when they were accused of being a lovers. They were ordered not to appear in public together again. On another occasion, while driving home alone at midnight she was stopped and accused of being a prostitute. On a third occasion she was questioned for an hour after meeting her male employer in the lobby of a hotel. Finally, during a party at a friend's home where everyone was in western clothes, armed guards forced their way in and detained all those present. They were held for a number of days during which they were humiliated and beaten. They were all charged with "behaviour not conforming to Islamic values." The claimant feared that she would receive treatment similar to that of a friend who had been raped and tortured during two months of imprisonment. She left the country before the arrival of her court date.

The Refugee Board noted that the "laws under which she would face punishment do not conform to internationally recognized human rights standards," which could include the death penalty for defying the dress codes. The Board concluded that in view of the

arbitrariness of the application of the law and the range and severity of the punishment, including the possibility of execution, clearly any such prosecution of the claimant if she were to return to Iran would amount to persecution.<sup>6</sup>

In the second case, *Re Y. (M.J.)*,<sup>7</sup> the applicant from Pakistan was a single woman who was raped and became pregnant. The perpetrator was a member of a rival student group, the Muslim Students Federation. She was an activist for the student wing of the Pakistan People's Party (PPP). She reported the rape two days after it had occurred, however, the police disbelieved her because she had delayed in making the report. The standard of proof for rape is either the confession of the perpetrator or the eye-witness testimony of four adult, pious male Muslims. Should the charge of rape be unsuccessful, she would be subject to a charge of *qazf* (defaming the

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<sup>6</sup> *Ibid.*

<sup>7</sup> [1993] C.R.D.D. No. 339 (QL).

accused), or *zina* (having sexual relations outside marriage). To defend a charge of *zina* she would be required to meet the same standard of proof as for rape. However, should the victim become pregnant, as in this case, she would be charged with *zina* in any event. The fact that abortions are illegal in Pakistan makes the situation of raped women who become pregnant even more difficult.

In the third case illustrating a positive determination under the Gender Guidelines, *Re T.(W.T.)*,<sup>8</sup> the claimant, a Christian woman from Sudan, experienced a similar lack of recourse after being raped. She testified that her home was broken into and she was raped and robbed. Although she was able to identify the offenders in a police line-up and the police were able to gather physical evidence from her apartment identifying them, the accused were released because at trial the claimant's testimony was inadmissible as a female non-Muslim. The claimant also stated that she knew of other attacks on Christian women where prosecution was similarly refused. The Board concluded that:

Although the claimant in this case feared a criminal act, the concern for her safety however, stemmed from her belief that she would not be able to obtain the necessary protection. Her evidence was that she reported the incident concerning her rape and robbery and even had proof of the culprits' involvement, her testimony however was inadmissible due to the fact that she was a woman and a Christian. The judge did not hesitate to express this fact to her in court. This action is, in the panel's opinion, an admission that the state is unwilling to provide necessary protection to the claimant because of her gender and religion.<sup>9</sup>

In each of these three cases the Refugee Board has identified a gender-based discrimination institutionalized in the justice system in the name of Islam, and in each case the women were either persecuted by the state or unable to obtain the protection of the state. Gender-based persecution, together with persecution based on religion, are the two areas where the differences between Islamic and Canadian norms diverge the greatest.

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<sup>8</sup> [1993] C.R.D.D. No. 402 (QL).

<sup>9</sup> *Ibid.*

## II. DIFFERENCES BETWEEN GROUPS WITHIN ISLAM

The Islamic extremist movement, with its many regional variations, is only the harsher part of a more general Islamic renewal which has been under way since early in the twentieth century. Extremist Islam, which began more recently in the 1970s, is in its various guises the stimulus for much of the strife faced by the refugee claimants discussed in this paper. In the case of *Re N.(E.B.)*<sup>10</sup> a Lebanese woman and her children were admitted as refugees after members of the Hezbollah tried to recruit the woman for their cause. Her husband had already fled the country as a result of the Hezbollah's attempts to recruit him. The claimant said that she had refused because "the members of the Hezbollah group were engaged in what she considered immoral acts of violence based on religious fanaticism." Furthermore "she was morally and politically opposed to the activities and methods of the group and perceived them as criminals responsible for the destruction of Lebanon."

## III. ISLAMIC JUSTICE

Two successful claims for refugee status involving members of the legal community in Somalia illustrate the extent to which politics can infuse the operation of Islamic justice. In *Salah v. Minister of Employment & Immigration* (1987), 3 Imm. L.R. (2d) 254 (Imm. App. Bd.), the son of a judge described how he and his family were persecuted partly because his father had decided a land ownership dispute against a party who was the Minister of Agriculture and partly because of their membership in what was then a politically less-powerful tribe. In a second refugee determination, *Re U.(N.B.)*,<sup>11</sup> the President of the Supreme Court appointed during the Siad Barre regime fled following the collapse of that government fearing persecution on the basis of his judicial position and his tribal membership. These two situations present a striking contrast to the administration of the judiciary in Canada which is characterized by independence from government.

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<sup>10</sup> [1990] C.R.D.D. No. 246 (QL).

<sup>11</sup> [1992] C.R.D.D. No. 422 (QL).

The administration of justice in Islamic countries has also been found to be a source of persecution. *Re C.(Y.F.)*<sup>12</sup> dramatically illustrates the operation of justice as a tool of the state. In this case an Iranian male applicant had protested, with two friends, while Iranian government officials bulldozed the homes of the poor, in some cases with their occupants still inside. In his words,

I could not stand the inhumane situation any longer, and I ran to one of [sic] municipal officers and begged him to stop the destruction.<sup>13</sup>

After being forced to give their names and addresses to armed police officers, the three fled when the police were distracted by a disturbance. As a result of this occurrence, one of the three was executed after being convicted of "various charges which included creating terror, the use of firearms and setting fire to government buildings." The Board found that this person had been falsely charged and executed. The second friend had been arrested, but his situation was unknown.

It was material to the panel that the Iranian government is dominated by clerics who are imposing Islamic values and that "there is no distinction between religion and politics; everything is viewed through an Islamic perspective." In view of these circumstances, the panel concluded that although no charges had been brought against the claimant in Iran,

it is our considered view . . . that this regime could so accuse him. 'Given' the claimant's past political record and his intervention in the Mashad incident, 'given' that his name was noted and that he was accused of arousing unrest, 'given' the circumstances of [the first friend's] execution . . . and 'given' the government's perception of those it regarded as the perpetrators of the Mashad disturbances, we believe . . . it is reasonable to believe that the regime would think of him as a political threat.<sup>14</sup>

These refugee cases, taken with the many others that recount unjust detention or torture, cast a negative light on Islamic justice. While Islamic justice does not typically operate in disregard of

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<sup>12</sup> [1993] C.R.D.D. No. 152 (QL).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



fairness<sup>15</sup> even in those states where it is least refined, the traditional link between government and the administration of justice in Islam is a frailty which is easily exploited for political ends.<sup>16</sup> When the operation of Islamic justice is undermined in this manner the refugee system can only compensate in a minor way by offering refuge to the most seriously aggrieved victims who are able to leave.

#### IV. RELIGIOUS FREEDOM

In spite of the *Qur'ānic* admonition in *s\_ra* 2:256 that "there is no compulsion in religion," an effort to coerce conversion to Islam accompanies many acts of religious persecution. The *Qur'ānic* admonition against forcing people to convert is a value shared by the *Canadian Charter of Rights and Freedoms*<sup>17</sup> and international human rights instruments.

Islam has a tradition of toleration for its Jewish and Christian minorities ( *ahl al-kitāb* or "people of the Book"), and occasionally even those who were loosely identified as Sabians. But Religious toleration was never universal, and its scope has been sharply restricted by Muslim extremists with the result that some non-Muslims are targeted for persecution.

In *Re L.(K.C.)*,<sup>18</sup> a Sikh family from Malaysia fled religious persecution and attempts at forcing them to convert to Islam and were accepted as refugees in Canada. In his Personal Information Form (PIF) the father enumerated a series of discriminations he faced as a Sikh. The father, who worked as a school teacher, faced persecution at his job. He went to the police to report a violent incident and was detained for two days and beaten. He was later told that his life would be better if he became a Muslim and that if he did not his life was in danger. After having to take an unpaid

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<sup>15</sup> For a study of the sophistication which Islamic justice has achieved see M. Khadduri, *The Islamic Conception of Justice* (Baltimore; London: Johns Hopkins University Press, 1984).

<sup>16</sup> A. A. Sachedina "The Ideal and Real in Islamic Law" in R. S. Khare ed., *Working Papers: Perspectives on Islamic Law, Justice and Society* Number 3, September 1987 (Virginia: Committee on the Comparative Study of the Individual and Society Centre for Advanced Studies University of Virginia, 1987) at 37.

<sup>17</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>18</sup> [1993] C.R.D.D. No. 260 (QL).

leave of absence from his work he went to discuss his problems with a member of a political party. The family was subsequently harassed in their home on a weekly basis. The children were told that if they did not become Muslim their father would go prison. An attempt to escape the situation by moving did not work and an attempt to leave the country resulted in the father being detained for a week.

Under Islam, apostasy is perceived to be a rebellion against God and thus carries a harsh punishment.<sup>19</sup> Blasphemy is treated in much the same way, as shown by the cases of Salman Rushdie, who continues to require protection from the threat to his life posed by the *fatwa* of Ayatollah Khomeini, and Taslima Nasreen, who has been charged in Bangladesh with "blaspheming the Koran," and has been forced to flee.<sup>20</sup>

In 1984 Ordinance XX amended the Pakistan Penal Code by the addition of sections 298B and 298C which prohibit the religious expression of Ahmadis, a heterodox sect that began in the Punjab in the late nineteenth century. Some Ahmadi practices were derived from Christianity, such as proselytizing and rituals surrounding conversion. Despite their differences from mainstream Sunni Islam, Ahmadis consider themselves to be Muslim. Ahmadis are divided into two groups, Lahorites and Qadianis. Section 298C reads as follows:

Any person of the Qadiana group or the Lahori group (who call themselves Ahmadis or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith or invites others to accept his faith, by words, either spoken or written, or by visible representation, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.<sup>21</sup>

In addition, in 1986 the Pakistan Penal Code was amended to make available the death penalty for those who derogate the Prophet:

<sup>19</sup> *Qur'ān* 3:86–88, 4:137, 16:106.

<sup>20</sup> *Manchester Guardian Weekly* 152:16 (16 April 1995) 4.

<sup>21</sup> Cited in *Re V. (A.U.)*, [1992] C.R.D.D. No. 104 (QL).

Whoever by words, either spoken or written, or by visible representation, or by any Imputation, innuendo, or insinuation, directly or indirectly defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.<sup>22</sup>

The constitutionality of Ordinance XX was affirmed by the Pakistan Supreme Court after which those who brought the constitutional challenge were prosecuted in accordance with its provisions.<sup>23</sup>

It is in the context of these laws that twelve successful claims under the Convention Refugee Determination Division of the Immigration and Refugee Board were made since 1989. This represents a small number of the total number of claimants that have sought refugee status on the basis of these provisions. Each claim for refugee status has to be weighed according to a subjective and an objective test to determine whether the applicant has a "well-founded fear of persecution" under paragraph 2(1)(a) of the *Immigration Act*.<sup>24</sup> The facts leading to the twelve positive determinations for Ahmadis, in chronological order, are enumerated below. It may be observed that these cases represent the threshold of Canada's willingness to shelter people from some of the worst by-products of Islam in its extreme political form.

Of the three successful claims in 1989, the first, *Re G. (J.G.)*<sup>25</sup> was a male applicant who was admitted because he was imprisoned by the police for twenty-four days following a complaint by a citizen. With reference to his imprisonment "he told the Refugee Division of the many beatings which he received and threats of what the police would do if he did not swear that he was not a Muslim." Following his release, a warrant was issued for his arrest but the applicant refused to report to the police. The Board also noted that both brothers of the applicant were arrested for practising their religion.

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Re M. (E.M.)*, [1994] C.R.D.D. No. 180 (QL).

<sup>24</sup> R.S.C. 1985 (4th Supp.), c. 28, s. 1; UNHCR, *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* paras. 38, 40-42; *Rajudeen v. M.E.I.* (1984), 55 N.R. 129 (F.C.A.); *Re G. (J.G.)*, [1989] C.R.D.D. No. 161 (QL).

<sup>25</sup> [1989] C.R.D.D. No. 161 (QL).

The second positive determination in 1989, *Re C.(K.Z.)*,<sup>26</sup> was in favour of a male applicant who, though never personally targeted, lived in an area where Ahmadis were targeted by angry riots, had their homes burned, were killed, and were not able to receive protection from the police.

In the third case, *Re Q.(J.O.)*,<sup>27</sup> a male applicant, was admitted because he and his family, including his parents and brothers, had been persecuted by the Mullahs and the police in Pakistan.

There was one successful claim in 1990. In *Re N.(C..D.)*<sup>28</sup> the male claimant was politically active for the minority rights of his ethnic group as a member of the Mohajir Qaumi Movement (MQM) for which he suffered persecution by other groups and the police. He met his wife, an Ahmadi, and converted to her faith. In 1989 rioters burned MQM homes, including the claimant's while his wife and child were forced to stay inside. The police were present but did nothing. The applicant said that he believed his family was burned because they were Ahmadi, and he feared for his life.

In 1991 there were three successful claims for Ahmadis. The first, *Re J.(G.W.)*,<sup>29</sup> was for a family including a husband, wife, and child. Although none had suffered persecution personally, the husband was vice-president of the Ahmadiyya Movement and was thus well-known as an Ahmadi. The panel accepted that this made him a target as other prominent Ahmadis had been jailed, assaulted, or murdered.

The second positive result in 1991, *Re G.(Z.M.)*,<sup>30</sup> was for a male claimant who held a position of missionary and religious teacher of the Ahmadiyya Movement. As a result of activities connected with his position, he was attacked on three occasions by his Sunni neighbours. The police refused to take any action to apprehend the assailants or protect him, and was instead told that "if he comes back with such a report his life would be in danger."

In the third positive determination in 1991, *Re J.(O.H.)*,<sup>31</sup> the male claimant was identified as an Ahmadi on a bus and taken to a

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<sup>26</sup> [1989] C.R.D.D. No. 145 (QL).

<sup>27</sup> [1989] C.R.D.D. No. 110 (QL).

<sup>28</sup> [1990] C.R.D.D. No. 518 (QL).

<sup>29</sup> [1991] C.R.D.D. No. 690 (QL).

<sup>30</sup> [1991] C.R.D.D. No. 55 (QL).

<sup>31</sup> [1991] C.R.D.D. No. 604 (QL).

police station and accused of preaching the Ahmadi faith. Although he denied this, the police told him that "Ahmadis are always preaching their religion." They detained him for two days during which he was severely beaten. The police told him that he would be "in serious trouble" if he was found preaching again.

In 1992 there were four successful Ahmadi claims. The first positive determination in 1992, *Re V.(A.U.)*,<sup>32</sup> was for a male claimant. In making its determination the Board noted that the "close-knit nature of neighbourhoods in Pakistan would make it difficult for an Ahmadi to hide his roots" and that any expression of Ahmadi faith carried a severe punishment under amendment 295C of the Penal Code. The claimant in this case had the duty of informing other Ahmadis of the time of prayer in person as it was forbidden to advertise this publicly.

The second successful claim, *Re D.(N.W.)*,<sup>33</sup> was in favour of a male claimant and his wife and child. The husband had great difficulty getting work in the field of computers because of his religion. After establishing his own business in a new city, his life was threatened by the business people in that neighbourhood because he refused to become a Muslim. The family decided to leave Pakistan when the husband's uncle was attacked by armed gunmen.

The third positive determination in 1992, *Re I.(E.Q.)*,<sup>34</sup> was for a male lawyer. He testified that his wife died in a car accident that occurred while he was trying to drive away from a mob that was threatening them. In 1991 a criminal complaint was laid against him under subsections 295(a), (b), and (c) alleging that the claimant had "uttered words with deliberate intent to wound religious feelings, defied the Holy Prophet, misused epithets and titles, and called himself a Muslim." He was told by a policeman to protect himself.

The fourth successful claim in 1992 was in *Re H.(R.L.)*.<sup>35</sup> The claimant was forced to leave his job after it was discovered that he was an Ahmadi and he was severely beaten by his co-workers. He then returned to his parents' home, when neighbours informed the

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<sup>32</sup> [1992] C.R.D.D. No. 104 (QL).

<sup>33</sup> [1992] C.R.D.D. No. 554 (QL).

<sup>34</sup> [1992] C.R.D.D. No. 326 (QL).

<sup>35</sup> [1992] C.R.D.D. No. 90 (QL).

police that he was posing as a Muslim. He was detained for three days during which he was interrogated and pressured to renounce his faith.

Interestingly, the Board in this case also noted section 153A of the Pakistan Penal Code which reads:

(a)Whoever . . . by words . . . promotes or incites on grounds of religion . . . disharmony or feeling of enmity, hatred or ill-will between religious groups or communities, or

(b)commits, or incites any other person to commit any act which is prejudicial to the maintenance of harmony between different religious groups . . . on any ground whatsoever . . . shall be punished with imprisonment of up to five years.<sup>36</sup>

The panel stated that "the Government of Pakistan itself violates section 153A" by inciting hatred against its Ahmadi community and that this has led to human rights violations, violence, and murder which are not prosecuted. The fact that Ahmadis are unable to rely on protection from the state is in each of these cases a factor in the determination to grant refugee status.

In February, 1994, another positive determination was made.<sup>37</sup> The female claimant was granted refugee status because she would no longer be able to rely on the protection of her daughter, as her daughter was also fleeing Pakistan. The claimant's two sons had previously gained asylum in Canada. The age of the applicant, between 65 and 90, was significant. The panel was sympathetic to the fact that the applicant would neither be able to defend herself nor rely on protection from the government of Pakistan.

The manner of deciding these cases is based on a determination that the individual claimant is at risk, which in the above cases is simply that the claimants' lives were threatened by more extreme Islamic political forces, in each case because of the religion of the claimant. The fact that the government, as an instrument of extremist Islam, was in many cases the perpetrator, or at least complicit in the carrying out of these injustices, was part of the reason why refugee status was granted.

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Re M.(E.M.)*, [1994] C.R.D.D. No. 180 (QL).

## V. HOMOSEXUALITY

Only in the last decade has homosexuality ceased to be a criminal offence in Canada.<sup>38</sup> An exception was enacted in 1968–69 for persons over the age of twenty-one who were acting privately.<sup>39</sup> It is interesting to note the parallel with the United States which illustrates better the ongoing tension around criminalizing homosexuality. In the early 1960s all of the jurisdictions in the United States criminalized sodomy; today almost half still do. Many jurisdictions in the United States follow the Model Penal Code which uses a scheme similar to that which was used in Canada of criminalizing deviant sexual intercourse with an exception where the parties consent and are of a certain age.<sup>40</sup>

The Supreme Court in *Canada (Attorney General) v. Ward*<sup>41</sup> recognized that, for the purpose of paragraph 2(1)(a) of the membership in a "particular social group" included members of "groups defined by an innate or unchangeable characteristic."<sup>42</sup> This category would include "individuals fearing persecution on such basis as gender, linguistic background and sexual orientation . . . ."<sup>43</sup>

There are two cases where Muslim homosexual males were recognized as refugees by Canada. In the first case, *Re N.(K.U.)*,<sup>44</sup> the applicant was from Bangladesh. The claimant was discovered by police while committing a homosexual act which was illegal. The applicant was forced to bribe the officer to escape being reported. The applicant was then subjected to repeated blackmail by the police officer. The Board recognized that in Bangladesh homosexuality is a serious Islamic crime with serious consequences:

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<sup>38</sup> The following sections of the *Criminal Code* were repealed by R.S.C. 1985, c. 19 (3rd Supp.), s. 2: s. 155, "Buggery"; section 157, "Acts of Gross Indecency"; and section 158, "exception Re Acts in Private Between Husband and Wife or Consenting Adults." Section 156, "Indecent Assault on a Male" was repealed by S.C. 1980–81–82, c. 125, s. 9.

<sup>39</sup> *Ibid.*

<sup>40</sup> W. B. Rubenstein, ed. *Lesbians, Gay Men, and the Law* (New York: The New Press, 1993) at 87–88.

<sup>41</sup> [1993] 2 S.C.R. 689.

<sup>42</sup> *Ibid.* at 739.

<sup>43</sup> *Ibid.*

<sup>44</sup> [1991] C.R.D.D. No. 1140 (QL).

The most severe punishment laid down in the quran for homosexuality is death by stoning, and the least severe of which is one hundred lashes. Because of their religious origins, those harsh laws and harsh punishment cannot be challenged or be subject to scrutiny in Bangladesh. The claimant testified that the community in Bangladesh uses indiscriminate violence against those discovered as homosexuals or practising homosexual acts.<sup>45</sup>

The Board used the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and followed the Federal Court of Appeal decision of *Ward*<sup>46</sup> in finding that "membership in a particular social group" in paragraph 2(1)(a) of the *Immigration Act* included homosexuals.

The second case, *Re H.(Y.N.)*,<sup>47</sup> applied the Supreme Court's analysis in *Ward* to find that homosexuals do have "membership in a particular social group" for the purpose of paragraph 2(1)(a) of the *Immigration Act*. Applying the objective and subjective tests set out in *Rajudeen v. M.E.I.*<sup>48</sup> the Board found the applicant from Pakistan to be a refugee. The applicant in this case was also a political activist as a member of the PPP, which at the time preceding the applicant's departure from Pakistan was opposed by a coalition of Islamic groups under the umbrella of the Islami Jamuri Ithad (IJI). After being "outed" by the police following the suicide of a lover, the applicant suffered persecution, including imprisonment, torture, and rape, at the hands of the police and IJI members. The applicant stated that according to the IJI, "homosexuals are sick, and wanted to make an example of me."<sup>49</sup>

The panel also noted Section 377 of the Pakistan Penal Code which criminalizes "unnatural offences":

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description which shall not be less

<sup>45</sup> *Ibid.*

<sup>46</sup> *Canada (Attorney General) v. Ward*, [1990] 2 F.C. 667, (C.A.), affirmed by the Supreme Court of Canada, *supra* note 41.

<sup>47</sup> [1994] C.R.D.D. No. 13 (QL).

<sup>48</sup> (1984), 55 N.D. 129 (F.C.A.) at 134.

<sup>49</sup> *Supra* note 47.



than two years nor more than ten years, and shall also be liable to fine.<sup>50</sup>

The Board, citing "A Global View of Lesbian and Gay Liberation and Oppression," *The Third Pink Book* (Buffalo: Prometheus Books) concluded that the law criminalizing homosexuality is enforced in "a persecutory manner" in Pakistan. In this respect, the Board remarked that the situation was similar to that of the Ahmadiis under Ordinance XX<sup>51</sup> as not all homosexuals are targeted by the law but those who are targeted have good reason to fear persecution.

## VI. POLYGAMY

Polygamy is one example of where Canada discriminates against a value tolerated by many, but not all, Islamic states.<sup>52</sup> Polygamy exists in Islam only in the sense of polygyny—a husband having more than one wife.

In Canada, polygamy is a criminal offence. Paragraph 293(1)(a) of the *Criminal Code*<sup>53</sup> prohibits "any form of polygamy" or "any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage." Thus even though Islamic law traditionally permits a man to marry up to four wives, such a polygamous marriage cannot occur legally in Canada, and nor will a foreign polygamous marriage be recognized as valid in Canada.<sup>54</sup>

<sup>50</sup> *Ibid.* The panel cited: Exhibit C-7, Index 2, item 1, Pakistan: Information regarding Muslim Law on Homosexuality, Response to Information Request PAK9462, irbdc, November 19, 1991.

<sup>51</sup> See Section 4: "Religious Freedom"

<sup>52</sup> The practice of polygyny in Islam is affirmed in legislation by Egypt, Jordan, Iraq, Morocco and Kuwait. Polygyny, however, is not uniformly practised in the Muslim world. In Syria, and Tunisia, for example, it is prohibited by statute. In addition, polygamous marriages are not the norm in those countries that permit them. The general trend has in fact been away from polygynous marriage toward monogamous marriage since the early twentieth century, as a result of European influence. See J. J. Nasir, *The Islamic Law of Personal Status, Second Edition* (London: Graham & Trotman, 1990) at 66–67.

<sup>53</sup> R.S.C. 1985, c. C-46.

<sup>54</sup> J.-G. Castel, *Canadian Conflict of Laws* Third ed. (Toronto; Vancouver: Butterworths, 1994) at 336–41.

However vexing to modern gender equality discourse, there are compelling reasons why Canada should consider recognizing foreign polygamous marriages. The foundation of the present policy against recognition of foreign polygamous marriages has its foundations in Christian morality.<sup>55</sup> In the context of constitutionally guaranteed religious equality,<sup>56</sup> it is possible that this policy is unnecessarily discriminatory. More importantly, it is rationally unsustainable for Canada to effectively project its religious morality upon other nationalities by refusing to recognize formally valid polygamous marriages on this ground.

The policy of not recognizing polygamous marriage is most likely to produce injustice in the immigration context where the admission into Canada of spouses is restricted to monogamous couples.<sup>57</sup>

Canada is, of course, entitled to regulate morality within its boundaries and there may be sound reasons to prohibit polygamy.<sup>58</sup> At present, the clearest expression of Canadian public policy on polygamy is found in the *Criminal Code* where it is broadly characterized as criminal:

293.(1) Every one who

(a) practices or enters into or in any manner agrees or consents to practice or enter into

(i) any form of polygamy, or

<sup>55</sup> *Hyde v. Hyde and Woodmansee*, (1866), L.R. 1 P & D 130 (Eng. Mat. Ct.); *Lee Shek Yew v. A.-G.B.C.*, [1924] 1 W.W.R. 753 at 754 (B.C.C.A.).

<sup>56</sup> Freedom of religion is guaranteed in section 2(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. The *Charter*, together with Canada's changing demography, argue for a more tolerant attitude toward the religious practice of others that was argued in 1959 by Professor Laskin (as he then was) in "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, in which he stated that: "Freedom of religion and of conscience will not, in the views of the courts of the common-law countries, justify human sacrifice or polygamy . . ."

<sup>57</sup> "Spouse" is defined to include only monogamous, opposite-sex couples. See *Immigration Regulations*, 1978 SOR/78-172 as am. by SOR/85-225.

<sup>58</sup> For a Muslim-feminist critique of a proposal to implement the *Shar'`a* in Canada see Shahnaz Khan, "Canadian Muslim Women and Shari'a Law: A Feminist Response to 'Oh! Canada!'" 6 CJWL/RFD (1992) 52 at 59-62.

(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.<sup>59</sup>

In the refugee context it is possible that the polygamy prohibition will not be a substantial hurdle. In *Hernandez v. Canada (Minister of Employment & Immigration)*,<sup>60</sup> the Federal Court quashed a refusal to admit seven claimants who formed a commune under the Refugee Claims Backlog Regulations, SOR/86-701, on humanitarian and compassionate grounds. The order quashing the application was granted on the ground that each applicant should have been assessed individually. In this case the Judge noted that:

While their lifestyle and what appears to frequently be a polygamous relationship within the commune are not normally acceptable within Canada, they do not appear to have been troublesome nor to have broken any Canadian laws. Apparently [the women's] relationship with [the male leader of the group] did not result from any marriage to him, as there is no suggestion that the marriages of the four who are now married to Canadian citizens or a permanent resident are bigamous, nor that the said marriages are not legal.<sup>61</sup>

The judge's interpretation of the law cannot be sustained on any reasonable reading of the *Criminal Code*. However, the group had clearly ended their polygamous activities. Had they continued the practice of polygamy it is unlikely that their applications would have been received as favourably. Arguably, however, the principle that each claimant is entitled to an individual evaluation should extend to all refugee claims and the question of being party to a polygamous marriage in Canada becomes a separate issue.

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<sup>59</sup> R.S.C. 1985., c. C-46.

<sup>60</sup> (1991), 13 Imm. L.R. (2d) 9 (F.C.).

<sup>61</sup> *Ibid.* at 12.

## VII. FEMALE GENITAL MUTILATION

While Female Genital Mutilation (FGM)<sup>62</sup> is associated with Islam, its only real connection to Islam is its geographical coincidence in North Africa and the Middle East. In spite of this, those who practice FGM typically believe that its practice is religious or at least moral,<sup>63</sup> and it is typically identified by others as an Islamic issue.

The issue was brought to the attention of Canadians with the influx, in recent years, of refugees from Somalia. The reaction has been one of horror by Canadians, mirrored by shock by Somalis at being singled out for attack.<sup>64</sup> The Quebec Human Rights Commission has given notice that parents and doctors who are party to any FGM will be prosecuted vigorously. The threat of FGM has also been used as ammunition in a custody dispute against a father from Somalia.<sup>65</sup> While the government has been called on to outlaw the practice,<sup>66</sup> the Justice Minister has stated that the *Criminal Code* provisions for assault causing bodily harm (section 267), aggravated assault (sections 7(3) and 268), and criminal negligence causing death (section 220) already criminalizes the practice.<sup>67</sup> Instead, the Justice Minister advocates "education and enforcement." In recognizing that the issue is a real one for Canadians, he stated that:

It's tragic. It has to be stopped. It's going on, at least to some extent, either because people don't understand that it's unlawful or they don't think its going to have a serious consequence.<sup>68</sup>

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<sup>62</sup> For an explanation of FGM see V. Oosterveld, "Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent" 51 U. Toronto Faculty L. Rev. 277 at 279-85.

<sup>63</sup> *Re B. (P.V.)*, [1994] C.R.D.D. No. 12 (QL); *Canadian Press* (30 September 1994) (QL).

<sup>64</sup> *Canadian Press* (1 November 1994) (QL). For a similar reaction in the UK see J. Flint, "Putting rites to wrong" *Manchester Guardian Weekly* (22 May 1994) 25.

<sup>65</sup> *Canadian Press* (14 April 1995) (QL).

<sup>66</sup> *Canadian Press* (7 March 1994) (QL).

<sup>67</sup> *Canadian Press* (8 March 1994) (QL).

<sup>68</sup> *Canadian Press* (11 April 1994) (QL).

The first case in which a person has been granted refugee status in Canada on the basis of the threat of FGM is *Re B. (P.V.)*.<sup>69</sup> In this case a Somali mother sought to remain in Canada in part to ensure that her daughter would not be forced to endure FGM as she had. The Gender Guidelines were applied to the daughter.

With respect to the mother, the Board found that due to the extremist Islamic government women had few rights with respect to the custody of children. In this case, the mother feared that the two children she had with her would be taken away by their father, as her eldest child had been, should she return to Somalia. The Board found that a woman from Somalia has "membership in a Particular social group" and that "her rights as a parent and her right to personal security are not upheld as the international human rights instruments require." The children similarly were held to be at risk from the operation of Somali law insofar as their right not to be separated from a parent unless in their best interest as recognized by Article 3 of the United Nations Convention on the Rights of the Child was not protected.

### CONCLUSION

Many of the described cases occur in the criminal context, either in the originating state or, less often, in Canada. The criminal law, which in general is a codification of the manner in which a state sanctions what it determines to be deviant behaviour, is also a basic indicator of public policy. The public policy of Islamic governments is demonstrated in the PIFs of refugee claimants; we are shown whether the law is enforced consistently, erratically, or not at all, and we see how those responsible for its administration carry out their duty. In each of the cases cited the applicant was found to lack the protection of the state, either because the state was the persecutor or the state was unable, or refused, to protect the claimant. Measured by international standards of fairness and equality, these cases expose serious flaws in the administration of justice in many Islamic states. While the Canadian refugee determination process offers relief to some of its victims, clearly it does nothing to remedy the systemic defects of other states.

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<sup>69</sup> [1994] C.R.D.D. No. 12 (QL).

Although in fairness, these cases represent the worst situations that occur in those states, the reality is that the traffic in refugees is one-way.