

# Exploring Perceptions of Cultural Difference in IRB Family Sponsorship Decisions

by

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## **Abstract**

This thesis analyzes the Canadian Immigration and Refugee Board (IRB)'s treatment of culture in recent family sponsorship decisions. Drawing upon theories of cultural difference, identity construction, and Critical Race Theory, it examines IRB decision-makers' assessments of cultural factors and their influence on the evaluation of parties' credibility. This thesis argues that appellants and applicants before the Immigration Appeal Division often had to demonstrate that their family class relationships were "performed" in accordance with the norms of their culture. Many IRB Members relied on essentialist conceptions of culture, and thus generated problematic images of both cultural minorities and Canadian society. Further, the identity of parties was often constructed in terms of defined categories such as ethnic background, religion, marital status, age, and disability. In conclusion, this thesis offers reflections on how issues of cultural identity can be more fairly and sensitively addressed by administrative tribunals such as the IRB.

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## Chapter 1

### Introduction

*Mélange*, hotchpotch, a bit of this and a bit of that is *how newness enters the world*. It is the great possibility that mass migration gives the world, and I have tried to embrace it.

Salman Rushdie<sup>1</sup>

If you are told “they are all this” or “they do this” or “their opinions are these”, withhold your judgment until all the facts are upon you. Because that land they call “India” goes by a thousand names and is populated by millions, and if you think you have found two men the same amongst that multitude, then you are mistaken. It is merely a trick of the moonlight.

Zadie Smith<sup>2</sup>

On August 2, 2007, the Immigration Appeal Division of the Immigration and Refugee Board (IRB) upheld a decision refusing a permanent resident visa to Kuldeep Kaur Goraya.<sup>3</sup> Ms. Goraya’s husband, Narinderjit Singh Goraya, had applied to sponsor her as a member of the family class. The IRB dismissed the appeal based on the finding that the marriage between them was not genuine, and had been entered into primarily to allow Ms. Goraya to immigrate to Canada as a sponsored family member.

In refusing the appeal, the IRB Member found that there were several inconsistencies in the evidence given by the husband and wife, both of whom were Sikhs from India. The Member stated that the couple’s testimony regarding the events of their meeting, engagement and subsequent marriage deviated substantially from her understanding of Indian Sikh cultural traditions, and thereby undermined the genuineness of the marriage. For example, the Member noted that Ms. Goraya, at age 24, was matched for the first time,

<sup>1</sup> Salman Rushdie, *Imaginary Homelands: Essays and Criticism, 1981-1991* (London, Granta Books, 1991) at 394.

<sup>2</sup> Zadie Smith, *White Teeth* (London: Penguin Books, 2000) at 100.

<sup>3</sup> *Goraya v. Canada (Citizenship and Immigration)*, [2007] I.A.D.D. No. 1097 (QL) [Goraya].

whereas the “typical” age of Indian Sikh women at marriage is 21 or 22.<sup>4</sup> In addition, the IRB Member remarked that the difference between the husband and wife’s educational levels—Mr. Goraya held a bachelor’s degree in political science; his wife had a Grade 12 education—was a “significant [departure] from the cultural norms.”<sup>5</sup> Finally, the tribunal noted that certain traditional rituals, such as the henna ceremony, were omitted from the marriage celebration, and that the bride was not wearing traditional red bangles.<sup>6</sup>

I offer this decision as an example of the IRB’s treatment of cultural difference in evaluating applications, and how such treatment can lead to negative determinations of the parties’ credibility. The IRB Member explicitly situates her reasoning within the context of an arranged marriage between Indian Sikhs. She uses these cultural factors to exclude the couple from her perceived understanding of what a Sikh marriage should be like, and thus excludes Ms. Goraya from Canada. However, the decision raises numerous questions about the IRB Member’s analysis: What is the source of her knowledge about the applicants’ cultural practices and traditions? How does her understanding of these traditions affect her reception of the evidence? What does her reasoning imply about her image of Indian culture, her perception of the shared characteristics of Indian women, and implicitly, her view of mainstream Canadian culture?

In this thesis, I undertake an analysis of how administrative decision-makers deal with cultural difference in the context of immigration law. I study recent decisions of the Immigration and Refugee Board in which cultural issues play a role in the Member’s

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<sup>4</sup> *Ibid.* at paras. 7, 23.

<sup>5</sup> *Ibid.* at para. 23.

<sup>6</sup> *Ibid.* at paras. 25-27.

adjudication. A review of recent IRB jurisprudence reveals that most the tribunal's decisions involving cultural considerations consist of family sponsorship appeals rendered by the IRB's Immigration Appeal Division. I test the hypothesis that parties seeking to establish the genuineness of their claims must demonstrate that their marriages, adoptions, and other family class relationships were "performed" in accordance with the norms of their culture. In other words, this thesis examines the possibility that some negative decisions result from a failure to meet the decision-maker's expectations of what the applicant's culture looks like.

Prior research conducted on the IRB's decision-making process shows that cultural considerations are vitally important to assessing the credibility of applicants before the IRB. IRB Members often held stereotyped views of minority cultures or demonstrated insufficient knowledge about different cultural contexts, leading to negative credibility decisions.<sup>7</sup> Since 2004, "cultural sensitivity" has been included in the list of behavioral competencies that forms part of the IRB's member selection criteria.<sup>8</sup> One purpose of this thesis is to ascertain whether IRB Members have truly displayed "cultural sensitivity" in recent decisions. My work explores how IRB Members handle cultural issues arising from family sponsorship cases, and how their treatment affects their evaluation of the parties' credibility. Examining these questions through the lenses of Critical Race Theory and

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<sup>7</sup> Cécile Rousseau, François Crépeau, Patricia Foxen, and France Houle, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board" (2002) 15 J. Refugee Stud. 43 at 55 [Rousseau et al.]; François Crépeau and Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System: 1989–2002" (2008) 20 Int'l J. Refugee L. 55 at 98 [Crépeau and Nakache].

<sup>8</sup> Janet Cleveland and Delphine Nakache, "Attitudes des commissaires et décisions rendues" (2005) 13 Vivre Ensemble 3 at 5 [Cleveland and Nakache]; Crépeau and Nakache, *ibid.* at 81-82.

theories of cultural difference, I identify ways in which visions of “Other” cultures are articulated by these decision-makers.

## **1.1. Rationale of this Study**

### **1.1.1. The IRB’s Regulatory Function**

My focus on the cultural aspects of IRB decisions is motivated by several considerations. To begin with, administrative tribunals such as the IRB can be regarded as instruments of social, political and economic regulation. The state’s policies and laws are not coherent; rather, they constitute “an ensemble of discourses, rules and practices.”<sup>9</sup> The state “never stops talking,” imparting its values and ideologies through different modes of regulation and sanction.<sup>10</sup> Like the state, the law also develops in an *ad hoc* and often contradictory manner.<sup>11</sup> Indeed, Kim Lane Schepppele describes legal institutions as “a site of contested meaning” upon which different perspectives struggle for dominance.<sup>12</sup>

Accordingly, the IRB could be viewed as a terrain upon which newcomers assert their claims to Canadian citizenship, and the state communicates its visions of Canada. Under this framework, we can recognize individual IRB decisions as expressions of state policy about the composition of Canadian society: whom we should let in and whom we should keep out.<sup>13</sup> We can glean insights from these decisions about how “the state”

<sup>9</sup> Wendy Brown, “Finding the Man in the State” (1992) 18 Feminist Studies 1 at 12.

<sup>10</sup> Janine Brodie, “Canadian Women, Changing State Forms, and Public Policy” in *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 1 at 13.

<sup>11</sup> Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 97-98.

<sup>12</sup> Kim Lane Schepppele, “Manners of Imagining the Real” (1994) 19 Law & Soc. Inquiry 995 at 996-997 [Schepppele].

<sup>13</sup> For example, a Citizenship and Immigration Canada report indicates that the government intended to grant 11,200 family sponsorship visas to parents and grandparents of Canadian citizens and permanent residents in 2011, versus its target of 16,200 visas in 2010: Douglas Todd, “Be honest’: Most parents will never immigrate

regards minority cultures, and how it perceives mainstream Canadian identity and values. IRB decisions thus provide a rich backdrop for examining intersecting questions of culture, race, gender, and national identity in the state's dealings with new immigrants.

### **1.1.2. Identity Construction**

Moreover, decisions rendered by IRB adjudicators contribute to our understanding of how cultural identities are constructed. As Sonia Lawrence argues, doctrinally insignificant cases such as lower court and tribunal decisions are major sites "for the construction and reproduction of race, the practice of race-ing, and the furthering of racist projects."<sup>14</sup> Textual or rhetorical analyses of such cases can help to illuminate problematic representations of minority cultures, as well as visions of the mainstream culture. Thus, studying the treatment of cultural difference by IRB Members hearing sponsorship cases reveals the ways in which racial and cultural identities are shaped by the legal system.

I opened this chapter with two quotations. The first reflects the view that all cultures are influenced and shaped by interaction with other groups, particularly within the context of immigration. The second emphasizes that cultures are inherently diverse, not homogenous. In a multicultural and multiethnic nation such as Canada, it is especially important for public decision-making bodies to avoid "misrecognition" of diverse cultures

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to Canada" *The Vancouver Sun* (26 February 2011), online: Vancouver Sun <<http://communities.canada.com/vancouversun/blogs/thesearch/archive/2011/02/26/be-honest-most-parents-will-never-immigrate-to-canada.aspx>>.

<sup>14</sup> Sonia N. Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom (2001) 13 Cdn J. of Women & L. 107 at 124, note 85 [Lawrence].

through stereotyping and marginalization.<sup>15</sup> Courtroom and tribunal decisions that propagate essentialist or overly simplistic images of minority cultures can inflict harm upon people of different backgrounds. We must therefore evaluate how public institutions like the IRB assess identity-related claims, in order to develop normative criteria for doing so in a fair and sensitive manner.<sup>16</sup>

### **1.1.3. Distributive Justice**

The adjudication of immigration cases is also a matter of distributive justice. A positive IRB decision, leading to the granting of permanent resident status and eventually, Canadian citizenship, is an invaluable social good. Ayelet Shachar notes that entitlement to birthright citizenship in an affluent country such as Canada is a “significant intergenerational [transfer] of wealth and power, as well as security and opportunity.”<sup>17</sup> Indeed, the presumption underlying assessments of the genuineness of family relationships is that foreign nationals are liable to enter “bad faith” relationships for the sole purpose of immigrating to Canada.<sup>18</sup> Thus, if we regard Canadian citizenship and immigration laws as linked to the allocation of “shares in human survival on a global scale,”<sup>19</sup> it becomes evident that family sponsorship rulings are a matter of redistribution.

<sup>15</sup> Charles Taylor, “The Politics of Recognition” in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, Princeton University Press, 1994) 25 at 25 [Taylor].

<sup>16</sup> Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (New York: Oxford University Press, 2009) at 9-11 [Eisenberg].

<sup>17</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009) at 4 [Shachar, *Birthright*].

<sup>18</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 4 [IRPR].

<sup>19</sup> Shachar, *Birthright*, *supra* note 17 at 12.

#### **1.1.4. Understanding Credibility Assessments**

Further, mapping the treatment of cultural difference in IRB decisions is a useful exercise for the practice of immigration law. For legal practitioners, it is imperative to understand how IRB decision-makers assess the credibility of parties appearing before them. Credibility is the touchstone of successful IRB hearings, since oral testimony is generally the primary source of evidence in both refugee cases and family sponsorship cases.<sup>20</sup> As detailed in Chapter 3 of this thesis, the cultural norms governing family relationships are key to establishing credibility in hearings before the Immigration Appeal Division. In several decisions, IRB Members questioned the genuineness of relationships where parties appeared to deviate from their cultural traditions. Hence, this work reviews the IRB's adjudication of cultural issues to gain a deeper understanding of how IRB decision-makers evaluate credibility.

#### **1.1.5. Public Policy**

Finally, a study of family sponsorship decisions is timely from a public policy perspective. In Canada, the topic of spousal sponsorship has become an increasingly hot-button issue.<sup>21</sup> Cases of "marriage fraud," in which foreign nationals abandon their Canadian spouses upon receiving permanent resident status, have received heightened media attention.<sup>22</sup> Immigration officials have also raised concerns that people are entering

<sup>20</sup> Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 106-107 [Dauvergne].

<sup>21</sup> Facilitating the reunification of family members is one of the stated goals of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 3 [IRPA]. The provision states:

3. (1) The objectives of this Act with respect to immigration are [...]  
 (d) to see that families are reunited in Canada.

<sup>22</sup> See "New immigration rules aim to weed out marriage fraud" *CBC News* (28 September 2010), online: CBC News <<http://www.cbc.ca/news/story/2010/09/28/immigration-marriages-sponsorship-survey.html>>. A

“marriages of convenience” in order to facilitate the entry of the sponsored spouse into Canada.<sup>23</sup> These types of cases are viewed as particularly widespread among members of cultures in which arranged marriages are common.<sup>24</sup> Conversely, immigrant advocates argue that officials have a tendency to automatically flag arranged marriages as fraudulent.<sup>25</sup> Immigrant groups claim that this position ignores the social reality of many traditional arranged marriages, in which “the relationship really begins after the marriage happens.”<sup>26</sup> As a result, parties from India, Sri Lanka, and other countries where marriages are typically arranged face additional difficulties in proving the genuineness of their relationships to immigration officials.

In March 2011, Citizenship and Immigration Canada (CIC) proposed changes to the *Immigration and Refugee Protection Regulations* to prevent individuals from entering non-*bona fide* relationships in order to facilitate entry into Canada. Firstly, the proposed amendments would introduce a period of “conditional permanent residence” for spouses and common-law partners sponsored under the *IRPA*, requiring them to remain in a relationship with

documentary film entitled *True Love or Marriage Fraud? The Price of Heartache*, following the stories of Canadians who sponsored spouses to Canada, was aired by CBC News Network in November 2010: “True Love or Marriage Fraud?” *The Passionate Eye*, online: CBC

<<http://www.cbc.ca/documentaries/passionateeyeshowcase/2010/truelove>>.

<sup>23</sup> David McKie, “Marriages of convenience problems persist” *CBC News* (10 November 2010), online: CBC News <<http://www.cbc.ca/news/canada/story/2010/11/07/david-mckie-marriages-of-convenience.html>>.

<sup>24</sup> “Arranged marriages risk immigration scrutiny” *CBC News* (3 May 2010), online: CBC News <<http://www.cbc.ca/news/canada/toronto/story/2010/05/03/arranged-marriages.html>> [“Arranged marriages”].

<sup>25</sup> Avvy Yao-Yao Go, Anita Balakrishna and Atulya Sharma, “Marriage of Convenience” *The Toronto Star* (6 April 2011), online: TheStar.com <<http://www.thestar.com/opinion/editorialopinion/article/970479--marriage-of-convenience>>.

<sup>26</sup> “Arranged marriages”, *supra* note 24.

their sponsor for a period of two years.<sup>27</sup> Secondly, CIC proposes barring sponsors who became permanent residents after first being sponsored as a spouse, common-law or conjugal partner from sponsoring a new spouse, common-law or conjugal partner for a five-year period.<sup>28</sup> Immigrant advocates maintain that such initiatives would impose serious hardships on sponsored partners, and that “characterizing relationship breakdown as marriage fraud” engenders a negative portrayal of newcomers to Canada.<sup>29</sup>

Given the controversy generated by these issues, an examination of how IRB Members evaluate parties’ credibility with respect to cultural issues in family sponsorship cases is opportune. Such an examination could shed light on whether negative credibility decisions are mainly due to fraudulent relationships, or whether some can be attributed to cultural misunderstandings or flawed interpretations of cultural norms.

## **1.2. Overview of the Thesis**

This work is divided into three chapters in addition to the present one. Chapter 2 sets out different theoretical perspectives which I use to frame my discussion of IRB decisions. First, I give an overview of the relevant literature on culture and cultural identity. I explain my belief that questions of cultural identity are important and deserve

<sup>27</sup> Notice (Department of Citizenship and Immigration), C. Gaz. 2011.I.1077, online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-26/html/notice-avis-eng.html#d114>>.

<sup>28</sup> *Regulations Amending the Immigration and Refugee Protection Regulations [Spousal Sponsorship]*, C. Gaz. 2011.I.1251, online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-04-02/html/reg3-eng.html>>.

<sup>29</sup> See “Statement on Proposed ‘Conditional Permanent Residence’ for sponsored spouses” (April 2011), online: Canadian Council for Refugees <<http://ccrweb.ca/en/statement-proposed-conditional-permanent-residence-sponsored-spouses>>, which was signed by numerous immigrant groups and human rights organizations. See also the Canadian Bar Association’s submissions to the government regarding the proposed amendments: Canadian Bar Association, “Immigration and Refugee Protection Regulations – Amendments (5-Year Sponsorship Bar Residence for Spousal Sponsors): Letter to Citizenship and Immigration Canada,” online: Canadian Bar Association <[http://www.cba.org/CBA/submissions/2011eng/11\\_28.aspx](http://www.cba.org/CBA/submissions/2011eng/11_28.aspx)>.

proper adjudication by public decision-making bodies. I highlight the problems of an essentialist view of culture and make a case for a constructivist approach that sees culture as complex, fluid and heterogeneous. I further argue that cultural identity can be envisaged as the repeated performance of norms. In the second part of the chapter, I outline various tenets of Critical Race Theory, including intersectionality, anti-essentialism, and the legal construction of race. I describe how these concepts help us to understand and critique IRB decisions dealing with cultural difference. Finally, in the third part of the chapter, I examine accounts of immigration law and its role in the production of identity.

Chapter 3 consists of a critical analysis of recent IRB decisions dealing with cultural difference. After briefly explaining the IRB's structure and procedures, I give an overview of recent criticisms of the IRB's decision-making process. Although the studies discussed in this section involve refugee decisions, the authors' critiques are also relevant to family sponsorship cases. The bulk of the chapter presents my research of published IRB decisions from the years 2004 to 2010. I begin by analyzing the different ways in which IRB Members understood their role in adjudicating cultural considerations that arise in family sponsorship decisions. Next, I explore the specific cultural issues emerging from cases concerning the genuineness of family class relationships, including marriages, adoptions, and common-law and conjugal partnerships. I also review decisions in which appellants before the IRB invoke a "cultural duty of care" toward their parents.

In my analysis, I apply the theoretical framework set out in Chapter 2 to highlight the themes and patterns emerging from these decisions. I argue that various IRB adjudicators failed to address issues of cultural difference in a sensitive and informed

manner. These Members relied on essentialist conceptions of culture and thus generated questionable images of both “Other” cultures and “mainstream” Canadian culture. In many decisions, parties were perceived as less credible if they failed to “perform” their family relationships in accordance with their cultural norms. Further, I argue that parties’ identities were often defined in terms of categories such as ethnic background, religion, marital status, age, and disability, which were used to establish the genuineness of their relationships.

Lastly, in Chapter 4, I present my reflections on how issues of cultural identity can be more fairly and sensitively assessed by the IRB. First, I discuss the production of “facts” about cultures and suggest strategies for how IRB Members adjudicating family sponsorship decisions could access accurate and up-to-date cultural information. Second, I argue that IRB Members should foster inclusiveness and respect for diverse cultures, including a willingness to acknowledge new perspectives and reflect upon incorrect assumptions and biases. Finally, I assert that enhancing the level of diversity among IRB decision-makers will help to address the problems of cultural essentialism identified in Chapter 3.

## Chapter 2

# Culture, Race, and Immigration Law: A Theoretical Framework

This chapter reviews different theoretical approaches in order to provide a framework for studying recent Immigration and Refugee Board (IRB) decisions. I highlight the relevant ideas of these theories, which are used to identify and critique the ways in which cultural differences are perceived and handled by IRB Members. The ideas discussed in this chapter will inform my analysis of the IRB decisions outlined in Chapter 3.

The first part of the chapter examines accounts of culture and cultural identity. I begin by articulating my belief that questions of cultural identity are important and should be assessed fairly and sensitively by public institutions. Next, I discuss the problematic representations of culture engendered by an essentialist approach, arguing that a constructivist view of culture can help to mitigate these problems. I also develop the notion of cultural identity as a performance governed by the expectations of the majority. The second part of the chapter describes various analytical tools and perspectives drawn from Critical Race Theory. I argue that concepts such as intersectionality, anti-essentialism, and the legal construction of race supplant and deepen our understanding of cultural identity and its relationship to the legal system. Finally, in the third part, I explore the links between immigration law and identity construction. This section canvasses the work of other authors on this topic, describing various ways in which identity is produced in the context of immigration law.

## 2.1. Conceptions of Cultural Difference

### 2.1.1. The Importance of Culture

The significance of cultural identity as a matter of public policy is widely recognized by scholars. Writings on multiculturalism focus on assessing the identity claims of minority groups and responding to the needs of an increasingly diverse polity.<sup>30</sup> While some theorists oppose policies of multiculturalism,<sup>31</sup> it is impossible to ignore the social fact of cultural pluralism in contemporary democracies such as Canada.<sup>32</sup>

The debates about multiculturalism are too numerous and varied to outline in detail here. In this thesis, I will not discuss whether, and to what extent, states should accommodate cultural difference. Instead, I take for granted that “[c]ulture matters, as part of the way we give meaning to our world, as an important element in self-ascribed identity.”<sup>33</sup> Put simply, I think that cultural identity<sup>34</sup> is a central aspect of being human,

<sup>30</sup> “Multiculturalism” signifies both the social fact of cultural pluralism and policies aimed at promoting or maintaining cultural diversity. Here, I am referring to the latter context. For example, Charles Taylor’s seminal essay advocates the equal recognition of cultural identities and argues that “[n]onrecognition or misrecognition” of cultures can inflict “real damage”: Taylor, *supra* note 15 at 25. Will Kymlicka argues for the preservation of minority rights within liberal societies to the extent that such rights are consistent with liberal principles of freedom and autonomy: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995). Iris Young argues that claims of difference can be used to create institutions and social structures that promote respect for diverse groups: Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) [Young, *Justice*]. Ayelet Shachar discusses the challenges of accommodating group-based rights and simultaneously protecting the interests of vulnerable group members: Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001) [Shachar, *Multicultural*].

<sup>31</sup> See e.g. Susan Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 9 [Okin]; Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001).

<sup>32</sup> Statistics Canada has projected that by 2031, between 25% and 28% of Canada’s population will be foreign-born, while between 29% and 32% of the population would belong to a visible minority group: Statistics Canada, “Media advisory: Canada’s diversity in 2031” (5 March 2010), online:

<[http://www42.statcan.ca/smr09/smr09\\_015-eng.htm](http://www42.statcan.ca/smr09/smr09_015-eng.htm)>.

<sup>33</sup> Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007) at 15 [Phillips].

and thus ought to be recognized by states.<sup>35</sup> Accordingly, this work is based on the assumption that cultural identity is something that should be taken seriously by public bodies, including administrative tribunals such as the IRB.

In her book *Reasons of Identity*, Avigail Eisenberg makes the compelling argument that identity-based claims have a legitimate place in legal and political decision-making, and therefore, public institutions require better guidance to assess such claims in a just and transparent manner.<sup>36</sup> Eisenberg notes that an increasing number of identity-based claims are being advanced in multicultural societies, and that public institutions should have the capacity to acknowledge and respect the distinctive ways of life developed by minority communities.<sup>37</sup> She further argues that developing criteria by which to assess identity claims will “engender institutional humility,” enabling public decision-makers to interrogate the biases and assumptions underlying their supposedly neutral practices.<sup>38</sup> Eisenberg maintains that the institutional capacity to fairly assess claims of religious, cultural, and racialized difference is an important feature of a just society.

<sup>34</sup> Much scholarly energy has been devoted to defining “culture”, “identity”, and “cultural identity”. I use these terms interchangeably and my understanding of them is broad. For example, Avigail Eisenberg defines “identity” as “the attachments that people have to particular communities, ways of life, sets of beliefs, or practices that play a central role in their self-conception or self-understanding”: Eisenberg, *supra* note 16 at 18.

<sup>35</sup> I also share Bhikhu Parekh’s belief that cultural diversity is inherently valuable, but this argument is beyond the scope of this chapter: Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2d ed. (New York: Palgrave Macmillan, 2006) at 167.

<sup>36</sup> Eisenberg, *supra* note 16 at 3.

<sup>37</sup> *Ibid.* at 9-11.

<sup>38</sup> *Ibid.* at 10-11, 25-28.

Eisenberg's argument is supported by other writings. For instance, Robert Currie invokes the equality and multiculturalism provisions of the *Charter*<sup>39</sup> to argue that Canadian courts and judges should move beyond perceptions of formal equality to take into account the perspectives of socially diverse litigants.<sup>40</sup> Alison Dundes Renteln advocates the admission of cultural evidence in American criminal law on the basis of a right to culture that is grounded in concepts of liberty as well as in international law.<sup>41</sup> In the Supreme Court of Canada decision *R. v. R.D.S.*, Justices L'Heureux-Dubé and McLachlin's concurring judgment emphasizes the importance of examining the social and cultural context within which litigation arises.<sup>42</sup>

Adopting the position of these writers, my discussion of cultural identity is thus premised on the belief that culture matters, and that legal and administrative decision-makers should therefore develop the competence to assess identity claims in a fair, sensitive and informed manner.

### 2.1.2. Problematic Representations of Culture

Theorists have analyzed the problematic representations of culture and encultured subjects<sup>43</sup> that can arise within legal discourse.<sup>44</sup> As Sonia Lawrence maintains: "When

<sup>39</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, ss. 15, 27, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [Charter].

<sup>40</sup> Robert J. Currie, "Whose Reality? Culture and Context before Canadian Courts" in Stephen Tierney, ed., *Multiculturalism and the Canadian Constitution* (Vancouver: UBC Press, 2007) 182 at 183-184 [Currie].

<sup>41</sup> Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004) at 211-14 [Renteln].

<sup>42</sup> *R. v. R.D.S.*, 1997 SCC 324, [1997] 3 S.C.R. 484 at paras. 42-49.

<sup>43</sup> I borrow this term from Audrey Macklin, "Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration" in Anna Koretweg and Jennifer Selby, eds., *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (Toronto: University of Toronto Press) [forthcoming].

<sup>44</sup> See e.g. Leti Volpp, "Talking 'Culture': Gender, Race, Nation and the Politics of Multiculturalism" (1996) 96 Colum. L. Rev. 1573 ["Talking 'Culture'"]; Leti Volpp, "Blaming Culture for Bad Behavior" (2000) 12 Yale J. L.

faced with cultural questions, the legal system often produces distorted and questionable versions of the content of non-mainstream cultures.”<sup>45</sup> In such cases, the perspective of the “Other” is rendered invisible, while their image is stereotyped and marginalized by the dominant culture.<sup>46</sup>

First of all, the law often propagates an essentialist image of people from non-European immigrant cultures. For example, Sherene Razack argues that women’s claims for gender-based refugee status in Canada are most successful where the women are presented as victims of exceptionally patriarchal cultures and communities.<sup>47</sup> Essentialist portrayals treat culture as monolithic and homogenous, despite acute differences in values, traditions or practices that often exist among members of the same culture.<sup>48</sup> Uma Narayan has dubbed this phenomenon “the Package Picture of Cultures,” which is an understanding of cultures as “neatly wrapped packages … possessing sharply defined edges or contours, and having distinctive contents.”<sup>49</sup> An essentialist view effaces any dissent within cultures

& Hum. 89 [“Blaming Culture”]; Leti Volpp, “The Culture of Citizenship” (2007) 8 *Theoretical Inquiries in Law* 571 [“Culture of Citizenship”]; Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) [*Looking White People*]; Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002) [Benhabib]; Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (New York: Cambridge University Press, 2007) [Song]; Young, *Justice*, *supra* note 30; Phillips, *supra* note 33; Eisenberg, *supra* note 16; Lawrence, *supra* note 14.

<sup>45</sup> Lawrence, *ibid.* at 111.

<sup>46</sup> Young, *supra* note 30 at 58-60.

<sup>47</sup> *Looking White People*, *supra* note 44 at 107-125. Razack writes that such images rely on “readily accessible orientalist tropes,” indicating that Indian and continental African women are more easily perceived as “exotic victims” of patriarchy than, for example, African-Caribbean women.

<sup>48</sup> “Talking ‘Culture’”, *supra* note 44 at 1588-89 [“Talking ‘Culture’”]; Benhabib, *supra* note 44 at 4-5; Eisenberg, *supra* note 16 at 61-62.

<sup>49</sup> Uma Narayan, “Undoing the ‘Package Picture’ of Cultures” (2000) 25 *Signs: J. Women in Culture & Soc’y* 1083 at 1084 [“Package Picture”].

and assumes that cultural values and practices are shared by all members. This stance fails to recognize that cultural traditions are contested, variable, and change over time. For instance, Narayan observes that marriage for girls at puberty is no longer viewed as "customary" among middle-class Indian families, while some Indian women are also challenging the tradition of arranged marriages.<sup>50</sup>

In addition to creating a one-dimensional portrait of "Other" cultures, essentialism also produces a distorted vision of the mainstream culture. The West is seen as liberal and progressive in opposition to the backward, traditional values of minority cultures.<sup>51</sup> Accordingly, principles such as democracy, tolerance and equality are construed as uniquely "Western" values. As Anne Phillips notes, "[t]he idea that support for these values might end at the borders of Europe ... draws on and reinforces stereotypical distinctions between liberal and illiberal, modern and traditional, Western and non-Western cultures."<sup>52</sup> Often, the discussion is framed in terms of gender: non-Western cultures are viewed as "bad for women,"<sup>53</sup> while Western society is seen as a paragon of gender equality. Leti Volpp asserts that such a perspective ignores that "'Western' or 'American' culture is also patriarchal, and non-European immigrant women are also feminists."<sup>54</sup>

<sup>50</sup> Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism" in Uma Narayan and Sandra Harding, eds., *Decentering the Center: Philosophy for a Multicultural, Postcolonial, and Feminist World* (Bloomington, IN: Indiana University Press: 2000) 80 at 90 ["Essence of Culture"].

<sup>51</sup> "Talking 'Culture'", *supra* note 44 at 1576-80. As Razack states: "Cultural differences are used to explain oppression; if these differences could somehow be taken into account, oppression would disappear": *Looking White People*, *supra* note 44 at 61.

<sup>52</sup> Phillips, *supra* note 33 at 23.

<sup>53</sup> See Okin, *supra* note 31.

<sup>54</sup> "Talking 'Culture'", *supra* note 48 at 1577. Volpp further notes that perceptions of the subjugation of women in the Third World were historically used to justify colonialist projects: *ibid.* at 1602. See also

Essentialist portraits also ignore characteristics that are shared by both Western and non-Western societies, since mainstream culture is presented as completely distinct from "Other" ideologies and traditions.<sup>55</sup> However, essentialism casts a selective gaze on minority cultural practices, failing to acknowledge any similarity to Western cultural practices. For example, *sati* murders and dowry murders of women in India are denounced as manifestations of a barbaric culture, but no parallel is drawn with North American women who are murdered in equally horrific ways using guns.<sup>56</sup> Sarah Song calls this "the diversionary effect," noting that by focusing on the patriarchal practices of minority cultures, the majority can divert attention from its own gender hierarchies.<sup>57</sup>

Furthermore, liberal democracies and their institutions are viewed as "culture-free" or culturally neutral in comparison with encultured minority subjects. As Wendy Brown writes:

Liberal politics and law are self-represented as secular not only with regard to religion but also with regard to culture, and above and apart from both. This makes liberal legalism at once cultureless and culturally neutral (even as legal decisions will sometimes allude to standards of 'national culture' or 'prevailing cultural norms').<sup>58</sup>

Whereas culture tends to be equated with non-Western or minority culture, it remains "relatively invisible to those in the hegemonic position, who rarely cite culture as

<sup>55</sup> "Blaming Culture", *supra* note 44 at 108; Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (New York: Routledge, 1997) at 17-21 [*Dislocating Cultures*].

<sup>56</sup> See generally Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978) [Said].

<sup>57</sup> *Dislocating Cultures*, *supra* note 54 at 113-117.

<sup>58</sup> Song, *supra* note 44 at 7.

<sup>58</sup> Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006) at 170 [Brown].

explaining why they think or act the way they do.”<sup>59</sup> Thus, the cultural specificities of dominant groups and institutions are treated as universal rules of conduct.<sup>60</sup> This attitude is particularly prevalent in legal discourse, which is rife with the language of abstract universalism.<sup>61</sup> However, Brown contends that liberalism itself is “a cultural form,” with its own values, assumptions, and practices.<sup>62</sup> Similarly, Volpp challenges the presumption that law and democratic citizenship are devoid of culture and based on universal values, in contrast with “culturally-laden Others” whose practices must be tolerated or banned by the state.<sup>63</sup>

Such perceptions also tend to regard members of minority groups as motivated by cultural dictates to act in certain ways. Volpp maintains that deviant behaviour by people from racialized minorities is generally perceived to be reflective of their group’s cultural norms.<sup>64</sup> She cites a highly publicized Texas case in which a 22-year-old immigrant man from Mexico had a child with a 14-year-old girl, also a Mexican immigrant. The man’s defence attorney and the press depicted the case as a “collision” between Mexican and American values, suggesting that the couple was merely following Mexican customs. By

<sup>59</sup> Phillips, *supra* note 33 at 63. See also *Dislocating Cultures*, *supra* note 54 at 100-112 (arguing that dowry-murders of women in India are viewed as incidents of “death by culture”, but no “cultural” explanations are offered for the high rates of domestic violence in the United States).

<sup>60</sup> Phillips, *ibid.* at 64.

<sup>61</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 60 [Minow]. To give an example, Article 6 of the *International Covenant on Civil and Political Rights* sets out a right to life, which is narrowly defined as a right to be free from “arbitrary deprivation of life” through state action. But this does not wholly reflect the experiences of women, who often encounter threats to their right to life in the private, rather than the public, spheres: see Hilary Charlesworth, “Human Rights as Men’s Rights” in Julie Peters and Andrea Wolper, eds., *Women’s Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) 103 at 107.

<sup>62</sup> Brown, *supra* note 58 at 23. See also Benjamin Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 *Can J.L. & Juris.* 245 at 246-247 (arguing that law is, in itself, a cultural system and that the interaction between religion and the constitutional rule of law should be viewed as a “cross-cultural encounter”).

<sup>63</sup> “Culture of Citizenship”, *supra* note 44 at 576-77.

<sup>64</sup> “Blaming Culture”, *supra* note 44 at 95-96.

contrast, a case with near-identical facts involving a white couple from Maryland was characterized as child sexual abuse—an aberration in the pattern of normal white people's behaviour.<sup>65</sup> Phillips argues that culture is "employed in a discourse that denies human agency, defining [non-Western] individuals through their culture, and treating culture as the explanation for virtually everything they say or do."<sup>66</sup> On the other hand, people belonging to the majority culture are viewed as acting out of autonomous choice. In the latter cases, deviations from socially acceptable behaviour are justified by individual character flaws rather than attributed to the norms of the dominant culture.<sup>67</sup>

Moreover, the language of culture often masks discussions about race, as perceptions of cultural difference become correlated with racial or ethnic difference.<sup>68</sup> For example, allusions to a so-called "culture of poverty" among African-Americans suggest that the latter are governed by cultural practices that foster poverty, violence and dysfunction. In this way, racist ideas are couched in the rhetoric of cultural difference.<sup>69</sup> Lawrence describes the way this phenomenon plays out in a judicial setting:

What goes on in courtrooms can be seen as a modern project of racialization, a more 'sophisticated' version of the blunt attribution of inferior traits to non-Whites that thereby attaches the inferiority label not to the individuals but rather to their culture. In belittling the content of other cultures and depicting the members of these cultures as either ignorant victims or zealous followers of deviant norms, legal processes are

<sup>65</sup> "Blaming Culture", *ibid.* at 91-93.

<sup>66</sup> Phillips, *supra* note 33 at 9. See also Shachar, *Multicultural*, *supra* note 30 at 66 (arguing that in such accounts, women who remain loyal to minority group's cultures are viewed as "victims without agency").

<sup>67</sup> "Blaming Culture", *supra* note 44 at 96; Phillips, *ibid.* at 64. As Brown states: "[W]e have culture while culture has 'them,' or we *have* culture while they *are* a culture. Or, we are a democracy while they are a culture": *supra* note 58 at 151.

<sup>68</sup> "Talking Culture", *supra* note 44 at 1600-02; Phillips, *supra* note 33 at 53-56.

<sup>69</sup> "Talking Culture", *ibid.* at 1601, n. 137.

assigning traits to people. Of course, these ‘traits’ are ostensibly based on cultural, rather than racial, affiliations.<sup>70</sup>

Thus, culture becomes a euphemism for race or ethnicity, and may conflate “cultural conflicts” with issues of racial and social inequality.<sup>71</sup>

But despite the challenges generated by such problematic representations of culture, it is not feasible to reject the notion of culture- or identity-based claims altogether. While acknowledging that cultures are contested and fluid, Maneesha Deckha argues that reliance on an essentialized concept of culture may be justified for strategic reasons, for instance as a legal tool to guard against cultural disintegration or the exploitation of vulnerable minority groups.<sup>72</sup> Deckha adopts Volpp’s “differentiated approach”, which advocates the strategic use of essentialist notions of culture to “achieve anti-subordination ends.”<sup>73</sup> She cites the example of a Turkish Muslim girl in France who claims the right to choose to wear *hijab* in school because it is part of her cultural and religious identity. While such a claim may perpetuate an essentialist view of traditional Turkish or Muslim culture, it would not subordinate the rights of any other group members (e.g., another girl who did not wish to wear *hijab*).<sup>74</sup> As Deckha explains, “a claim that did not advance [gendered] stereotypes or otherwise impugn the autonomy or equality of vulnerable internal cultural members, but was nevertheless essentialist at a discursive level, might be permissible if it was presented

<sup>70</sup> Lawrence, *supra* note 14 at 112.

<sup>71</sup> Phillips, *supra* note 33 at 54; *Looking White People*, *supra* note 44 at 60.

<sup>72</sup> Maneesha Deckha, “Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law” (2004) 16 Can. J. Women L. 14 at 36-38 [Deckha].

<sup>73</sup> *Ibid.* at 41. See also “Talking Culture”, *supra* note 44 at 1612.

<sup>74</sup> Deckha, *ibid.* at 45-46.

as contingent and particularized.”<sup>75</sup> Hence, this approach risks reinforcing essentialist stereotypes in order to achieve political gains for vulnerable groups.<sup>76</sup>

While the language of culture-based claims can be seen in many instances as essentializing non-white and non-Western groups, there is reason to believe that culture-based claims still have a legitimate role in protecting minority beliefs and practices. As stated earlier in this chapter, culture is an important facet of human life which should be taken seriously by public decision-makers. While it is important to avoid reinforcing harmful stereotypes, it is not feasible to adopt a “colour-blind” approach which ignores cultural distinctiveness altogether. Instead, public institutions should develop strategies for assessing cultural claims in an informed and equitable manner.

### **2.1.3. Constructivist Accounts of Culture**

In response to the conceptions of culture described in the previous section, some theorists have developed an alternative view of culture as “a shared framework of meaning that emerges in and through social interactions.”<sup>77</sup> Constructivist accounts understand human cultures as constituted through the narratives and practices of their members. Seyla Benhabib argues that cultures are “constant creations, re-creations, and negotiations of imaginary boundaries between ‘we’ and the ‘other(s)’.”<sup>78</sup> Constructivism envisages people

<sup>75</sup> *Ibid.* at 50. Richard Delgado and Jean Stefancic also recognize that essentialism has a political dimension and “entails a search for the proper unit, or atom, for social analysis and change”: Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001) at 56 [Delgado and Stefancic].

<sup>76</sup> Deckha points out that the law contains many other contested terms, such as “women”. Despite the contested nature of this category, there are few calls to remove the category of “women” from legal discourse: *ibid.* at 36-37. See also Phillips, *supra* note 33 at 29-30.

<sup>77</sup> Song, *supra* note 44 at 31.

<sup>78</sup> Benhabib, *supra* note 44 at 8.

as agents who produce and define their own culture and identity, drawing upon a wide range of local, national, and global resources.<sup>79</sup> Under this framework, culture is fluid, hybrid and evolving, and does not possess clearly delineated boundaries.<sup>80</sup> Moreover, cultures are not monolithic, but internally contested.<sup>81</sup>

The constructivist approach also recognizes that cultures are the product of historical and political processes.<sup>82</sup> While essentialist portrayals tend to present cultures as preexisting entities rather than human constructs, a historical analysis can reveal the contexts in which certain values and practices are deemed to be key components of a particular culture. For instance, Narayan observes that *sati* came to be regarded as a central Indian tradition only in the nineteenth century, following public debates on the practice among British colonials and certain Indian elites. As a result of these debates, *sati* grew to acquire an “emblematic status” as a symbol of “Indian culture” that transcended the reality of its limited actual practice.<sup>83</sup> Cultural norms also reflect a political process, as members of a group struggle for dominance in defining the practices and beliefs of their community.<sup>84</sup> In situations where the norms of a minority culture are contested, the voice of the

<sup>79</sup> “Blaming Culture”, *supra* note 44 at 98; Phillips, *supra* note 33 at 45.

<sup>80</sup> Benhabib, *supra* note 44 at 7-8; Phillips, *ibid.* at 43-45; Song, *supra* note 44 at 5; “Package Picture”, *supra* note 49 at 1084; Lawrence, *supra* note 14 at 116. This implies that cultures are also resilient. As Song argues, “the different strands of a culture are loosely coupled such that the loss or change of one strand does not necessarily bring down the entire culture, leading to cultural extinction or collapse”: *ibid.* at 32.

<sup>81</sup> Benhabib, *ibid.* at 61; Song, *ibid.* at 32; “Essence of Culture”, *supra* note 50 at 82; Phillips, *ibid.* at 27-28.

<sup>82</sup> “Essence of Culture”, *supra* note 44 at 86-88. See also *Dislocating Cultures*, *supra* note 54 at 46-59.

<sup>83</sup> “Essence of Culture”, *ibid.* at 87-88.

<sup>84</sup> Shachar, *Multicultural*, *supra* note 30 at 49.

community may be represented by a single “authentic insider”<sup>85</sup> despite the existence of divergent views within the community.<sup>86</sup>

Further, constructivism sees cultural norms as influenced by outsiders and shaped by interactions with other cultures.<sup>87</sup> To begin with, individuals have multiple allegiances and often claim membership within a wide range of communities and cultures.<sup>88</sup> In addition, focusing on the dynamics of inter-group relations can be useful to assessing cultural claims.<sup>89</sup> This is illustrated by the dilemma of First Nations who seek to prove that their distinctive practices are Aboriginal rights protected under Canadian law. Under the test set out by the Supreme Court in *R. v. Van der Peet*, Aboriginal right claimants must establish that their practices existed prior to “contact” with European settlers. However, many traditional activities, such as the commercial salmon trade of the Sto:lo First Nation, arose as a result of the relations between Europeans and Aboriginal peoples.<sup>90</sup> In this way, analyzing intercultural relations can lead to a deeper, more informed understanding of cultural values and practices.

Constructivism also examines the role of the state in shaping minority cultures. Volpp gives the example of Asian immigrant garment workers in the United States whose willingness to work under abysmal conditions in sweatshops is attributed to their

<sup>85</sup> This term is attributed to Narayan: *Dislocating Cultures*, *supra* note 54 at 142-150.

<sup>86</sup> See Lawrence, *supra* note 14 at 127-129.

<sup>87</sup> Benhabib, *supra* note 44 at 8; Parekh, *supra* note 35 at 163; Song, *supra* note 44 at 36.

<sup>88</sup> Shachar, *Multicultural*, *supra* note 30 at 70.

<sup>89</sup> Song, *supra* note 44 at 5-8.

<sup>90</sup> Eisenberg, *supra* note 16 at 122-125, citing *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4<sup>th</sup>) 289 at paras. 44-65. A more promising solution lies in the “pre-control” test for Métis rights set out in *R. v. Powley*. To qualify as a Métis right, the activity must have been integral to a particular Métis community’s distinctive existence before Europeans effectively achieved political and legal control in a given area: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at paras. 36-27.

“culture”. Describing the plight of such employees as “cultural” erases the complicity of government agencies, multinational corporations, and garment retailers in their exploitation.<sup>91</sup> Constructivists seek to uncover how discussions of cultural difference mask the ways in which the state affects the construction of non-mainstream identities.<sup>92</sup>

In sum, adopting a constructivist, rather than an essentialist, approach allows for a more complex and nuanced analysis of culture. Constructivism recognizes that cultures are fluid, heterogeneous, and evolving, shaped by members’ interactions with each other, with other cultures, and with the state. I do not deny that cultures have essential aspects, that people’s behaviour is often heavily influenced by the norms (or imperatives) of their culture, or that many cultural traditions and practices endure over time.<sup>93</sup> However, I wish to examine culture through the more sophisticated lens that has become available for analyses of gender and class—not as the sole determinant of individual behaviour, but as a significant force that shapes and influences it.<sup>94</sup> As Phillips writes: “This means understanding cultural pressures, but not assuming that culture dictates.”<sup>95</sup>

<sup>91</sup> “Talking Culture”, *supra* note 48 at 1591, n. 85. This stereotyped vision of hard-working Asian immigrants is echoed in former Etobicoke city councillor Rob Ford’s statement that “Oriental people work like dogs ... they sleep beside their machines”: Donovan Vincent, “Ford refuses to apologize for Asian comments” *The Toronto Star* (7 March 2008), online: TheStar.com <<http://www.thestar.com/News/GTA/article/310319>>.

<sup>92</sup> See also Song, *supra* note 44 at 36-37. I return to the concept of social and legal constructions of identity when I discuss Critical Race Theory later in this chapter.

<sup>93</sup> Catherine Dauvergne argues: “What is interesting, and possible, for legal scholars is to analyze the legal (and therefore social) constructions of identity, even if identity also has essential aspects. An identity-focused analysis of the law necessarily lines up on the constructivist side of the debate. The pitfall for legal analysts is not so much being entangled in the essentialist-constructivist debate that we are ill-equipped to navigate, but rather falling into a version of social constructionism that is completely circular”: Dauvergne, *supra* note 20 at 25.

<sup>94</sup> Phillips, *supra* note 33 at 98-99, 131.

<sup>95</sup> *Ibid.* at 41.

#### 2.1.4. Culture as Performance

An understanding of identity as influenced by social norms further reveals that encultured subjects are often compelled to *perform* their identities in ways that the dominant culture can understand. Judith Butler's gender theory helps articulate the notion of a performative identity. Butler writes that gender is not naturally or biologically determined, but created and imagined through the repeated performance of norms.<sup>96</sup> Gender is not a stable identity, but rather is "tenuously constituted in time, instituted in exterior space through a stylized repetition of acts."<sup>97</sup> Like culture, gender is "shifting and contextual," and denotes "a relative point of convergence among culturally and historically specific sets of relations."<sup>98</sup>

Sean Rehaag draws upon Butler's analysis in his study of bisexual refugee claims in Canada. He argues that "categories such as straight, gay and lesbian are continuously reconstructed through socio-historical patterns of regulated social interaction."<sup>99</sup> Rehaag's work demonstrates that claimants who assert a bisexual identity are far more likely to be disbelieved than other people who make a claim based on sexual orientation (i.e., gays and lesbians).<sup>100</sup> Since Canadian refugee jurisprudence views sexual orientation as an essential and immutable personal characteristic,<sup>101</sup> it is challenging for bisexual claimants to "perform" their sexual identities to the IRB in a sufficiently persuasive manner. For

<sup>96</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2006) [Butler].

<sup>97</sup> Butler, *ibid.* at 191.

<sup>98</sup> Butler, *ibid.* at 14.

<sup>99</sup> Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill L.J. 59 at 80 ["Patrolling"].

<sup>100</sup> "Patrolling", *ibid.* at 79.

<sup>101</sup> "Patrolling", *ibid.* at 68.

example, Rehaag notes that in some cases, claimants are unable to convince the IRB that they are bisexual because they testified about having relationships with members of the opposite sex.<sup>102</sup>

Elizabeth Povinelli's article on Australian Aboriginal land claims advances a similar contention with regard to the performativity of culture. She argues that in order to substantiate the validity of their native title, Aboriginal claimants must "perform" their indigenous difference in a way that "conform[s] to the imaginary of Aboriginal traditions."<sup>103</sup> Claimants must ensure that judges have no difficulty in understanding their traditional practices, even if this means distorting the nuances of their local culture.<sup>104</sup> Similarly, Eisenberg describes the phenomenon of "cultural performance" in the context of religious identity claims:

Minorities defend their claims in ways they believe will be convincing. Sometimes, this means that they distort or oversimplify the rationales for their practices in order to meet the expectations they assume dominant groups have about them. Minorities thereby 'perform' their identities and their performances are built on caricature which easily lends itself to naturalizing, essentializing, and stereotyping.<sup>105</sup>

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<sup>102</sup> *Ibid.* at 78-79. Conversely, Rehaag cites *Re B.D.K.*, the only published IRB decision in which an explicitly bisexual refugee claimant successfully claimed refugee status: "Patrolling", *ibid.* at 76. Accepting that the claimant was a "bisexual man who prefers relationships with men" and a transvestite, the IRB Member noted that the claimant appeared at his hearing "dressed as a woman" and stated that he "[did] so most of the time except when [he was] at work": *Re B.D.K.*, [2000] C.R.D.D. No. 72 (QL) at paras 1-2. Hence, the claimant's success was at least partially dependent on his convincing physical presentation.

<sup>103</sup> Elizabeth Povinelli, "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship" (1998) 24 Critical Inquiry 575 at 590 [Povinelli].

<sup>104</sup> *Ibid.* at 600-601, 606.

<sup>105</sup> Eisenberg, *supra* note 16 at 61.

Eisenberg argues that performances sometimes fail to be convincing when they contradict the expectations of the majority, thus leading religious minorities to perform their identities in ways that the majority will recognize.<sup>106</sup>

Demands on minorities to engage in “identity work,” either by assimilating into the mainstream culture or by fulfilling stereotypes, also emerge in the context of employment law. In her discussion of workplace discrimination cases, Gowri Ramachandran describes how employers may impose requirements on their employees to perform their identities in certain ways.<sup>107</sup> For example, an employer might ask a gay worker to “cover” crucial aspects of his identity by presenting himself in a manner viewed as typical for a straight man,<sup>108</sup> or may penalize women employees for not conforming to stereotypes of femininity.<sup>109</sup> Ramachandran argues that identity performance demands can cause particular harm to people with intersectional identities, such as lesbian women of colour, who may receive mixed or contradictory messages about the differing identities they must “perform”. For example, an Asian lesbian employee must overcome stereotypes of Asian women as passive and reserved, yet must also refrain from acting in a way that is perceived as overly aggressive and masculine.<sup>110</sup>

<sup>106</sup> *Ibid.* at 96.

<sup>107</sup> Gowri Ramachandran, “Intersectionality as ‘Catch 22’: Why Identity Performance Demands are Neither Harmless Nor Reasonable” (2005) 69 Albany L. Rev. 299 [Ramachandran].

<sup>108</sup> Ramachandran asserts that some employers hire gay people but either explicitly or implicitly ask that they not “flaunt” their identity: “An employer may do this by hiring men who state that they are gay and [discuss] football, while failing to hire men who state that they are gay and [discuss] their antique lamp collection”: *ibid.* at 305-306.

<sup>109</sup> In *Price Waterhouse v. Hopkins*, a woman successfully sued for sex discrimination after her employer demanded that she dress, act, and speak in a more “feminine” manner: 490 U.S. 228 (1989), cited in Ramachandran, *ibid.* at 313-315.

<sup>110</sup> *Ibid.* at 330-331. On the other hand, Roberto Gonzalez argues that critiques of identity performance demands are often based on essentialist assumptions. For instance, if we assume that prohibiting traditional

Hence, a perception of culture as constituted through social interactions suggests that culture is something that one *does*, not merely an expression of what one *is*.<sup>111</sup> Informed by Butler's gender theory, it can be argued that cultural identities are shaped and imagined through the repeated performance of norms. This indicates that in order to establish a successful identity claim, cultural performances must conform to the dominant group's expectations of what that culture looks like. It also implies that people at the intersection of different groups are often forced to negotiate multiple demands of identity performance.<sup>112</sup>

In sum, these accounts of cultural identity provide a framework for critical analysis of IRB decisions dealing with cultural difference. I have established my belief that cultural identity claims are important and should be taken seriously by public institutions. Further, I have argued that essentialist viewpoints can produce distorted portrayals of "Other" cultures as well as the mainstream culture, and that such analyses are better served by a constructivist approach. However, this approach should not preclude recognition of cultural distinctiveness. Understanding cultural identity as constituted by "performances" reveals that members of minority cultures must contend with the majority's expectations to perform their identity in certain ways. In the next section, I explore principles of Critical Race Theory that will further inform my study of IRB decisions.

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African dress in the workplace unfairly harms African American employees because they must "cover" their African identity, are we implicitly arguing that African Americans have a natural preference for African dress? See Roberto J. Gonzalez, "Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine" (2003) 55 Stan. L. Rev. 2195.

<sup>111</sup> See Butler, *supra* note 96 at 34.

<sup>112</sup> I discuss intersectionality in more detail in the following section on Critical Race Theory.

## 2.2. Critical Race Theory

Critical Race Theory examines the role of race and racism in law and society, recognizing that “law is both a product and a promoter of racism.”<sup>113</sup> It questions the neutrality and objectivity of legal principles and argues that the legal system is structured in such a way as to maintain white privilege.<sup>114</sup> Critical Race Theory offers a critique of the social, economic and power relations underlying the legal system, seeking not only to understand the impact of racism in society but also to articulate strategies for how it can be eradicated.<sup>115</sup> Hence, it can help to explain how social and institutional practices contribute to problematic representations of “Other” applicants before the IRB.

### 2.2.1. The Prevalence of Racism

One of the key ideas underlying Critical Race Theory is that racism is commonplace and pervasive, not aberrational. It is perpetuated by individuals, rather than systems, and experienced by people of colour in countless subtle ways throughout their everyday lives.<sup>116</sup> Thus, laws and policies that reflect formal conceptions of equality, such as anti-discrimination statutes, can only address the most blatant forms of racial injustice.<sup>117</sup>

<sup>113</sup> Mari Matsuda, *Where Is Your Body? And Other Essays on Race, Gender, and the Law* (Boston: Beacon Press, 1996) at 22 [Matsuda].

<sup>114</sup> See e.g. Kimberlé Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101 Harvard L. Rev. 1311; “Introduction” in Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995) xiii at xv-xvi.

<sup>115</sup> Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 29 [Aylward]; Matsuda, *supra* note 113 at 24.

<sup>116</sup> Delgado and Stefancic, *supra* note 75 at 7.

<sup>117</sup> Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, “Battles Waged, Won and Lost: Critical Race Theory at the Turn of the Millennium” in Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, eds., *Crossroads, Directions, and a New Critical Race Theory* (Philadelphia, Temple University Press, 2002) 1 at 2 [Crossroads].

Critical race theorists thereby advocate “race consciousness,” or the explicit recognition of racial differences, as a more effective approach to social transformation.<sup>118</sup>

Canadian critical race scholars argue that one of the “prevailing myths” of Canada is that unlike the United States, it does not have a history of racism.<sup>119</sup> As Sherene Razack states, “Canadians are outraged when racism, particularly indirect racism, is named, as it is not supposed to exist.”<sup>120</sup> Carol Aylward argues that this misguided belief can present more serious problems than those of the United States, since a failure to acknowledge the reality of racism in Canadian society precludes discussion over the role law plays in its perpetuation.<sup>121</sup> Constance Backhouse, on the other hand, claims that we tend to admit that our country has not been free from racism, “in the finest ‘honest Canadian’ tradition.” However, she notes that acknowledging Canada’s racist past also serves to disassociate its history from the present day, implying that racism existed in Canada, but has since been eliminated.<sup>122</sup>

<sup>118</sup> As Ian Haney López explains: “In order to get beyond racial beliefs, we must first be race-conscious. This is the basic flaw of color-blindness as a method of racial remediation. Race will not be eliminated through the simple expedient of refusing to talk about it. Race permeates our society on both ideological and material levels”: Ian Haney López, *White By Law: The Legal Construction of Race* (New York: New York University Press, 2006 at 124 [Haney López]).

<sup>119</sup> Sharryn J. Aiken, “From Slavery to Expulsion: Racism, Canadian Immigration Law and the Unfulfilled Promise of Modern Constitutionalism” in Vijay Agnew, ed., *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) 55 at 57-58 [Aiken, “Slavery”]; Aylward, *supra* note 115 at 39-40.

<sup>120</sup> *Looking White People*, *supra* note 44 at 60.

<sup>121</sup> Aylward, *supra* note 115 at 40.

<sup>122</sup> Constance Backhouse, “Legal Discrimination of the Chinese in Canada: The Historical Framework” in David Dyzenhaus and Mayo Moran, eds., *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (Toronto: Toronto University Press, 2005) [Dyzenhaus and Moran] 24 at 25. See e.g. the Ontario Court of Appeal’s decision in *Mack v. Canada (Attorney General)*, dismissing a class action suit arising from the discriminatory “head tax” imposed on Chinese immigrants from 1885 to 1923. The Court acknowledges the racist motivations behind the head tax, calling it “a stain on our minority rights tapestry”: [2002] 60 O.R. (3d) 737 at 740, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 476 (QL).

## 2.2.2. Race as a Legal Construction

Another basic principle underpinning Critical Race Theory is the notion that race is a social construction rather than a biological phenomenon.<sup>123</sup> Race is at least partially constructed through legal institutions and practices, given that law is “one of the most powerful mechanisms by which any society creates, defines, and regulates itself.”<sup>124</sup> In his book *White By Law*, Ian Haney López traces the history of the legal definition of “whiteness” in the United States through early immigration law cases. Until 1952, the naturalization of immigrants to the United States was legally restricted to “white persons”.<sup>125</sup> Over time, the boundaries of race were established and re-established by judges in decisions that used a wide variety of criteria to produce definitions of “whiteness”.<sup>126</sup> Haney López employs these early immigration cases as a stark example of how legal actors are “both conscious and unwitting participants in the legal construction of race.”<sup>127</sup>

In both Canada and the United States, official immigration policies that discriminated on the basis of racial and national origin have been abolished through

<sup>123</sup> See e.g. Robert S. Chang, “Critiquing ‘Race’ and Its Uses: Critical Race Theory’s Uncompleted Argument” in *Crossroads*, *supra* note 117, 87 at 87-88; Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s L.J. 16 at 24 [Grillo].

<sup>124</sup> Haney López, *supra* note 118 at 7.

<sup>125</sup> *Ibid.* at 1.

<sup>126</sup> Syrians, for instance, were held to be “white persons” in cases that were decided in 1909, 1919 and 1915, but other cases decided in 1913 and 1914 deemed that Syrians are not white: *ibid.* at 48.

<sup>127</sup> *Ibid.* at 79. Haney López contends that historically, American laws have created differences in people’s physical appearance (e.g., by constraining reproductive choices through exclusionary immigration laws and anti-miscegenation laws); ascribed meanings to their physical features (e.g., by intimating through discriminatory barriers to naturalization that non-white immigrants are not suited for U.S. citizenship); and translated ideas about race into a lived reality (e.g., by perpetuating material inequalities between races): *ibid.* at 10-12.

legislation.<sup>128</sup> However, some critical race scholars maintain that contemporary laws continue to restrict the admission of racialized immigrants from the South.<sup>129</sup> Furthermore, theorists argue that although American and Canadian legal doctrines are no longer explicitly racist, they continue to legitimate the notion of race. For instance, human rights and anti-discrimination laws are designed to advance equality, yet they also require people to frame their identities in terms of rigid racial and social categories.<sup>130</sup> Hence, the legal system helps to maintain racialized identities by validating the existence of “races” and racial categories.

Critical race scholars further contend that racialized images permeate the decisions of policymakers and judges, leading to (often unconscious) racial discrimination in the application of laws.<sup>131</sup> To give an example, Pascale Fournier describes two Québec criminal law cases in which the defendants, two Haitian men and a Muslim man, received unusually light sentences for committing sexual assaults. Fournier argues that in the first case, the judge invoked racist imagery that suggested that the Haitian defendants were inherently

<sup>128</sup> *Immigration Act, 1976*, S.C. 1976-77, c. 52; *Immigration Act of 1965*, Pub. L. No. 89-236, 79 Stat. 911.

<sup>129</sup> For example, Sharryn Aiken identifies a series of barriers in Canada’s immigration policies that have, she argues, disproportionate effects on poor immigrants from non-Western countries. These include a “points system” which favours white-collar professions and excludes childcare and agricultural workers, and a substantial landing fee and processing fee for immigration applications: Aiken, “Slavery”, *supra* note 119 at 69-72. Similarly, Kevin Johnson argues that a “diversity visa” program, which was created to grant visas to immigrants from countries with low rates of immigration to the United States, has indirect “racial effects” since it excludes citizens of high-immigration nations such as the Philippines, India, and Mexico: Kevin R. Johnson, “Race and the Immigration Laws: The Need for Critical Inquiry” in *Crossroads*, *supra* note 117, 187 at 193.

<sup>130</sup> Haney López, *supra* note 118 at 88. Here, I am also informed by Martha Minow’s argument that legal analysis establishes categories, drawing boundaries between those who fit within the norm and those who do not. Minow reveals that racial differences are not intrinsic, but constructed through the categorization effects of legal reasoning: Minow, *supra* note 61 at 8-9, 53-55.

<sup>131</sup> For instance, Aylward notes that in Canada, black people are overrepresented in the prison system and less likely than white people to be released by the police following a bail hearing: Aylward, *supra* note 115 at 15. Similarly, Haney López points to the disproportionate number of blacks and Latinos who face the death penalty in the United States, compared to whites: Haney López, *ibid.* at 97.

sexually aggressive.<sup>132</sup> In the second case, the trial judge took into account the fact that the accused, who sexually assaulted his stepdaughter, did not have complete vaginal intercourse with her and accordingly “preserved the virginity of the victim, something important to him and to the victim, both of whom are Muslim.” Thus, Fournier argues, the court invoked a “cultural defence” which “rests on a highly Orientalist, unsophisticated view of culture.”<sup>133</sup> In both cases, the legal system was complicit in the “Othering” of cultural minorities by playing a role in the construction of racialized identities.

### **2.2.3. Anti-Essentialism and Intersectionality**

Anti-essentialism and intersectionality are concepts from Critical Race Theory that further our understanding of racial and cultural identity. Anti-essentialism rejects the idea that a group’s experience is monolithic and can be represented by a single voice.<sup>134</sup> It also recognizes that a person’s different “strands of identity”<sup>135</sup> (such as her gender or race) cannot be separated from other aspects of her self. Angela Harris puts forth the notion of “multiple consciousness”, arguing that people are composed of “partial, sometimes contradictory, or even antithetical ‘selves’” which must be understood as a meaningful whole.<sup>136</sup>

<sup>132</sup> Pascale Fournier, “The Ghettoisation of Difference in Canada: “Rape by Culture” and the Danger of a “Cultural Defence” in Criminal Law Trials” (2002) 29 Manitoba L.J. 1 at 12-14 [Fournier].

<sup>133</sup> *Ibid.* at 26-27.

<sup>134</sup> Grillo, *supra* note 123 at 19.

<sup>135</sup> Grillo, *ibid.* at 19.

<sup>136</sup> Angela P. Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 Stan. L. Rev. 581 at 584. Anti-essentialism proponents recognize that it is impossible to avoid all categorization, but claim that such categories should be “explicitly tentative, relational, and unstable”: *ibid.* at 586. As stated above, essentialism has a valuable political dimension when people mobilize around gender, racial, or other group-based categories in order to influence the exercise of power: Martha Minow, “Not Only For Myself: Identity, Politics, and Law” (1996) 75 Or. L. Rev. 647 at 648. See also Deckha, *supra* notes 72 to 76 and accompanying text; and Delgado and Stefancic, *supra* note 75 at 56.

Intersectionality, the counterpart to anti-essentialism, examines axes of identity such as race, sex, class, national origin, and sexual orientation and “how their combination plays out in various settings.”<sup>137</sup> For instance, Kimberlé Crenshaw writes that the experiences of women of colour are often “the product of intersecting patterns of racism and sexism” and that they are therefore marginalized within both anti-racist and feminist discourses.<sup>138</sup> Or, as Natasha Bakht points out, woman may understand and construct their cultural or racial background differently from men.<sup>139</sup> In general, anti-essentialism and intersectionality critiques seek to “define complex experiences as closely to their full complexity as possible.”<sup>140</sup>

Factors such as class and immigration status are also considered to be features of a person’s identity. Crenshaw notes, for example, that immigrant women face unique obstacles in dealing with situations of domestic violence: they are hampered by fear of deportation, limited access to social services, and language barriers.<sup>141</sup> Furthermore, Volpp has studied historical barriers to U.S. citizenship for Asian-American immigrant women and concluded that the combined impact of race and gender served to disenfranchise these women from formal citizenship.<sup>142</sup> In addition, Yxta Maya Murray discusses the

<sup>137</sup> Delgado and Stefancic, *supra* note 75 at 51.

<sup>138</sup> See Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241 [Crenshaw].

<sup>139</sup> Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach” (2009) 6 J. L. & Equality 135 at 150.

<sup>140</sup> Grillo, *supra* note 123 at 22.

<sup>141</sup> Crenshaw, *supra* note 138 at 1246-49.

<sup>142</sup> Leti Volpp, “Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage” (2005) 53 UCLA L. Rev. 405.

stigmatization of Latino-Americans in the United States, who are made to feel insecure by the treatment of undocumented Latino-American migrants who “look like them.”<sup>143</sup>

The intersection of gender and class is illustrated by the Ontario Court of Appeal decision *Falkiner v. Ontario*. In this case, the Court found that unmarried mothers, who were reclassified as “spouses” under the Ontario *Family Benefits Act* when they began cohabiting with their partners, suffered discrimination on the combined basis of sex and the receipt of social assistance.<sup>144</sup> The Court held that this “spouse-in-the-house” welfare rule infringed unmarried mothers’ right to dignity as well as their right to equality on the basis of social condition.<sup>145</sup> These examples demonstrate how intersecting patterns of subordination, such as poverty and uncertain immigration status, can contribute to people’s marginalization.

Thus, the themes of Critical Race Theory can be used to develop a critique of IRB decisions dealing with cultural difference. Recognizing the prevalence of racism in society helps to deconstruct the racialized images that permeate legal decision-making. Engaging in a critical race analysis also enables us to understand how the legal system contributes to the construction of race and culture. Finally, concepts such as anti-essentialism and intersectionality are useful tools for understanding the multi-faceted identities of applicants before the IRB.

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<sup>143</sup> Yxta Maya Murray, “The Latino-American Crisis of Citizenship” (1998) 31 UC Davis L. Rev. 503 at 516-517.

<sup>144</sup> *Falkiner v. Ontario (Ministry of Community and Social Services)*, 59 O.R. (3d) 481 (C.A.), 212 D.L.R. (4th) 633.

<sup>145</sup> *Ibid.* at paras. 100-103.

The significance of cultural identity and the importance of critical race analysis are brought to bear in the context of immigration law. These theoretical perspectives will serve as lenses through which to examine particular IRB decisions in Chapter 3. In the next section, I examine more specifically notions of identity in immigration law, bringing additional nuance to that particular area of law.

### **2.3. Immigration Law as a Site for Constructing Identity**

Many scholars have recognized the salience of immigration law as a site for the production and contestation of identities. This section reviews different accounts of how the relationship between identity and immigration law has been understood and conceptualized. First, I examine the production of national identity through migration laws which delineate the scope of the national community and establish categories of “good” and “bad” migrants. Second, I consider the identities of those construed as potential threats to national security and therefore excluded from the national community, often by reason of their perceived “Otherness”. Lastly, I discuss the construction of refugee identities through the IRB’s refugee determination process.

#### **2.3.1. Constructing a National Identity**

Catherine Dauvergne’s book *Humanitarianism, Identity and Nation* focuses on the symbiotic relationship between immigration law and national identity. Dauvergne argues that immigration law provides “a rich site in which to search for images of national identity, and in which national identity can be reinvented, reconstructed, reimaged.”<sup>146</sup> For settler nations such as Canada and Australia, national identity is created and re-created

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<sup>146</sup> Dauvergne, *supra* note 20 at 9.

through migration laws, which historically provided the mechanism for the nation's literal construction through immigrants' labour, and now define the boundaries of membership in the national community.<sup>147</sup> In particular, Dauvergne notes that the treatment and admission of non-citizens for humanitarian reasons (i.e., refugees and other migrants admitted on humanitarian grounds) play a central role in characterizing these countries as prosperous, powerful and generous.<sup>148</sup>

Dauvergne emphasizes the role of categorization in immigration law, which establishes clear boundaries around identities such as "permanent resident", "*bona fide* spouse" and "refugee".<sup>149</sup> These categories create a hierarchical relationship, since they establish who is included, and to what degree, within the national community.<sup>150</sup> Moreover, "[i]n labelling and controlling these others, it builds a reflected image of the nation and those who are insiders."<sup>151</sup> Thus, the boundaries created by migration law produce both representations of national identity and images of the "Other". For example, the stated objectives of the *Immigration and Refugee Protection Act* refer extensively to Canada's humanitarian ideals, *Charter* principles, and commitments to multiculturalism, conveying a message about the nation's self-image and its collective values.<sup>152</sup> At the same

<sup>147</sup> *Ibid.* at 5, 13.

<sup>148</sup> *Ibid.* at 7. Dauvergne notes that apart from humanitarian reasons, immigrants are generally admitted on three other grounds: historical or cultural ties (because they are "like us"); economic potential (because they bring value and contribute to our growth); or family reunification (because they reflect an ideological vision of family and community): *ibid.* at 6-7.

<sup>149</sup> *Ibid.* at 33-34.

<sup>150</sup> *Ibid.* at 32. Aiken also remarks that immigration and citizenship laws "foster a hierarchical ordering of 'insiders' and 'outsiders' living and working within Canadian society": Aiken, "Slavery", *supra* note 119 at 57.

<sup>151</sup> Dauvergne, *ibid.* at 30.

<sup>152</sup> *Ibid.* at 54. See the IRPA, *supra* note 21, s. 3.

time, the *Act's* main objective, which is to establish rules for determining who can remain within Canada's borders, is not mentioned.<sup>153</sup>

Dauvergne contends that the mass of legislative, judicial, and administrative decisions concerning immigration reflects a vision of national identity; however, each individual decision need not consciously represent this identity. Instead, she explains that national identity is produced over several locations and is constantly in flux.<sup>154</sup> As Dauvergne argues, "identity is ... a site of struggle, a contingent result of contestation over meaning."<sup>155</sup> Hence, immigration law's constructed image of the outsider is continuously manipulated "in order that the reflected picture of those who belong can appear constant."<sup>156</sup>

Sherene Razack also explores the role of immigration law in "the making of Canada as a white-settler society."<sup>157</sup> She writes that Canadian national identity is partially constructed through its narratives about immigration, which have been adopted by the state as "the official story of who Canadians are and who they are not, performed in Canadian courtrooms, parliament, media, classrooms and elsewhere."<sup>158</sup> Open immigration policies and cultural diversity are considered essential building blocks of Canadian identity. Canada is presented as a "clean, ordered, white territory in which

<sup>153</sup> However, the *Act* does state the following objective: "to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals": see IRPA, *ibid.* at s. 3(2)(h).

<sup>154</sup> Dauvergne, *supra* note 20 at 9, 24.

<sup>155</sup> *Ibid.* at 26.

<sup>156</sup> *Ibid.* at 54.

<sup>157</sup> Sherene Razack, "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s" (1999) 14 Can. J.L. & Soc'y 159 at 167 ["Making Canada"].

<sup>158</sup> *Ibid.* at 161.

bodies of colour who are morally deserving are welcomed.”<sup>159</sup> National mythologies about immigration are dependent on the construct of the “good immigrant,” who comes to Canada with nothing yet manages to succeed, thus establishing Canada’s “essential goodness.”<sup>160</sup> However, the narrative is also built on the trope of the “bad immigrant” who must be policed, a category which includes bogus refugees, undocumented migrants, and migrants who engage in criminal activity.<sup>161</sup>

This “dream of Canada”<sup>162</sup> is powerful and appealing, intimating that generosity, equality and tolerance are an intrinsic part of the country’s national character. But Razack contends that it also relies on a phenomenon that she terms “national innocence”: glossing over the country’s treatment of Aboriginal peoples and the role that immigrant labour has played in its formation.<sup>163</sup> Canada is presented as a multicultural haven for people fleeing persecution, with an immigration policy that is no longer marked by racial and social injustice. For Razack, national innocence depends on “the crucial forgetting of Canada’s history of imperialism and white supremacy.”<sup>164</sup>

Leti Volpp argues that the national identity of the United States is similarly constructed in opposition to “those categorized as ‘foreigners,’ ‘aliens,’ and ‘others.’”<sup>165</sup> She

<sup>159</sup> *Ibid.* at 173.

<sup>160</sup> *Ibid.* at 174-175. Razack discusses the image of the “quintessential new citizen” who “belongs everywhere and nowhere,” and thus is absorbed into the dominant culture. In Razack’s view, multiculturalism values new immigrants for their “newness”, but ultimately expects them to assimilate within the larger society: *ibid.* at 179-181. Razack argues that *bona fide* refugees also fall within the category of “good immigrant”: *ibid.* at 170.

<sup>161</sup> *Ibid.* at 170, 181-182.

<sup>162</sup> *Ibid.* at 172.

<sup>163</sup> *Ibid.* at 161, 176,

<sup>164</sup> *Ibid.* at 176.

<sup>165</sup> Leti Volpp, “The Citizen and the Terrorist” (2002) 49 UCLA L. Rev. 1575 at 1586 [“Terrorist”].

notes that in the year following the September 11, 2001 terrorist attacks, over 1,200 non-citizens in the United States were detained under suspicion of terrorist activity, most of whom appeared “Middle Eastern, Arab, or Muslim.”<sup>166</sup> Volpp writes that such incidents of ethnic and racial profiling reflect the United States’ own anxieties regarding “threats to the coherence of the national body.” As explained by Edward Said, Western representations of the East have historically served to define the West as modern, progressive and democratic, through a range of contrasting stereotypes which portray Eastern cultures as primitive and barbaric.<sup>167</sup> In this way, the “‘imagined community’ of the American nation, constituted by loyal citizens” relies on its difference from the imagined “Other” to construct its own identity.<sup>168</sup>

### **2.3.2. Constructing Outsiders**

While national identity is constituted through the state’s treatment and admission (or exclusion) of non-citizens, immigration law also plays a role in constructing the identity of people seen as outsiders from the national community. Such outsiders include both non-citizens and citizens, naturalized or native-born, who are viewed as threats to national security or national unity. This is partly owing to these individuals’ suspected affiliation with threatening elements, but also largely due to their perceived “Otherness”.

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<sup>166</sup> *Ibid.* at 1577-78.

<sup>167</sup> Said, *supra* note 55, cited in “Terrorist”, *ibid.* at 1586-87.

<sup>168</sup> *Ibid.* at 1595.

In “Can We Do Wrong to Strangers?”,<sup>169</sup> Audrey Macklin discusses Canada’s early immigration laws, which discriminated against Asian migrants and contributed greatly to their status as outsiders. Beginning in 1885, the federal government imposed a “head tax” of \$50 on all Chinese immigrants.<sup>170</sup> The levy was gradually raised to \$500, or the equivalent of two years’ salary, in 1903 through a succession of laws known as the *Chinese Immigration Acts*.<sup>171</sup> In 1923, a final law known as the “Chinese Exclusion Act” was passed that prohibited all immigration from China until its repeal in 1947.<sup>172</sup> Macklin argues that the immigration laws targeting Chinese newcomers reflected a wider climate of discrimination and xenophobia against Asian migrants in Canada.<sup>173</sup> Border control measures were also enacted against immigrants from Japan<sup>174</sup> and South Asia.<sup>175</sup> Asians were racialized as “Orientals”, “Asiatics”, or “Hindus” and subjected to a plethora of laws and regulations explicitly barring them from suffrage, public office, and most professional sectors and educational opportunities.<sup>176</sup>

The internment and deportation of Japanese Canadians during the Second World War further reflected public sentiment toward people of Asian descent. Following the

<sup>169</sup> Audrey Macklin, “Can We Do Wrong to Strangers?” in Dyzenhaus and Moran, *supra* note 122, 60 [Macklin].

<sup>170</sup> *Chinese Immigration Act, 1885*, S.C. 1885, c. 71.

<sup>171</sup> Macklin, *supra* note 169 at 65-66.

<sup>172</sup> *Chinese Immigration Act, 1923*, S.C. 1923, c. 38.

<sup>173</sup> Macklin, *supra* note 169 at 61.

<sup>174</sup> In 1908, Canada reached a confidential “gentleman’s agreement” with Japan, imposing a quota restricting the number of Japanese immigrants to Canada: *ibid.* at 67-68.

<sup>175</sup> Since Indians were British subjects, they had a *prima facie* right to enter Canada. In 1908, the government passed an order-in-council known as the “continuous journey” provision, prohibiting the landing of any person who did not make a direct voyage from the country of his or her “birth or citizenship.” Next, it ordered the cancellation of Canadian Pacific Railway’s shipping route which was the only direct passage from India to Canada. The combined effect of these manoeuvres led to a near-cessation of Indian immigration to Canada: *ibid.* at 69-73.

<sup>176</sup> *Ibid.* at 73-74.

attacks at Pearl Harbor, the Canadian government ordered the mass expulsion of all persons of Japanese origin from the coast of British Columbia, under the guise that their presence could help facilitate a Japanese invasion.<sup>177</sup> However, reviews of wartime government documents demonstrate that officials were aware that Japanese Canadians did not truly pose a threat to national security.<sup>178</sup> In addition, the federal government asked Japanese Canadians whether they wished to be “repatriated” to Japan after the war.<sup>179</sup> Orders-in-Council were passed under the *War Measures Act*<sup>180</sup> that legalized the deportation of 4,319 people, two-thirds of whom were Canadian citizens. All persons of Japanese ancestry, regardless of their citizenship or political affiliations, were thereby constructed as enemy aliens, at once perpetually foreign and disloyal to Canada.<sup>181</sup>

Volpp describes the recent case of a Pakistani-American father and son, Muhammad and Jaber Ismail, who were refused entry into the United States after having lived in Pakistan for four years. Due to their association with a relative who was a suspected terrorist, they were placed on a no-fly list and only allowed to return to the United States after completing a lie detector test.<sup>182</sup> Volpp suggests that by being refused entry into their

<sup>177</sup> Roy Miki, *Redress: Inside the Japanese Canadian Call for Justice* (Vancouver: Raincoast Books, 2004) at 2-3 [Miki].

<sup>178</sup> *Ibid.* at 89-90.

<sup>179</sup> Miki, *supra* note 177 at 101-103.

<sup>180</sup> *An Act to confer certain powers upon the Governor in Council in the event of War, Invasion, or Insurrection*, S.C. 1914, c. 2.

<sup>181</sup> Miki, *supra* note 177 at 105. A legal challenge against the deportation orders in 1946, which the federal government referred to the Supreme Court of Canada. The Supreme Court found that the Orders-in-Council were not *ultra vires* of the executive, a decision that was later upheld by the Privy Council. Section 3 of the *War Measures Act* specifically provided that the government’s power extends to “arrest detention, exclusion and deportation”; therefore, the deportation orders were deemed to be within jurisdiction. The Supreme Court’s judgment widened the definition of “deportation” to include the removal of Canadian-born Japanese as well as foreign nationals: *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race*, [1946] S.C.R. 248 at 267-69, aff’d [1947] 1 D.L.R. 577 (J.C.P.C.) [*Reference Re Japanese*].

<sup>182</sup> Leti Volpp, “Citizenship Undone” (2007) 75 Fordham L. Rev. 2579 at 2579 [“Citizenship Undone”].

own country, the Ismails were being punished for their “failure to perform U.S. citizenship ... in the sense of proving their allegiance.”<sup>183</sup> She argues that the increased surveillance of Muslim American communities stems from their identity as “potential terrorists.”<sup>184</sup> Volpp asserts that their position is similar to that of naturalized U.S. citizens, whose status is forever “tinged by a possible disloyalty” and who are therefore perceived as lesser citizens.<sup>185</sup>

Volpp further argues that while contemporary restrictions on U.S. citizenship are supposedly based on neutral standards of conduct rather than on ethnic or national identity, U.S. immigration law continues to exclude people based on identity. Attaining U.S. citizenship requires a demonstration that one possesses “good moral character” and is “well disposed to the good order and happiness of the United States.”<sup>186</sup> However, Volpp asserts that historical race-based exclusions were based on assumptions regarding conduct or behaviour. For example, laws prohibiting Chinese immigrants from becoming citizens were based on the presumption that Chinese people were incapable of understanding American democratic values.<sup>187</sup> Further, Volpp maintains that “the conduct- or behavior-based restrictions that exist today, while conventionally understood as neutral, are both constitutive of and the product of status.” Hence, the state’s efforts to exclude potential terrorists are aimed at people who have an “Arab, Middle Eastern or Muslim” appearance.

<sup>183</sup> *Ibid.* at 2580.

<sup>184</sup> *Ibid.* at 2583.

<sup>185</sup> *Ibid.* at 2582.

<sup>186</sup> *Immigration and Nationality Act*, 8 U.S.C.A. § 1427 (West 2006), cited in “Culture of Citizenship”, *supra* note 44 at 578.

<sup>187</sup> “Culture of Citizenship”, *ibid.* at 580-581.

Accordingly, identity becomes a “predictor” of conduct that will lead to exclusion from the national community.<sup>188</sup>

### **2.3.3. Constructing Refugees**

Scholars have recognized Canadian refugee hearings as a central site for the production of identities through immigration law. Dauvergne writes that “refugee” is a legal category that “incorporates particular background norms and unstated perspectives.”<sup>189</sup> Although the refugee determination process focuses on the individual claimant’s story, the claimant must ensure that his or her identity fits within the boundaries of the existing category:

The refugee definition sets up a category in the migration law hierarchy. This identity is constructed within the text of the law but it then becomes a standard that individuals aim to fit within on the basis of other identity characteristics. Law does not simply construct the identity, but provides a map of which characteristics are important in the legal setting.<sup>190</sup>

Similarly, Robert Barsky argues that the refugee hearing often becomes “a test of the claimant’s ability to construct an appropriate version of the ‘Convention refugee.’”<sup>191</sup> Accordingly, those seeking protection under Canadian refugee law must structure their personal narratives such that they fit into acceptable legal categories.

<sup>188</sup> *Ibid.* at 581.

<sup>189</sup> Dauvergne, *supra* note 20 at 87.

<sup>190</sup> *Ibid.* at 117.

<sup>191</sup> Robert F. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Amsterdam: John Benjamins, 1994) at 6 [Barsky, *Other*]. While Barsky’s work addresses the Canadian refugee determination process prior to the creation of the IRB in 1989, his analysis and conclusions on the way in which refugee identities are constructed are similar to those of authors who have studied the current process: see Dauvergne, *ibid.* at 119, n. 125.

To establish a successful claim, a refugee claimant must give an oral account of their identity and present a credible story of persecution.<sup>192</sup> The IRB's Refugee Protection Division, an administrative tribunal, is not bound by the formal rules of evidence.<sup>193</sup> Thus, the establishment of credible facts hinges upon the claimant's ability to produce a skilled narrative, as their testimony is often unsupported by documentary evidence.<sup>194</sup> Since it is impossible to ascertain whether a story is factually accurate, the credibility of a story is established by its *appearance* of truth. This does not indicate that reality is misrepresented in refugee testimony; rather, it means that these stories must be constructed in a way that will allow them to be accepted by the adjudicator.<sup>195</sup> Applicants must "match their experience as closely as possible to the experience deemed acceptable, even if by so doing they must modify the narration of their own experience."<sup>196</sup>

Further, applicants must establish that the facts they allege are consistent with the known situation in their country of origin.<sup>197</sup> Such stories are plausible because they are widely publicized, as well as confirmed through similar accounts by other refugee claimants. Paradoxically, this commonality of experience can also work against the claimant, since an IRB adjudicator might assume that a story based on well-known public events could easily have been invented.<sup>198</sup> A refugee applicant must thereby demonstrate

<sup>192</sup> Dauvergne, *ibid.* at 104.

<sup>193</sup> Crépeau and Nakache, *supra* note 7 at 98.

<sup>194</sup> Dauvergne, *supra* note 20 at 106-107. See also Crépeau and Nakache, *ibid.* at 98.

<sup>195</sup> Barsky, *Other*, *supra* note 191 at 143.

<sup>196</sup> Barsky, *ibid.* at 5-6.

<sup>197</sup> Crépeau and Nakache, *supra* note 7 at 106-107.

<sup>198</sup> Amy Shuman and Carol Bohmer, "Representing Trauma: Political Asylum Narrative" (2004) 117 *J. American Folklore* 394 at 396-397, 409 (describing research conducted with refugee applicants at a community service organization in Columbus, Ohio) [Shuman and Bohmer].

that she has a personal connection to these public events which has placed her at risk, and from which the government in her country of origin cannot provide protection.

A successful refugee narrative must not only be believable, it must also be related in a “credible manner”, without flaws or inconsistencies. Generally, a claimant’s story is deemed not credible if there are discrepancies found among the notes taken by the immigration officer upon entry into Canada, the Personal Information Form (PIF) submitted by the claimant prior to the hearing, and his or her oral testimony.<sup>199</sup> Applicants are often asked to provide minute details about their testimony, such as the exact dates on which events occurred, on the assumption that accurate recollection of details is a sign of truthfulness.<sup>200</sup> Conversely, if claimants include too much detail in their testimony, their stories may appear overly precise, and therefore fabricated.<sup>201</sup> Hence, factual inconsistencies among “retellings” of the refugee’s narrative can lead to a finding of non-credibility.<sup>202</sup>

Overall, the construction of successful refugee identities requires careful consideration of legal categories and narrative devices that will bolster the credibility of the claimant’s testimony. The structure of the applicant’s testimony and her ability to fit it within existing categories become pivotal to proving her story. Facts recounted at the hearing must be consistent with the IRB Member’s knowledge of “typical” stories from the

<sup>199</sup> Rousseau et al., *supra* note 7 at 55; Crépeau and Nakache, *supra* note 7 at 106.

<sup>200</sup> Crépeau and Nakache, *ibid.* at 101-102. See also Shuman and Bohmer, *supra* note 198 at 408-409.

<sup>201</sup> Discussing testimonial evidence in U.S. law, Kim Lane Scheppelle observes that “[s]tories that present familiar tales, laced with enough detail to be distinctive but not so much as to feel contrived, are the most credible”: Scheppelle, *supra* note 12 at 1018.

<sup>202</sup> For applicants before the IRB, this problem is exacerbated by the fact that claimants often face cultural, linguistic and psychological barriers that can seriously compromise their storytelling abilities: see generally Rousseau et al., *supra* note 7.

applicant's country of origin. Moreover, the applicant's oral evidence must be delivered in a convincing fashion, with sufficient recollection of detail. As I discuss in the next chapter, many of these considerations also apply to family sponsorship hearings before the IRB.

## **2.4. Conclusion**

In this chapter, I have developed a theoretical framework that draws upon conceptions of cultural difference and identity construction as well as principles of Critical Race Theory. I have argued that a constructivist, rather than an essentialist, approach allows for a more complex and nuanced analysis of culture. I have further argued that cultural identity is constituted by the repeated performance of norms, which are governed by the expectations of the dominant culture. Despite the problematic representations of culture that often emerge in legal discourse, recognition of cultural difference remains important. Hence, it is incumbent upon a just society to find informed and transparent ways to evaluate cultural identity claims.

In addition, the tenets of Critical Race Theory elucidate the role of racial construction in the legal system, and how it can contribute to problematic representations of "Others". Exploring the work of other authors reveals the different ways in which identity is produced in the context of immigration law. This theoretical framework will be used in a critical examination of recent IRB decisions dealing with cultural difference. I present the findings that emerge from this research in the following chapter.

## Chapter 3

### Presentation and Analysis of IRB Decisions

This chapter presents the results of my research of IRB decisions dealing with cultural difference from the years 2004 to 2010. I have chosen to study decisions from this time period due to the fact that criteria for the selection of IRB Members were enacted in 2004, including the mandatory requirement of “cultural competence”. In the first part of the chapter, I briefly outline the IRB’s structure and procedural rules. Next, I examine two recent studies that criticize the IRB’s treatment of culture in its adjudication process, and identify gaps that could be filled by the present research. In particular, I note that the IRB’s consideration of cultural difference has yet to be analyzed for decisions rendered in the years 2004 and beyond.

The second part of the chapter presents my findings, which consist of a review of published IRB decisions from 2004 to 2010 where culture plays a significant role in the outcome. The vast majority of these decisions involve sponsorship appeals to the Immigration Appeal Division, in which the panel must determine whether a family class relationship is genuine or whether it was entered into for immigration purposes. The results are organized into seven categories: the IRB’s understanding of its role, the cultural validity of marriage, spousal compatibility, cultural notions of adoption, common-law and conjugal partnerships, cultural duties of care, and the use of opinion and documentary evidence. I identify the main issues and themes emerging from these decisions and give examples of cases in which the IRB Member’s assessment of cultural factors influenced

their evaluation of the parties' credibility. I analyze these decisions through the lens of the conceptual framework established in Chapter 2.

It is difficult to present a comprehensive qualitative analysis of the decisions involved. As I note in this chapter, IRB Members had divergent approaches in determining how various cultural factors affected the parties' credibility. Nonetheless, I offer a number of observations and critiques that can help to elucidate the problems arising from these patterns of decision-making. The analysis presented in this chapter strengthens my claim that many IRB Members failed to address issues of cultural difference in a sensitive and informed manner.

### **3.1. Background**

#### **3.1.1. The IRB's Structure and Process**

The IRB is Canada's largest independent administrative tribunal.<sup>203</sup> Its Members, who are appointed by the Governor in Council, are responsible for hearing and deciding immigration and refugee matters under the *Immigration and Refugee Protection Act* (IRPA). The IRB is made up of four tribunals: the Immigration Division, the Immigration Appeal Division, the Refugee Protection Division, and the Refugee Appeal Division.<sup>204</sup> My

<sup>203</sup> Immigration and Refugee Board of Canada, "About the Board," online: Immigration and Refugee Board of Canada <<http://www.irb.gc.ca/Eng/brdcom/abau/Pages/Index.aspx>> (last accessed 24 March 2011).

<sup>204</sup> Immigration and Refugee Board of Canada, *Immigration and Refugee Board of Canada: An Overview*, online: Immigration and Refugee Board of Canada

<<http://www.irb.gc.ca/eng/brdcom/publications/oveape/Pages/index.aspx#id1>> (last accessed 24 March 2011). The Immigration Division conducts immigration admissibility hearings and detention reviews, while the Refugee Protection Division deals with claims for refugee protection and applications for vacation and cessation of refugee protection. At the time of writing, the sections of the IRPA legislating the Refugee Appeal Division were not yet in force. However, a bill which provides for the implementation of the Refugee Appeal Division, among other reforms to the refugee determination process, received Royal Assent on June 29, 2010: see Bill C-11, *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, 3<sup>rd</sup> Sess., 40<sup>th</sup> Parl., 2010, cl. 13-28 (assented to 29 June 2010). According to Citizenship

research focuses on decisions of the Immigration Appeal Division (IAD), since it is before this tribunal that cultural considerations most often arise. The IAD hears appeals from family sponsorship decisions issued by officials of Citizenship and Immigration Canada (CIC), appeals against removal orders, appeals by permanent residents who have been found to violate their residency obligations, and appeals concerning admissibility decisions made by the Immigration Division.<sup>205</sup> A decision of the IAD may be challenged, with leave, by way of judicial review to the Federal Court.<sup>206</sup>

Section 174 of the *IRPA* provides that the IAD has "all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction."<sup>207</sup> Appeals heard by the IAD result in a hearing *de novo*. Hence, the IAD is obliged to consider the totality of the evidence adduced by the applicant as well as the reasons of the original decision-maker.<sup>208</sup> The tribunal is "not bound by any legal or technical rules of evidence," but may "receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances."<sup>209</sup> In addition, section 162 of the *IRPA* provides that hearings before all tribunals of the IRB must

and Immigration Canada, the changes set out in this bill will come into effect in late 2011 or early 2012: Citizenship and Immigration Canada, "Moving ahead with refugee reform," online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/refugees/reform.asp>> (last accessed 24 March 2011).

<sup>205</sup> *IRPA*, *supra* note 21 at s. 63(1).

<sup>206</sup> *IRPA*, *ibid.* at s. 72(1).

<sup>207</sup> *IRPA*, *ibid.* at s. 174.

<sup>208</sup> *Amar Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673, [2005] F.C.J. No. 2071 (QL) at para. 8; *Nadon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 59, [2007] F.C.J. No. 84 (QL) at para. 24.

<sup>209</sup> *IRPA*, *supra* note 21, s. 175(1). Specifically, the tribunal's hearings are not bound by the "best evidence" and "hearsay" rules: *Canada (Minister of Citizenship and Immigration) v. Nkunzimana*, 2005 FC 29, [2005] F.C.J. No. 68 (QL).

be dealt with “as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.”<sup>210</sup> Matters are conducted before a single Member of the IRB unless the Chairperson is of the opinion that a panel of three Members should be constituted.<sup>211</sup> In practice, however, very few matters are heard by panels of three members.

The Chairperson of the IRB has the authority to issue written guidelines to Board Members and identify decisions of the IRB as “jurisprudential guides”, to assist Members in rendering decisions.<sup>212</sup> Guidelines have been issued on topics such as women refugee claimants fearing gender-related persecution, child refugee claimants, and procedural accommodations for vulnerable persons.<sup>213</sup> To date, there are no chairperson’s guidelines or jurisprudential guides respecting the IRB’s adjudication of cultural factors.

Recent case law of the Federal Court provides further guidance to IRB decision-makers. For example, the Court has held that evidence presented by sponsorship applicants before the IAD regarding the genuineness of a relationship must be examined in relation to the cultural background in which they have lived.<sup>214</sup> Similarly, the Court has directed that evidence should not be “minutely scrutinized” and that IRB decision-makers should refrain from applying “North American reasoning” to an applicant’s conduct.<sup>215</sup>

<sup>210</sup> IRPA, *ibid.*, s. 162(2).

<sup>211</sup> IRPA, *ibid.*, s. 163.

<sup>212</sup> IRPA, *ibid.*, s. 159(h).

<sup>213</sup> Immigration and Refugee Board of Canada, *Chairperson’s Guidelines*, online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/index.aspx>> (last accessed 24 March 2011).

<sup>214</sup> *Mohammad Farid Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490, [2006] F.C.J. No. 1875 (QL).

<sup>215</sup> *Siev v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 736, [2005] F.C.J. No. 912 (QL) [*Siev*].

Therefore, the IAD must consider different cultural contexts when assessing evidence of the *bona fides* of a marriage or other family class relationship.<sup>216</sup>

### **3.1.2. Critiques of the IRB's Decision-Making Process**

In order to assess how the IRB deals with cultural difference, it is necessary to examine existing studies of the decision-making process. In this section, I give an overview of some recent criticisms of the IRB's procedures and practices. The two papers discussed in this section were produced by a research team that included Cécile Rousseau, François Crépeau, Delphine Nakache, and others. The scope of their research was limited to the refugee determination process. My discussion of these papers focuses on the issues which are relevant to this thesis, namely the treatment of cultural factors in the evaluation of IRB applicants' testimonies.<sup>217</sup>

The first paper, a multidisciplinary study of the IRB's refugee adjudication process, provides an in-depth analysis of hearings for refugee claimants who arrived in Canada

<sup>216</sup> The IRB's Legal Services department has compiled Federal Court cases in a document outlining key legal concepts and procedural matters before the IAD: see IRB Legal Services, "Sponsorship Appeals" (1 January 2008), online: Immigration and Refugee Board of Canada <<http://www.irbcisr.gc.ca/eng/brdcom/references/legjur/iadsai/appl/Pages/index.aspx>> (last accessed 24 March 2011) ["Sponsorship Appeals"]. The case law pertaining to refugee hearings also enjoins IRB decision-makers to consider claimants' social and cultural backgrounds when assessing the credibility of their testimony. These cases are cited in IRB Legal Services, "Assessment of Credibility in Claims for Refugee Protection" (31 January 2004), online: Immigration and Refugee Board of Canada <<http://www.irbcisr.gc.ca/eng/brdcom/references/legjur/rpdsp/cred/Pages/index.aspx>> (last accessed 24 March 2011).

<sup>217</sup> Other authors have criticized the IRB's refugee adjudication practices for reasons that do not deal directly with cultural difference. For example, Rehaag has studied refugee claim acceptance rates of individual IRB Members and concluded that outcomes in refugee adjudication appear to depend at least partly upon the identity of the adjudicator hearing the case: Sean Rehaag, "Troubling Patterns in Canadian Adjudication" (2008) 39 Ottawa L. Rev. 335 ["Troubling Patterns"]. Jenni Millbank argues that decision-makers' own assessment of what constitutes appropriate "public" or "private" sexual behaviour dictates the success of gay and lesbian refugee claims: Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melb. Univ. L. Rev. 144.

between 1995 and 1998.<sup>218</sup> According to Rousseau et al., many actors involved in refugee cases, including lawyers, social workers, psychologists, and doctors, had expressed dissatisfaction with the IRB's decision-making process. On the other hand, IRB Members and Refugee Claim Officers<sup>219</sup> did not share these perceptions. In their findings, the authors identify various legal, cultural, and psychological factors that are likely to explain the discrepancies in different actors' evaluations of these cases.<sup>220</sup>

The authors' research on the cultural factors affecting the IRB's decision-making process reveals that cultural miscommunication frequently played a significant role in assessments of non-credibility. They argue that "hearings involve the intersection of radically different cultures, assumptions, belief systems, and reference points in a highly charged, intense and short-term setting."<sup>221</sup> The cultural relativity of words and concepts was often deeply problematic during an asylum hearing, particularly when adjudicators and claimants were not conscious of these differences. Such misunderstandings could lead to erroneous interpretations of refugee claimants' testimony, or translated into attitudes of suspicion and cynicism in relation to the claimant's story.<sup>222</sup>

The authors report that IRB Members often held stereotyped views of other cultures, or demonstrated a lack of knowledge about different cultural contexts. For instance, the authors found that IRB Members sometimes lacked comprehension of situations of

<sup>218</sup> Rousseau et al., *supra* note 7.

<sup>219</sup> The decisions examined in this paper were rendered under the former *Immigration Act*, R.S.C. 1985 (4th Supp.), c. 28. Under the *IRPA*, Refugee Claim Officers are now known as "Refugee Protection Officers."

<sup>220</sup> *Ibid.* at 46, 52-54.

<sup>221</sup> *Ibid.* at 51.

<sup>222</sup> *Ibid.* at 63-64.

marginality and political violence. One Member argued that a Tutsi claimant should be safe in Rwanda because the government was Tutsi, thus demonstrating a simplistic understanding of the tense ethnic situation in Rwanda following the genocide.<sup>223</sup> Others had unrealistic notions of conflict settings, leading them to believe that all “normal life” must stop or change in situations of war and violence. Hence, these Members were suspicious of applicants’ accounts of attempting to maintain their daily routine in the midst of turmoil.<sup>224</sup> Some Members displayed an assumption that Canadian “logic” or ways of thinking are universal, or were unable to grasp other cultural situations. In two cases, IRB Members disbelieved women’s stories of being raped because the women could not produce medical evidence. They failed to understand that although women in Canada might be compelled to seek medical attention in such circumstances, this response is not typical in cultural contexts where rape constitutes a loss of honour for the woman’s family.<sup>225</sup>

Diverse styles of narration and expression stemming from cultural differences also led to miscommunications and negative decisions. Unlike Western modes of discourse, many cultures tend to emphasize collective identities rather than individual notions of selfhood. The blurred use of ‘we’ and ‘I’ when narrating stories can generate confusion, or be seen as “an attempt to conceal the ‘personal’ nature of the claimants’ persecution.”<sup>226</sup> Culture-specific expressions of emotion, particularly while recounting difficult stories, were also misconstrued. In some cases, the authors observed that IRB members were suspicious

<sup>223</sup> *Ibid.* at 61.

<sup>224</sup> *Ibid.* at 62.

<sup>225</sup> *Ibid.* at 62.

<sup>226</sup> *Ibid.* at 63.

of the emotional reserve displayed by people who are culturally disposed to conceal emotions from strangers.<sup>227</sup> Rousseau et al. found that such frustrating cross-cultural encounters could engender impatience or even hostility on the part of IRB members, who were then more likely to dismiss information or reject testimony.<sup>228</sup>

Building on the results of this research, Cr  peau and Nakache closely studied the institutional culture of the IRB by interviewing former IRB Members and conducting focus groups made up of lawyers, NGO workers, social workers, interpreters, and other key actors in the refugee determination system.<sup>229</sup> Their findings include a discussion of the process of the IRB's Member selection process as well as the evaluation of evidence by IRB Members.

To begin with, Cr  peau and Nakache found that cultural sensitivity was not adequately assessed in selecting IRB Members. Since dealing with refugees "entails a complex interaction with a complete 'other,'" it is essential to be receptive to social and cultural diversity and to have experience, if not expertise, in a culturally-different environment.<sup>230</sup> Interviewees reported that understanding issues from the perspective of the refugee claimant often required empathy, which could sometimes compensate for lack of cultural awareness. Further, some Members stated that it was important to be humble and self-aware about their limitations in understanding the situations of refugees.<sup>231</sup> It was

<sup>227</sup> *Ibid.* at 63.

<sup>228</sup> *Ibid.* at 63.

<sup>229</sup> Cr  peau and Nakache, *supra* note 7 at 54. The interviews and focus groups were conducted in 2004, and the study covered the period of 1999 to 2002.

<sup>230</sup> *Ibid.* at 75-76.

<sup>231</sup> *Ibid.* at 76.

noted that characteristics such as discernment, sensitivity, and common sense were not measured during the selection process; nor were Members screened for inappropriate attitudes or prejudices.<sup>232</sup>

Crépeau and Nakache also observed that credibility assessments were affected by a lack of what they term “cultural competence”:

[This] involves lack of awareness of the complexity and variability of human behaviour, failure to question one’s own cultural assumptions about what constitutes ‘normal’ behaviour, and a lack of sensitivity to the cultural, social, and contextual determinants of claimants’ behaviour. Lack of cultural competence may also take more subtle forms, such as the expectation that claimants should present a linear, logical narrative, and remember specific dates.<sup>233</sup>

For example, stakeholders reported that some Members placed an undue emphasis on the recollection of details, despite the fact that many refugee claimants come from cultures in which specific dates, times and similar details are much less important than in North American culture.<sup>234</sup> Other Members failed to recognize when applicants were suffering from trauma or mental or emotional disorders. The psychological effects of traumatic events and the experience of recounting them during a hearing could be misread as an indication that the claimant lacks credibility.<sup>235</sup> Overall, Crépeau and Nakache concluded that there are “genuine risks associated with making credibility assessments on the basis of an applicant’s demeanour and conduct,” and that particular caution is required in cases where the decision-maker and the applicant have different cultural backgrounds.<sup>236</sup> Thus, credibility assessments require continuous efforts to keep an open mind, to take account of

<sup>232</sup> *Ibid.* at 77-79.

<sup>233</sup> *Ibid.* at 105.

<sup>234</sup> *Ibid.* at 102. See also text accompanying notes 200 to 216.

<sup>235</sup> *Ibid.* at 104-105. See also Rousseau et al., *supra* note 7 at 48.

<sup>236</sup> *Ibid.* at 105.

cultural and social factors, and to “guard against judging plausibility based on one’s own cultural norms.”<sup>237</sup>

In sum, these studies demonstrate that culture plays an important role in adjudicating evidence and assessing the credibility of claimants before the IRB. It was noted that cultural miscommunications between IRB Members and applicants frequently arise during IRB hearings, which can engender frustration, disbelief, and other negative reactions on the part of both decision-makers and applicants. Moreover, the authors observed that IRB Members often held stereotyped views of other cultures, or had insufficient knowledge about different cultural contexts. Thus, lack of awareness about the nuances of a claimant’s social and cultural background can severely affect credibility assessments in the context of IRB hearings.

Further to these studies, Rousseau, Crépeau, and their research team called on the IRB to add “cultural competence” as a mandatory requirement for its Members.<sup>238</sup> This proposal was implemented in 2004, when the Chairperson of the IRB enacted criteria for selection of IRB Members.<sup>239</sup> Currently, “cultural sensitivity” is among the list of behavioral competencies in the IRB’s Statement of Qualifications for Members. In addition, Members must have a minimum of five years’ experience in “working with diverse communities and exposure to different cultural perspectives.”<sup>240</sup> However, it is unclear

<sup>237</sup> *Ibid.* at 105.

<sup>238</sup> Cleveland and Nakache, *supra* note 8 at 5.

<sup>239</sup> Crépeau and Nakache, *supra* note 7 at 81-82; Cleveland and Nakache, *ibid.* at 5.

<sup>240</sup> Immigration and Refugee Board of Canada, *Statement of Qualifications for IRB GIC Members*, online: Immigration and Refugee Board of Canada

<<http://www.irb.gc.ca/eng/brdcom/empl/memcom/Pages/sq.aspx>> (last accessed 24 March 2011).

how these terms have been defined by the IRB, or how Members have applied the principles in rendering recent IRB decisions.

My research attempts to understand how the IRB has interpreted and applied these criteria. Hence, the present work contributes to the existing literature by mapping the treatment of cultural difference by IRB Members in decisions rendered in and after 2004, when “cultural competence” was added to the IRB’s member selection criteria. In the next section, I present my findings on how IRB Members’ treatment of cultural factors influences their decision-making.

### **3.2. Analysis of IRB Decisions from 2004 to 2010**

#### **3.2.1. Methodology**

For this study, I reviewed published IRB decisions from the years 2004 to 2010. The IRB cases were obtained by searching the terms “cultur! or tradition!” in three combined Quicklaw databases: Canada Immigration and Refugee Board, Immigration Appeal Division Decisions; Canada Immigration and Refugee Board, Immigration Division Decisions; and Canada Immigration and Refugee Board, Refugee Protection Division Decisions. The 3,670 IRB decisions yielded by this search were sorted by relevance in Quicklaw’s database. In order to obtain a broad representative sample of the data, I reviewed the top 40 per cent most relevant decisions from each year, for a total of 1,470 decisions. Among these decisions, I identified the cases in which consideration of cultural factors played a significant role in the IRB’s adjudication.

The majority of IRB decisions pertaining to culture involve applications for sponsorship in which the panel must determine whether a family relationship is a “bad

faith relationship" entered into for immigration purposes.<sup>241</sup> Section 4 of the *Immigration and Refugee Protection Regulations* provides that a "bad faith relationship" is one for which it is established that: (1) the relationship is not genuine, and (2) the relationship was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*.<sup>242</sup> To succeed in an appeal, the appellant must demonstrate that only one of the two prongs of this test does not apply to the relationship.<sup>243</sup> Most of the decisions examined involve the *bona fides* of a relationship between married spouses; however, the "bad faith" provision also applies to common-law partnerships,<sup>244</sup> conjugal partnerships,<sup>245</sup> and adoptions.<sup>246</sup> I also studied decisions in which appellants claimed to owe a "cultural duty of care" to their parents.

<sup>241</sup> Another set of decisions that I identified were sponsorship appeals concerning the legal validity of marriage and adoptions. In addition to proving that his or her relationship is genuine, a foreign national must establish that it is valid pursuant to both the laws of the jurisdiction where it took place and under Canadian law: *IRPR*, *supra* note 18, ss. 2, 116, 117(1)(a), 117(3)(d). These decisions entail complex principles of family law and conflicts of laws that are beyond the scope of this thesis. Hence, while I acknowledge the role of culture in determining the legal validity of foreign marriages and adoptions, my work focuses on appeals concerning the genuineness of family relationships under the *IRPA*.

<sup>242</sup> *IRPR*, *ibid.* at s. 4. The provision states as follows:

4. **Bad faith** – For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

<sup>243</sup> *Khera v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, [2007] F.C.J. No. 886 (QL) at para. 6; *Ouk v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 891, [2007] F.C.J. No. 1157 (QL) at para. 12. Thus, it is possible that a relationship that was originally entered into for the purpose of acquiring a privilege or status under the *IRPA* may become a genuine relationship at the time of assessment: *Donkor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089, [2006] F.C.J. No. 1375 (QL) at para. 13.

<sup>244</sup> "Common-law partner" is defined at s. 1(1) of the *IRPR*, *supra* note 18, as "an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year."

<sup>245</sup> "Conjugal partner" is defined at s. 2 of the *IRPR*, *ibid.*, as "a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year."

<sup>246</sup> A dependent child who has been adopted by a permanent resident or a Canadian citizen, or a child whom the sponsor intends to adopt, may qualify as a member of the family class: *IRPR*, *ibid.*, ss. 117(1)(b) and (g). The *IRPR* also allows for adoptions of persons 18 years of age or older in prescribed circumstances: *ibid.*, s. 117(4).

In the sections that follow, I examine how IRB Members handled the cultural issues arising from the appeals and how these issues affected the Members' evaluation of the applicants' credibility. Given the large amount of relevant material, I present my findings in a thematic framework that identifies the broader patterns emerging from the decisions. For each theme, I highlight particular decisions which best illustrate the cultural issues involved.

### **3.2.2. The IRB's Understanding of its Role**

Although there are no written guidelines setting out the manner in which IRB Members should adjudicate cultural factors, some of the decisions examined reveal how Members themselves viewed their role. As stated above, it is well established in the case law that recognition of cultural differences is important in adjudicating all types of immigration files.<sup>247</sup> For sponsorship appeals before the IAD, tribunal members acknowledged that decision-makers must consider the cultural norms governing family relationships in assessing whether these relationships are credible.<sup>248</sup>

The panel in *Padda* recognized the challenges faced by the IAD in determining the genuineness of relationships in a large number of different cultural contexts:

In dealing with an appeal from the refusal to deliver a visa because the marriage is caught under section 4 of the Regulations, the Panel must always take into account the different cultural norms that can exist. One day, the Panel will deal with a marriage from Morocco between Muslim and Muslim, another between Muslim and Christian, and on another day Vietnamese, East European, Buddhist or atheist, and in this case Sikhs from India.<sup>249</sup>

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<sup>247</sup> See text accompanying notes 232 to 234.

<sup>248</sup> See e.g. *D.L.H. v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 632 (QL) at para. 59; *Phan v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 1602 (QL) at para. 18.

<sup>249</sup> *Padda v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 773 (QL) at para. 27 [*Padda*].

Despite these difficulties, various IRB Members noted that decision-makers must be careful to avoid applying “Canadian” standards to individuals in other cultural contexts.<sup>250</sup> The idea that family relationships should be assessed according to the cultural practices and traditions of the parties was generally reflected in the decisions examined in this study.

However, the manner in which IRB adjudicators understood and applied this principle varied from Member to Member. In *Mirza*, for instance, the IRB Member wrote that reliance on “cultural norms and standards” requires a certain amount of “coherence”. Put differently, “if [a party] should deviate from cultural norms, then it is reasonable to expect some form of explanation, which should satisfy the Panel on a balance of probabilities.”<sup>251</sup> In this way, many decisions reflected a more rigid stance, in which parties who did not adhere to their cultural norms and traditions were viewed as less credible.

By contrast, some panels seemed more accepting of the idea that there are exceptions to cultural norms, and that appellants and applicants will not always follow traditional customs. In *Pop*, the IRB Member stated that it was incorrect to say that “all people of a specific culture” will “fit into a set of cultural norms and traditions.”<sup>252</sup> Another Board Member affirmed that “marriage customs and practices are not infallible guides to whether a marriage is genuine … [but] are a starting point into an inquiry about the genuineness of

<sup>250</sup> *Mirza v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 998 (QL) at para. 31 [*Mirza*].

<sup>251</sup> *Mirza*, *ibid.* at para. 34. See also *Ho v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1110 (QL) at para. 9, in which the IRB Member states: “Cultural norms are always important regarding marriage, and when parties do not follow their own cultural norms, the panel is entitled to expect a plausible explanation.”

<sup>252</sup> *Pop v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 839 (QL) at para. 9.

a relationship such as marriage.”<sup>253</sup> Other Members acknowledged that while cultural considerations may be important, it is necessary to analyze whether they are particular to the case at bar:

While knowing what the usual situation is and whether the appellant’s and applicant’s situation comports with the same may be of some importance, it must be remembered that we are concerned here with two specific individuals whose actions are governed by their individual circumstances, their individual philosophies, their individual lifestyles, their individual cultures, and their individual practices. It is these individual traits that in the final analysis will determine whether the “usual” situation is applicable or important to them.<sup>254</sup>

Such tribunals did not automatically regard the parties’ failure to follow cultural norms as indicative of a lack of credibility.

Thus, Members of the IAD treated cultural issues differently in accordance with their understanding of their role. While some Members required strict adherence to cultural norms, others were more apt to acknowledge that deviations from traditional customs and practices are expected, and do not necessarily undermine the credibility of parties.

### **3.2.3. The Cultural Validity of Marriage**

In this study, marriages made up the vast majority of cases where cultural factors played a role in the IRB’s adjudication. At first glance, it seemed that IRB Members were generally alive and sensitive to different marital traditions. It is safe to say that panels made a real effort to evaluate the genuineness of relationships according to the customs of the applicant’s culture. In particular, practices such as arranged marriages were viewed as

<sup>253</sup> *Chan v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1463 (QL) at para. 8 [*Chan*].

<sup>254</sup> *Vuong v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2152 (QL) at para. 18. See also *Kalsi v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1199 (QL) at para. 33; *Dhami v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1169 (QL) at para. 25 [*Dhami*].

the “norm” in cultural contexts where such practices are common; panels did not attempt to assess relationships according to North American practices. However, their decisions sometimes resulted in questionable representations of “Other” cultures and encultured subjects. Putting aside temporarily the issue of where the IRB Members obtained their knowledge of traditional customs and practices, various Members’ treatment of cultural difference had the effect of propagating essentialist views of cultural minorities.

A key consideration in establishing the genuineness of a marriage before the IRB was whether the couple’s marriage was performed according to the norms of the applicant’s culture.<sup>255</sup> While none of the factors discussed below are determinative in themselves of a genuine marriage, the “culturally appropriate” details provided by both the appellant and applicant with regard to their meeting, engagement and subsequent wedding celebration influenced the IRB’s evaluation of their credibility.

### 3.2.3.1. Traditional Ceremonies

Weddings that were celebrated with “pomp and show” and in accordance with traditional or religious customs were generally held to be indicative of a genuine relationship. For example, in evaluating the validity of Sikh marriages, IRB Members considered whether the Sikh wedding ceremony (*Anand Karaj*) was duly performed, whether the couple made the requisite rounds of the holy book (*lavan*),<sup>256</sup> and whether the

<sup>255</sup> In such cases, the applicant is the foreign national being sponsored by the appellant, his or her putative spouse. Where the spouses are from different cultural backgrounds, the marriage ceremony is almost invariably scrutinized with reference to norms of the applicant’s culture, rather than the appellant’s.

<sup>256</sup> *Jatinder Auja v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1132 (QL) at para. 23 [*Jatinder Auja*]; *Tarsem Kaur Dhillon v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 234 (QL) at para. 11 [*Tarsem Kaur Dhillon*].

*sagan* or ring ceremony was completed.<sup>257</sup> In *Bagha*, one aspect of the couple's testimony that led to a finding of non-credibility was an inconsistency as to whether they had made four or seven rounds of the holy book.<sup>258</sup>

For Pakistani Muslim weddings, IRB Members found that the failure to perform "the culturally necessary ritual of *Rukhsati*" (bride's departure from her parents) indicated a lack of genuineness in the marriage.<sup>259</sup> Another tribunal drew a positive inference from evidence that a holy fire ceremony was performed at a Hindu wedding in India.<sup>260</sup> In *Prasad*, the fact that a couple from Fiji chose not to have a Hindu ceremony at the time of their civil wedding militated against the genuineness of their marriage.<sup>261</sup>

The absence of a banquet or formal procession at Vietnamese weddings was seen as a *prima facie* indicator of a non-genuine relationship.<sup>262</sup> Similarly, with respect to Chinese weddings, the holding of a traditional tea ceremony and wedding banquet was deemed to bolster the couple's credibility.<sup>263</sup> In *Ndiaye*, the IRB Member drew a positive inference

<sup>257</sup> *Hansra v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1344 (QL) at para. 14-15; *Gurbux Kaur Gill v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 1641 (QL) at para. 18.

<sup>258</sup> *Bagha v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1669 (QL) at para. 9. This was one of the rare cases in which the appeal was heard before a panel of three Members. The dissenting Member wrote that the number of rounds made around the holy book by the couple was irrelevant, considering that the legality of the marriage was not in question: *ibid.* at para. 28.

<sup>259</sup> *Tariq v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 495 (QL) at para. 12. See also *Saeeda Khatoon Khan v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1008 (QL) at paras. 8-11; *Ashraf v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1562 (QL) at para. 10 [*Ashraf*]; *Rauf v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 964 (QL) at para. 23.

<sup>260</sup> *Sharma v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2078 (QL) at para. 32 [*Sharma*].

<sup>261</sup> *Prasad v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 940 (QL) at paras. 32-35.

<sup>262</sup> See e.g. *Phuoc Huu Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1678 (QL) at para. 18; *Huang v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1250 (QL) at paras. 11, 15.

<sup>263</sup> See e.g. *Yong v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 205 (QL) at para. 16; *Yim v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 1776 (QL) at para. 9; *Truong v. Minister of*

from the fact that the couple held a religious ceremony in Mali and that a dowry was paid.<sup>264</sup>

The importance assigned to the performance of cultural ceremonies often varied according to the person hearing the case. Some panels drew a negative inference from the absence of a *thali* ceremony at a wedding between Sri Lankan Tamils.<sup>265</sup> In *Anthonipillai*, a visa officer had noted that a Sri Lankan couple had not used an elder person to tie the *thali* at their marriage celebration, which was “culturally inappropriate.” The appellant testified that his elder sister had handed him the *thali* because his parents were not present at the ceremony, and that this was consistent with Tamil custom.<sup>266</sup> However, another IRB Member found that the fact that the *thali* was not performed was understandable, given the families’ opposition to the marriage.<sup>267</sup>

The contrast between different Members’ expectations is aptly illustrated by two decisions involving Sikh weddings. In *Goraya*, the adjudicator drew a negative inference from the fact that the henna ceremony was omitted from the marriage celebration:

*Citizenship and Immigration*, [2005] I.A.D.D. No. 475 (QL) at para. 10; *Chen v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 15 (QL) at para. 19.

<sup>264</sup> *Ndiaye v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2914 (QL) at paras. 11-12.

<sup>265</sup> See e.g. *Thangamaniam v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 777 (QL) at para. 38 [*Thangamaniam*]; *Sivaramakrishnan v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1847 (QL) at para. 26 [*Sivaramakrishnan*].

<sup>266</sup> Because neither party had presented evidence on Tamil wedding ceremonies, the IRB Member wrote that he could not “assign much weight to this issue”: *Anthonipillai v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1509 (QL) at para. 11.

<sup>267</sup> The IRB Member wrote: “[i]t would be inappropriate to slavishly adhere to a generalization of how Sri Lankan rural marriages come about.”: *F.G.T. v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 9 (QL) at para. 37.

... it does not appear that the applicant underwent a 'henna ceremony', which is part of the ritual of preparing the bride for marriage. While she claimed that the ceremony took place on the day preceding the wedding, no henna was visible on the applicant's hands in the wedding photographs. The panel takes judicial notice of the fact that henna is a vegetable dye that stains the skin.<sup>268</sup>

For the Board Member in *Singh*, however, the henna ceremony was inconsequential to the spouses' credibility finding concerning a Sikh marriage:

The panel wishes to point out that the weight that must be given to the ceremonial practices is not established before us and it would be a stretch of the imagination to conclude that the legal marriage would somehow be a sham for the only reason that the young lady does not have henna on her hands.<sup>269</sup>

Accordingly, some Board Members concluded that deviation from cultural traditions did not necessarily undermine the genuineness of the wedding ceremony. For instance, in *Ly*, the Member wrote that the Minister's counsel had not questioned the couple on whether they felt their courtship and marriage conformed to traditional Vietnamese practices, or whether they "knowingly did non-traditional things":

The panel must also state that it is reticent to accord much weight to textbook statements of what cultural practices are or should be in an evolving modern world where traditions are changing and people may well respect and follow some traditional practices and not others.<sup>270</sup>

In this way, some tribunals found that elaborate religious ceremonies were not necessarily indicative of a genuine marriage.

<sup>268</sup> *Goraya*, *supra* note 3 at para. 25.

<sup>269</sup> *Ranbir Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 917 (QL) at para. 12. The absence of a henna ceremony was also questioned with respect to traditional weddings in Morocco: see e.g. *Masse v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 171 (QL) at para. 13; *Poulin v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 439 (QL) at para. 22; *Trudeau v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1103 (QL) at para. 9.

<sup>270</sup> *Ly v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 985 (QL) at para. 26 [*Ly*].

### 3.2.3.2. Traditional Attire

In many decisions, appellants and applicants were asked to explain why their wedding photographs did not depict them wearing traditional wedding garments. Costumes that did not meet the decision-maker's expectations were viewed as contraventions of cultural norms and thus detracted from the spouses' credibility:

When the Applicant was confronted with the fact that she did not appear like a new bride because she did not wear the vermillion on her forehead; she claimed that the Appellant does not like it.<sup>271</sup>

The photographs tendered did not present a wedding ceremony or a couple depicted in the traditional garments of a Muslim married couple of Ethiopian background. It did show, however, persons of Ethiopian origin in a room attired in western clothing in a setting akin to a party.<sup>272</sup>

In *Beardy*, the Minister's counsel asked a Pakistani Muslim bride why she wore pink rather than red or burgundy.<sup>273</sup> Another appellant from Iran was confronted regarding the colour of her dress, which was blue at her Muslim religious ceremony and white at her wedding celebration. The Minister's counsel argued that she "should have been wearing blue" at the engagement ceremony. Her husband, the applicant, testified that blue, red, or white can be worn, and that it was "a question of taste and family customs."<sup>274</sup> With regard

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<sup>271</sup> *Prafulkumar Mohanbai Patel v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 484 (QL) at para. 34 [*Prafulkumar Mohanbai Patel*].

<sup>272</sup> *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 102 (QL) at para. 14 [*Mohamed*]. This was a decision of the Refugee Protection Division in which the credibility of the claimant's testimony turned on whether or not she was married.

<sup>273</sup> *Beardy v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2583 (QL) at para. 27 [*Beardy*].

<sup>274</sup> *Zadeh v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1122 (QL). See also *Abbas v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 1481 (QL) at para. 28, in which the Lebanese appellant was questioned about why she was not wearing a white wedding dress.

to Sikh weddings, appellants were required to give reasons for why the bride was not wearing red bangles or other jewelry.<sup>275</sup>

Several tribunal members noted that the married couple or their guests were dressed too casually, in a manner that was inappropriate for a wedding.<sup>276</sup> For instance, in *Bergeron*, the panel wrote that in the wedding photos, “the applicant is wearing a baseball cap and his sister is wearing a jogging suit.”<sup>277</sup> This type of dress was viewed as inconsistent with “the level of respect and seriousness that one would normally expect in a genuine marriage.”<sup>278</sup> In *Barhtia*, however, the appellant testified that he was dressed casually for his wedding because “he is from a lower caste, and that his tradition is to dress simply.” The IRB Member accepted this explanation.<sup>279</sup> Another appellant was able to justify his simplicity of dress as being respectful of an Indian mourning tradition that avoids celebrations during the first year following the death of a loved one, in this case his mother.<sup>280</sup>

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<sup>275</sup> See *Manpreet Kaur Jaswal v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2706 (QL) at para. 16; *Sukhwant Singh Tak Singh v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1599 (QL) at para. 21; *Goraya*, *supra* note 3 at para. 27.

<sup>276</sup> See e.g. *Osei v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 937 (QL) at para. 10 [*Osei*]; *Do v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1494 (QL) at para. 6; *Kataria v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2054 (QL) at para. 11.

<sup>277</sup> *Bergeron v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 614 (QL) at para. 11 [*Bergeron*].

<sup>278</sup> *Osei*, *supra* note 276 at para. 15.

<sup>279</sup> *Barhtia v. Canada (Citizenship and Immigration)*, [2010] I.A.D.D. No. 434 (QL) at para. 12 [*Barhtia*].

<sup>280</sup> *Dua v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 41 (QL) at para. 15, aff'd 2008 FC 1055, [2008] F.C.J. No. 1331 (QL) [*Dua*].

### 3.2.3.3. Attendance at the Wedding

High attendance at the marriage celebration, particularly by family members, was viewed favourably by the IRB as a marker of a genuine marriage.<sup>281</sup> Conversely, the presence of few guests was seen as an indicator of a bad faith relationship, implying that the couple did not wish to publicize the event or did not attach much significance to it.<sup>282</sup> In such decisions, a small wedding was treated as a departure from cultural norms, requiring justification by the appellant and applicant:

The visa officer also noted the lack of celebrations or parties after the wedding as another characteristic of a marriage that was not genuine. This observation also falls under the officer's specialized knowledge of Moroccan customs. All marriages need to be publicized, and in Morocco this function is carried out through a party, which is generally quite spectacular.<sup>283</sup>

Often there was a lack of consistency among these decisions. In *Trudel*, the Canadian appellant's assertion that she and her Moroccan husband did not hold a big wedding because it was "not part of her values" was met with disbelief. The IRB Member pointed out that when the applicant's sister was married, she had had a traditional Moroccan wedding with much fanfare and several guests in attendance.<sup>284</sup> However, in a factually similar case, the appellant and applicant offered the same explanation for not holding an

<sup>281</sup> See e.g. *Chire v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 822 (QL) at para. 11; *Manjinder Singh Gill v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 636 (QL) at para. 22; *Dass v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1767 (QL) at para. 25.

<sup>282</sup> See e.g. *Boivin v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1200 (QL) at para. 28; *Amratpal Singh Sidhu v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 736 (QL) at para. 14 [*Amratpal Singh Sidhu*]; *Deschênes v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 980 (QL) at para. 19-20 [*Deschênes*]; *Bhinder v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2038 (QL) at para. 21 [*Bhinder*]; *Trudeau*, *supra* note 269 at para. 8; *Bergeron*, *supra* note 277 at para. 10.

<sup>283</sup> *Vigneault v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 248 (QL) at para. 32 [*Vigneault*].

<sup>284</sup> *Trudel v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2655 (QL) at para. 8.

elaborate celebration, which was accepted by the tribunal.<sup>285</sup> Thus, the justification of having a small ceremony due to personal choice and financial constraints was not consistently viewed as reasonable.

In some cases, the couple themselves offered “cultural” explanations to justify their family’s lack of attendance at the wedding. In the *Zhao* decision, the appellants argued that it was a Fujian custom for the bride’s family not to attend the wedding. However, the IRB gave no weight to this assertion, stating that the onus was on the appellant to establish foreign custom.<sup>286</sup>

#### *3.2.3.4. Location of the Wedding*

With respect to many Indian marriages, the fact that the celebration was held at the bride’s family residence was seen as indicative of a genuine relationship. According to these IRB Members, holding a Sikh or Hindu wedding at a venue far from the bride’s ancestral home was considered a deviation from customary norms.<sup>287</sup>

Parties tendered various explanations for this particular departure from tradition, usually of a pragmatic nature. One appellant explained that their wedding was not held in the bride’s home village because “there was no decent banquet hall” and “no heating in her family home.” This explanation was accepted as reasonable by the IRB.<sup>288</sup> Another

<sup>285</sup> *Therrien v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1814 (QL) at para. 15 [*Therrien*].

<sup>286</sup> *Zhao v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1348 (QL) at para. 19.

<sup>287</sup> See e.g. *Mahir v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2125 (QL) at para. 12 [*Mahir*]; *Kiranben Patel v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 201 (QL) at para. 43; *Dhami*, *supra* note 254 at para. 39; *Jhutti v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2192 (QL) at para. 14; *Manjinder Singh Gill*, *supra* note 281 at para. 22; *Goraya*, *supra* note 3 at para. 18.

<sup>288</sup> *Joshi v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2727 (QL) at para. 11 [*Joshi*].

appellant testified that their marriage ceremony took place in the city rather than the applicant's village because the village was "dirty, the bathrooms ... not liveable and the water undrinkable."<sup>289</sup> In the latter case, the panel did not find the appellant's explanation to be credible.

Some appellants also offered evidence of changing norms in respect of the location of weddings. In *Grewal*, the appellant's counsel filed a letter from a Sikh priest attesting to the recent trend of holding marriages in the Punjab at "marriage palaces" or banquet halls rather than the bride's place of residence. The IRB found this evidence to be satisfactory.<sup>290</sup> The appellant and the applicant gave similar testimony in *Janjua*, which was found to be credible by the tribunal:

I have no reason to doubt that customs in the Punjab change from time to time and holding marriages in a place designed specifically for banquets instead of a home as traditionally done is understandable and plausible.<sup>291</sup>

Hence, in these cases the adjudicators were open to accepting the parties' testimony about evolving cultural traditions.

### *3.2.3.5. Development of the Relationship*

When assessing the genuineness of a marriage, the IAD must take into account the cultural context in which the couple's relationship arises.<sup>292</sup> In particular, it is well established that the practice of arranged marriages does not in itself call into question the

<sup>289</sup> *Kang v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 648 (QL) at paras. 11-12 [*Kang*].

<sup>290</sup> *Jaspal Singh Grewal v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 412 (QL) at para. 31 [*Jaspal Singh Grewal*].

<sup>291</sup> *Janjua v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 343 (QL) at para. 12 [*Janjua*].

<sup>292</sup> *Siev, supra* note 215.

good faith of the spouses as long as the practice is customary in their culture.<sup>293</sup> As such, Board Members are obliged to consider the development of the couple's relationship, including their introduction and courtship, in accordance with their cultural norms.<sup>294</sup>

However, some IRB Members seemed to have difficulty imagining scenarios in which the appellant and applicant's relationship was "outside the norm." In many decisions, suspicion was cast upon couples that did *not* have an arranged marriage in cultural contexts where such marriages are typical. For instance, in *Aujla*, a Sikh couple testified that they lived in a common-law relationship while the applicant was still married. The IRB held that it was not credible that they had been in a genuine conjugal relationship, since it was highly unusual for a couple in the rural Punjab to be living together without being married:

Certainly the uncommon nature of this relationship, taking place in the context of a conservative religious culture, required additional explanation from the couple to establish the genuineness of their relationship. Neither the appellant nor applicant was able to provide a reasonable explanation for why they opted for a conjugal relationship, versus marrying nor waiting to marry after the applicant divorced.<sup>295</sup>

Even in cases where the panel accepted that the relationship was genuine, the fact of having a so-called "love match" attracted greater scrutiny and required detailed explanations from the appellants. For example, in *Sanghera*, the Minister's counsel argued

<sup>293</sup> See e.g. *Bhuiyan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 144, [2010] F.C.J. No. 167 (QL); *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1051, [2007] F.C.J. No. 1381 (QL).

<sup>294</sup> As stated by one IRB Member: "As to the development of their relationship it must be measured using not a western paradigm but rather the yardsticks found in the context of the Ghanaian traditions and cultural practices relevant to marriage": *Ansaah v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 244 (QL) at para. 17 [*Ansaah*].

<sup>295</sup> *Jaswant Singh Aujla v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1553 (QL) at para. 10 [*Jaswant Singh Aujla*]. See also *Harjinder Singh Sidhu v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 814 (QL) (in which another Punjabi Sikh couple's testimony about having a common-law relationship was disbelieved) [*Harjinder Singh Sidhu*].

that a Sikh couple's marriage was "implausible" because they had met and begun a clandestine relationship while the appellant was married to another person. The panel found that the development of the relationship, though "unusual in respect to traditional Sikh society," was "not so outside the realm of the possibility as to be implausible."<sup>296</sup> In *Mujib*, the IRB Member also deemed it unusual that the appellant and applicant had fallen in love and married without their parents' knowledge:

The story of the development of the relationship is certainly unusual. Muslims, especially recent immigrant Muslim daughters, do not normally or egregiously oppose the will of their parents on matters such as marriage. Dating behind one's parents' back and living together are significantly outside the cultural norm; however, there are always exceptions and the panel is guided to view the matter through the eyes of the couple and not through its own cultural or moral lens.<sup>297</sup>

Thus, despite ultimately finding the couple's relationship to be genuine, the tribunal was compelled to specify how "recent immigrant Muslim daughters" would ordinarily behave. In this way, the Board Member's perception of the appellant's cultural norms informed their evaluation of evidence about the genesis of the relationship.

Certain IRB Members seemed unable to reconcile the fact that couples would enter an arranged marriage, yet not adhere to other cultural traditions:

One difficulty that the appellant encounters is the fact that he apparently has no attachment to any traditional Chinese values. He explains this when he is required to answer why there is no formal marriage ceremony and none of the usual cultural

<sup>296</sup> *Sanghera v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1789 (QL) at para. 37 [*Sanghera*]. See also *Malik v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1631 (QL) at para. 10 (in which a Pakistani couple's non-arranged marriage was found to be genuine).

<sup>297</sup> *Mujib v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 604 (QL) at para. 19 [*Mujib*]. See also *Unique v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 41 (QL) at para. 15:

In the panel's view, while arranged marriages may be the norm in Pakistan, it clearly is not the only form of marriage that takes place and Pakistanis have married outside of their culture, notably and notoriously, Imran Khan, a former captain of the Pakistan National cricket team.

activities. If this is the case then the arranged marriage cannot be placed within cultural norms as these hold no weight with the appellant.<sup>298</sup>

I find it unusual that the parties have followed the cultural norms by selecting marital partners by way of an arranged marriage but have not followed other cultural norms in that the appellant does not live with her in-laws, she lives by herself. The reason she gave for living alone after marriage is that she had done so before marriage. I find little substance to that answer.<sup>299</sup>

In *Eid*, the genuineness of the appellant's marriage to her Lebanese cousin was questioned in part because of her decision to return to work and school in Canada after the wedding rather than staying in Lebanon with her husband. The IRB Member wrote that he was "baffled and perplexed" that the appellant had given "her job with Rossy and her studies priority over marriage and its usual obligations."<sup>300</sup> The Member further stated that the fact that she had a boyfriend prior to her marriage "reveals a contradiction with the appellant's attachment to and respect for cultural and religious values, habits, customs, and traditions."<sup>301</sup> Pursuant to the Board Member's logic, the appellant's willingness to flout other traditions cast doubt upon the good faith of her marriage to the applicant.

Arranged marriages that did not entail extensive negotiations were also regarded with doubt. In *Klair*, the appellant testified that he had agreed to marry the applicant 15 to 20 minutes after their first meeting, which was considered contrary to Indian Sikh norms by the tribunal.<sup>302</sup> In *Nguyen*, the brief nature of the couple's courtship prior to their decision to marry was found to be inconsistent with the couple's Vietnamese cultural traditions.<sup>303</sup>

<sup>298</sup> *Qiheng Wu v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1231 (QL) at para. 19 [*Qiheng Wu*].

<sup>299</sup> *Kandola v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1277 (QL) at para. 27.

<sup>300</sup> *Eid v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 151 (QL) at para. 23.

<sup>301</sup> *Eid, ibid.* at para. 24.

<sup>302</sup> *Klair v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2015 (QL) at para. 16-20 [*Klair*];

<sup>303</sup> *Hung Tom Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 203 (QL) at para. 6.

However, in a case involving Cambodian appellants, the panel accepted that that an eight-day courtship was reasonable because “culturally speaking, it was preferable for a young man and young woman who were attracted to one another and who had common interests to marry before pushing their acquaintance further.”<sup>304</sup> In *Mahir*, the supposed haste with which the marriage occurred was successfully explained by the fact that a Sikh priest had advised them of an auspicious date for the marriage.<sup>305</sup>

There are also examples of cases where IRB Members questioned the good faith of couples whose marriages appeared to run counter to other marital customs. According to the panel in *Shergill*, it was against Sikh cultural norms for the applicant to be married before his older brother, which contributed to its finding that the marriage was not genuine.<sup>306</sup> In *Sandhu*, however, the tribunal found the applicant’s explanation for allowing his younger brother to be married first to be credible:

... while it may be the norm that the elder brother should marry first, in this case, the applicant testified that after the death of his father he took on the responsibility of the family and allowed his younger brother to marry first.<sup>307</sup>

Women of colour also experienced additional difficulties in establishing the credibility of their relationship stories. For example, some Asian women were stereotyped as timid or subservient, which undermined their credibility regarding the development of their spousal relationship. In one recent decision, the Minister’s counsel argued that the applicant’s testimony that she had initiated her relationship with the appellant was not

<sup>304</sup> *To v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 31 (QL) at para. 23.

<sup>305</sup> *Mahir*, *supra* note 287 at para. 12.

<sup>306</sup> *Shergill v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 573 (QL) at para. 25 [*Shergill*].

<sup>307</sup> *Simarjit Kaur Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2394 (QL) at para. 14 [*Simarjit Kaur Sandhu*].

credible. He cited Internet articles stating that Filipina women are “expected to be demure, modest, shy, loyal, and self-effacing,” and that “[a] woman who is confident and assertive is … not consistent with cultural norms.”<sup>308</sup> These texts were accepted by the IRB Member as evidence of cultural impediments to the applicant and appellant’s relationship.

In another case, the appellant described his wife, a Somali woman, as “shy” in an attempt to explain her poor performance at the visa interview. The IRB Member wrote that she interpreted the appellant’s evidence as “referring as much to [the applicant’s] culturally influenced behaviour as to her inherent personality features.”<sup>309</sup> In this manner, the IRB Member attributed a cultural explanation to a character trait such as shyness, suggesting that all Somali women are timid. The above comments highlight the stereotyped images of women of colour that were sometimes propagated in IRB decisions. Thus, the demands of identity performance created particular burdens for people with intersectional identities, who had to overcome dual stereotypes in presenting their narratives.

### *3.2.3.6. Sexual Relations*

Many tribunals were also concerned with the parties’ sexual behaviour and whether it was credible in the context of their cultural backgrounds. In particular, several Board Members discussed whether cohabiting or engaging in sexual relations outside of marriage was consistent with prevailing social mores. Some of these inquiries took a very personal and intrusive turn:

<sup>308</sup> *De Quiroz*, *supra* note 340 at para. 11.

<sup>309</sup> *Grat v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2798 (QL) at para. 20.

Although the applicant professes to be a traditional [Chinese] woman, she did not wait long before she had intimate relations with the appellant.<sup>310</sup>

For the visa officer assigned to this case, although realising that such relationship exists, in a conservative culture of Afghanistan, it was odd for the Applicant to have sex before marriage, let alone having a child out of wedlock.<sup>311</sup>

Authors such as Volpp, Brown and Phillips have noted that dominant groups tend to view the behaviour of non-European immigrants as motivated by culture. Such accounts suggest that members of minority groups are bound by cultural imperatives to act in certain ways: instead of having culture, culture has “them”.<sup>312</sup> This phenomenon was manifest in some IRB decisions, where Board Members held that aspects of parties’ conduct were not credible because of their cultural background. For instance, many panels were unable to countenance the possibility that a practicing Muslim would have sexual relations outside of marriage:

The panel also finds it very unusual that, on the one hand, the applicant’s family adheres to Moroccan traditions, especially religious ones (e.g. Friday prayers, veils worn by women in the family, a religious wedding ceremony held before sexual intercourse between the spouses, etc.), but, on the other hand, allowed a 33-year-old man who still lives with his parents, brother, and sisters to develop a relationship over the Internet with a woman of another nationality and another religion.<sup>313</sup>

Leaving aside the fact that it is strange to speak of a 33-year-old man being “allowed” to date by his family, these remarks are problematic because they suggest that the applicant lacks agency. Put differently, the decision implies that it is not credible that the applicant

<sup>310</sup> *Ash v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1276 (QL) at para. 10 [*Ash*].

<sup>311</sup> *Khaliq v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2501 (QL) at para. 15.

<sup>312</sup> See text accompanying notes 64 to 67.

<sup>313</sup> *Morisseau v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 930 (QL) at para. 16.

Similar reasoning can be found in *Lemire v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 3066 (QL) at para. 19; *Lamouchi v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 217 (QL) at para. 19; *Lafrenière v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 901 (QL) at para. 10 [*Lafrenière*]; *Turgeon v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 27 (QL) at para. 13; *Bergeron, supra* note 277 at para. 9.

would pursue a sexual relationship with a woman solely because the applicant is a Moroccan Muslim, and such behaviour is prohibited in his religion and culture. This standpoint defines “Other” immigrants in terms of their cultural background and assumes that they could never deviate from prevailing norms.

However, in some decisions, IRB Members were receptive to appellants’ testimony about changing social values and customs, accepting that non-traditional behaviour did not necessarily indicate a lack of credibility:

The visa officer was concerned that the couple have broken with Bangladeshi tradition and had cohabited before marriage. ... In fact, the Appellant’s father testifies ... that the Appellant was “influenced by friends”, but nonetheless, she is his daughter and he has “no alternative than to accept them.”<sup>314</sup>

While the appellant conceded that it never used to be a norm in his culture [in India] to have sexual relations prior to a marriage, things have changed over the years. He stated that once the applicant’s family and friends knew that the relationship between them was serious, the sleeping together became a non-issue.<sup>315</sup>

Hence, some IRB Members relied on appellants’ and applicants’ testimony to determine the content of sexual norms in their culture.

### *3.2.3.7. Essentialism and Cultural Performance*

In sum, many IRB decisions relating to the validity of marriage were based on the assumption that members of a cultural group share the same traditional values and practices, and adhere strictly to those values. Spouses were expected to “perform” their family relationships in a manner that was consistent with their culture. Certain Board Members appeared to have a preconceived notion as to what a marriage in the applicant’s

<sup>314</sup> Khan v. Canada (Minister of Citizenship and Immigration), [2009] I.A.D.D. No. 1385 (QL) at para. 36.

<sup>315</sup> Rathod v. Canada (Minister of Citizenship and Immigration), [2008] I.A.D.D. No. 1569 (QL) at para. 31.

culture would look like. Thus, the credibility of marriages that did not meet the Member's expectations of "pomp and show" was questioned. This type of reasoning reinforces the notion that cultural identity is created by the repeated performance of norms.

Marriage celebrations that did not conform to the decision-maker's expectations were regarded as lacking credibility. For example, IRB Members drew a negative inference when appellants and applicants testified that they had not fulfilled traditional rites or worn traditional wedding garments. Several tribunals held that omitting certain ceremonies from the wedding, such as the *Rukhsati* for Muslim marriages or the tea ceremony for Chinese marriages, was indicative of a bad faith relationship.<sup>316</sup> Brides who wore pink instead of red or burgundy, or who chose not to put henna on their hands or vermillion on their foreheads, were found to be less credible.<sup>317</sup> Parties who did not hold elaborate celebrations with large numbers of guests were also regarded with suspicion.<sup>318</sup> One Member even stated that parties might "partake in lavish mock weddings in order to convince immigration authorities of the authenticity of the union,"<sup>319</sup> thus illustrating the importance of "performing" their culture in a sufficiently persuasive manner. Thus, in cases where wedding ceremonies were not culturally recognizable and convincingly authentic, the parties were held to lack credibility.

<sup>316</sup> See text accompanying notes 274 to 285.

<sup>317</sup> See text accompanying notes 289 to 298. This is akin to saying that a "Canadian" wedding, where the bride does not wear a white gown, has no bridesmaids, and refuses to let her husband toss her garter belt into the crowd, is indicative of a non-genuine marriage.

<sup>318</sup> See text accompanying notes 299 to 304.

<sup>319</sup> *Aguilar*, *supra* note 356 at para. 40. See also *Padda*, in which the IRB Member found that "[t]he appellant and the applicant chose to make use of all the trappings of a Sikh ritual for appearance's sake," but held that the marriage was not genuine: *supra* note 438 at para. 33.

Further, numerous panels drew a negative inference from the fact that the appellant and applicant's relationship deviated from the conventions of an arranged marriage. Couples who married without their parents' consent<sup>320</sup> or cohabited prior to marriage<sup>321</sup> were regarded as less credible. Many IRB Members also held that applicants and appellants who engaged in sexual relations outside marriage were acting in a manner that was inconsistent with their cultural norms.<sup>322</sup> Board Members demanded further explanations when applicants and appellants testified that they had departed from prevailing traditional mores in this manner, and in some decisions, held that such departures from the norm were not plausible. These types of conclusions reflect an essentialist approach, since they preclude any divergence from (the decision-maker's understanding of) the applicant's cultural norms.

Moreover, certain decision-makers had difficulty accepting that cultural practices change and evolve over time, or that some applicants simply did not adhere to them for personal reasons. Guests wearing "western clothing" at an Egyptian marriage celebration,<sup>323</sup> a Sikh applicant who married before his older brother,<sup>324</sup> and a couple who did not wish to hold their Indian wedding in the applicant's home village<sup>325</sup> were all subjected to additional scrutiny. In another decision, a Chinese appellant who also had an arranged marriage, but opted against a traditional wedding ceremony, was viewed as

<sup>320</sup> See e.g. *Mujib*, *supra* note 297 at para. 19.

<sup>321</sup> See e.g. *Jaswant Singh Aujla*, *supra* note 295 at para. 10; *Tarsem Kaur Dhillon*, *supra* note 256 at para. 10.

<sup>322</sup> See text accompanying notes 328 to 331.

<sup>323</sup> *Mohamed*, *supra* note 272 at para. 14.

<sup>324</sup> *Shergill*, *supra* note 306 at para. 25.

<sup>325</sup> *Kang*, *supra* note 289 at paras. 11-12.

lacking credibility.<sup>326</sup> Hence, the idea that applicants and appellants would decide to follow some cultural traditions, yet reject others (a choice analogous to celebrating Christmas with a tree and presents but not attending Mass), seemed implausible to these decision-makers. Such conclusions generate a one-dimensional portrait of the parties' culture, since only rigid conformity to traditional practices – or complete rejection thereof – is considered to be credible. This approach fails to recognize that cultural norms are constantly shaped and re-shaped by group members, and influenced by their interactions with other cultures.

On one hand, the above examples highlight the essentialist conceptions of culture underlying many of the IRB decisions on family sponsorship. On the other hand, various IRB decision-makers acknowledged that failure to adhere to cultural norms does not necessarily undermine the parties' credibility. For example, some Members accepted testimony about the evolving nature of cultural norms, such as the recent trend of holding Punjabi weddings at "marriage palaces" rather than in the bride's village.<sup>327</sup> Others held that traditional customs and practices existed, but acknowledged that in the case at bar, they simply were not respected by the parties.<sup>328</sup> Despite these exceptions, there was a consistent pattern among IRB adjudicators to assume that applicants and appellants would follow their traditional norms, and to demand an explanation when they did not.

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<sup>326</sup> *Qiheng Wu*, *supra* note 298 at para. 19.

<sup>327</sup> See text accompanying notes 308 to 309.

<sup>328</sup> See e.g. *Ly*, *supra* note 270 at para. 26; *Therrien*, *supra* note 285 at para. 15; *Joshi*, *supra* note 288 at para. 11; *Sanghera*, *supra* note 296 at para. 37.

### **3.2.4. Spousal Compatibility**

In determining the genuineness of a marriage, numerous panels raised questions about the seeming incompatibility of the spouses, based on factors such as marital history, age, education, religion, cultural background, and disability. While such differences are generally not sufficient to warrant the rejection of an application, the Federal Court has ruled that the IAD is entitled to consider these factors, as well as others, in deciding whether a marriage was entered into for immigration purposes.<sup>329</sup> Many negative credibility decisions were therefore based on the alleged incompatibility between the spouses. The basic assumption underlying these decisions was that in the applicant and appellant's culture, arranged marriages are negotiated agreements that bring the spouses' families together, in contradistinction to "Canadian" marriages, where spouses tend to "marry for love." Due to the importance of social compatibility in such cases, spouses with differing backgrounds were seen as cultural anomalies and subjected to extra scrutiny.

#### *3.2.4.1. Marital Background*

A vast number of cases dealt with arranged marriages where one of the spouses was divorced or had children from a previous marriage. According to the IRB, such differences in marital background were viewed as a cultural concern from which the tribunal could draw a negative inference:

As the panel understands it, divorce in India is a cultural taboo. When asked, he admits that his father does not like the fact that his son is divorced. The same, he admits would be for the father of a daughter. A fair question is why the Applicant's

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<sup>329</sup> *Froment v. Canada (Citizenship and Immigration)*, 2006 FC 1002, [2006] F.C.J. No. 1273 (QL) at para. 28.

father agreed to a match with the brother of the man who had dishonoured his daughter.<sup>330</sup>

Similar arguments were advanced by the Minister's counsel in support of a taboo against divorce and remarriage in the context of Vietnamese culture,<sup>331</sup> Bangladeshi culture,<sup>332</sup> and Pakistani culture,<sup>333</sup> among others.

In some decisions, the panel found that in light of the totality of evidence, marital background did not undermine the couple's credibility. In *Patel*, for example, the IRB Member held that despite the appellant's two divorces and her children from a previous marriage, the couple did not consider themselves to be incompatible:

The uncontradicted testimony is that the fact of the appellant's two marriages was overlooked by the couple and that the marriage was acceptable to the families irrespective of traditional norms. Customs are not entirely rigid nor do they create an "iron bed" into which the facts of any given matter must fit in order to satisfy customary expectations.<sup>334</sup>

Similarly, in *Aujla*, the IRB accepted explanations provided by the parties as to why their marriage was acceptable to their respective families despite their incompatibility in age and marital status. The Member noted that "general norms in any given society do not translate

<sup>330</sup> *Prafulkumar Mohanbai Patel*, *supra* note 271 at para. 30. See also *Amarpreet Kaur Sran v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1419 (QL) at para. 21; *Kulwinder Kaur Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 803 (QL) at para. 10 [*Kulwinder Kaur Sandhu*]; *Nag v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 437 (QL) at paras. 17-21; *Kaur v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 624 (QL) at para. 14-15; *Sanghera*, *supra* note 296 at para. 19; *Amratpal Singh Sidhu*, *supra* note 282 at para. 9.

<sup>331</sup> See e.g. *Tran v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1100 (QL) at para. 14; *Ngoc Chau Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1969 (QL) at para. 4.

<sup>332</sup> See e.g. *Khatun v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1578 (QL) at paras. 12-13.

<sup>333</sup> See e.g. *Arshad v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 206 (QL) at paras. 19-20.

<sup>334</sup> *Swatiben Patel v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2679 (QL) at para. 17. See also *Gurpreet Kaur Sran v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 919 (QL) at para. 19; *Jaswinder Kaur Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 188 (QL) at para. 16 [*Jaswinder Kaur Dhaliwal*]; *Kahlon v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1169 (QL) at para. 15.

to across the board homogenous practices.”<sup>335</sup> Further, the appellant in *Radmanish*, a Pakistani Muslim, successfully argued that it was not unusual in his culture for a man to marry a widow.<sup>336</sup> In such cases, the IRB acknowledged that perceived incompatibilities in marital background are not always indicative of a lack of genuineness.

A problematic feature of these decisions was that certain values or behavioral patterns were deemed as particular to the applicant and appellant’s culture, despite the fact that they are shared across cultures. Numerous Board Members stated that marriage is considered a “sacrament” in the couple’s religion, and that therefore it was improbable that the appellant or applicant would agree to marry a spouse who had previously been divorced.<sup>337</sup> However, it can be argued that marriage is a sacrament in virtually all religions, and that divorce is universally viewed as an unfortunate event. Further, it is plausible that people of all cultural backgrounds might be hesitant to enter a relationship with a person who has previously been married. In this way, IRB Members failed to acknowledge similarities between Western and non-Western cultural values and practices.

<sup>335</sup> *Jagwinder Kaur Aujla v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 20 (QL) at para. 21 [*Jagwinder Kaur Aujla*].

<sup>336</sup> *Radmanish v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 1641 (QL) at para. 9. See also *Chaudhary v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 2127 (QL) (in which the appellant argued that it was a normal practice in his culture and religion for a brother to marry the widow of another brother and to accept the children of that former marriage as his own).

<sup>337</sup> *Sahijdip Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 8 (QL) at para. 36; *Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 687 (QL) at para. 4; *Veerdavinder Brar v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2014 (QL) at paras. 15-16; *Kulwinder Kaur Sandhu, supra* note 330 at para. 10; *Nag, supra* note 330Error! Bookmark not defined. at para. 21.

### 3.2.4.2. Age Difference

Differences in age<sup>338</sup> between spouses also attracted scrutiny from IRB Members in a significant number of cases. Like marital background, age compatibility was treated as a cultural norm and viewed as indicative of a genuine marriage:

It is sometimes difficult to comment on age difference as one would like to avoid value judgments which could be deemed inappropriate, or even discriminatory. However, when a marriage is entered into on a purely cultural basis, as is the case in arranged marriages, then the factors which lead to the arrangement must be considered with the proper deference to the cultural context at hand.<sup>339</sup>

In these cases, the Minister's counsel argued that relationships between older women and younger men are frowned upon among Filipinos,<sup>340</sup> Indian Sikhs,<sup>341</sup> Bangladeshi Muslims,<sup>342</sup> Vietnamese,<sup>343</sup> and Moroccans.<sup>344</sup> While the degree of age difference between the appellant and applicant was often substantial – spanning 20 or even 30 years – occasionally a very small age gap was considered to be a cultural impediment. In *Goraya*,

<sup>338</sup> In addition to age, the fact that the appellant and applicant had different educational backgrounds was also cited as a factor undermining the genuineness of arranged marriages. Conversely, the fact that the couple had similar levels of education was seen as a positive factor. However, parties were less likely to invoke *cultural* arguments as to why differences in education were or were not indicative of a genuine marriage.

<sup>339</sup> *Benipal v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 69 (QL) at para. 25.

<sup>340</sup> See e.g. *De Quiroz v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2036 (QL) at para. 12 [*De Quiroz*]. The panel identified a list of general factors that could be relevant to weighing the issue of age difference. These include the degree of age difference, the reaction of the spouses' families and communities to the relationship, the couple's ability to procreate, and the younger person's ability and inclination to care for an aging spouse: *ibid.* at para. 9.

<sup>341</sup> See e.g. *Sanghera, supra* note 296 at para. 18; *Charanjit Kaur Dhillon v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1347 (QL) at para. 24; *Shergill, supra* note 306 at para. 24; *Goraya, supra* note 3 at para. 23.

<sup>342</sup> See e.g. *Sinanan v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2795 (QL) at para. 21.

<sup>343</sup> See e.g. *Loan Thi Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 760 (QL) at paras. 11-12.

<sup>344</sup> See e.g. *Vigneault, supra* note 283 at para. 28; *Lafrenière, supra* note 313 at para. 6; *Bergeron, supra* note 277 at para. 8.

for example, the fact that the Sikh applicant was merely two years older than her husband was enough to call into question the spouses' good faith.<sup>345</sup>

Treatment of age difference as an issue affecting parties' credibility varied among Board Members. In a number of cases, the couple's similarity in age was cited as a positive factor that lent credibility to their marriage.<sup>346</sup> In other decisions, the panel noted the visa officer's concerns about the couple's "age incompatibility" but drew no negative inference from this detail.<sup>347</sup> Some appellants cited the fact that other, well-known couples had large age differences between them:

... the appellant's counsel argued in his written submissions that the age difference is of no importance in Muslim tradition concerning arranged marriages and gave in retrospect the age of the wife of the Prophet Muhammed. He also said that a divorced man should be able to remarry legitimately. The panel finds that the comparison made by the appellants counsel with the Muslim customs of the six century A.D. is irrelevant in this case.<sup>348</sup>

The Minister's counsel asked the appellant why a young woman of 22 years old would accept to marry a man of twice her age (46 years old) who had been unemployed for 2001 to 2005. The appellant, in a very angry manner, first compared himself to Céline Dion and René Angélil stating that age did not matter, then, he added that he was working during these years and that he was rich.<sup>349</sup>

<sup>345</sup> *Goraya*, *supra* note 3 at para. 23. By contrast, the IRB Member in *Gill* found that a three-year age difference between the spouses was insignificant, particularly since the appellant was "westernized": *Gurpreet Singh Gill v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 143 (QL) at para. 21 [*Gurpreet Singh Gill*].

<sup>346</sup> See e.g. *Jasvir Kaur Grewal v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1363 (QL) at para. 28. The appellant's counsel argued that the couple's compatibilities in age, education, and cultural background explained the haste with which their marriage was arranged. The IRB Member noted that the appellant had not provide any expert evidence to suggest that "the bride being older than the groom is a customary Sikh faith practice" and that there was a "cultural inclination for a never married male to marry a divorcee." See also *Gurpreet Singh Dhillon v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1131 (QL) at para. 15.

<sup>347</sup> *Ha v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1364 (QL) at para. 15; *Sangha v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2514 (QL) at para. 12.

<sup>348</sup> *Sarigat v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1381 (QL) at paras. 17-18. See also *Saleh v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1671 (QL) at para. 14 (in which another appellant makes reference to the Prophet and his elder bride, with comparable success).

<sup>349</sup> *Can v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 959 (QL) at para. 29 [*Can*].

Although IRB Members generally treated age compatibility as a cultural concern, it is reasonable to claim that age differences between partners are viewed with trepidation in many societies. As noted by the appellant in *Can*, couples with significant age differences—such as Céline Dion and René Angélil—are unusual, but exist in all cultures.<sup>350</sup> In *Begum*, Islamic law professor Anver Emon rightly remarks in his affidavit evidence that “Bangladeshi culture is not alone in suggesting that women should be younger than their husbands.”<sup>351</sup> Therefore, the idea that age difference is an impediment to a genuine marriage should not be viewed as a culturally specific norm.

Finally, some tribunals made reference to appellants’ and applicants’ physical appearance, ostensibly to determine whether their age difference would affect their compatibility:

The panel can understand why the appellant would be attracted to the idea of a relationship with a 21-year-old woman. The applicant is by any estimation a desirable woman. All but the most narrow minded would not describe her as pretty by any standard, Western or otherwise.<sup>352</sup>

The panel finds it implausible that a healthy and handsome young man would want to marry a single, welfare mother of two young boys without even first meeting her in person.<sup>353</sup>

Here was a 25-year-old man marrying a woman who had already been married twice and who has two children older than him and two grandchildren. There is an age difference of 28 years between them, physically, the appellant looked her age.<sup>354</sup>

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<sup>350</sup> *Can*, *supra* note 349 at para. 29.

<sup>351</sup> *Begum v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2203 (QL) at para. 21 [*Begum*].

<sup>352</sup> *Lee v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2334 (QL) at para. 21.

<sup>353</sup> *Caron v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 18 (QL) at para. 13.

<sup>354</sup> *Deschênes*, *supra* note 282 at para. 23.

Needless to say, it is inappropriate for public decision-makers to comment on the physical attractiveness of parties appearing before the IRB, or whether they “look their age,” in determining the genuineness of their relationship.

### *3.2.4.3. Cultural and Religious Background*

Several IRB Members drew positive inferences from the fact that an appellant and applicant were compatible in terms of their ethnic, cultural, and religious backgrounds.<sup>355</sup> In contrast, decision-makers’ treatment of relationships involving people with differing religious beliefs and cultural origins was widely divergent. For example, in cross-cultural marriages involving a Cambodian and a Salvadorian,<sup>356</sup> a Canadian Ojibway and a Jordanian,<sup>357</sup> an Iranian and a Chinese,<sup>358</sup> and a Guatemalan and a Punjabi,<sup>359</sup> the spouses were viewed as incompatible on cultural, linguistic and religious grounds. However, cases concerning a Québécoise and a Jordanian,<sup>360</sup> a Korean and a Chilean,<sup>361</sup> a Greek and a Romanian,<sup>362</sup> and a Pakistani and a Filipino<sup>363</sup> were deemed to be genuine relationships despite the equally vast cultural differences between the spouses. In the latter cases, the appellant and applicant demonstrated that they were similar in age and able to

<sup>355</sup> See e.g. *Youssef v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1479 (QL) at para. 16; *Sultana v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2001 (QL); *Ansah, supra* note 294 at para. 22; *Phung v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 963 (QL) at para. 26; *Kailey v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1443 (QL) at para. 24.

<sup>356</sup> *Aguilar v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 779 (QL).

<sup>357</sup> *Tawalbeh v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1452 (QL).

<sup>358</sup> *Khosh-Khoo v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2643 (QL).

<sup>359</sup> *Sandoval v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2979 (QL).

<sup>360</sup> *Brazeau v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 946 (QL).

<sup>361</sup> *Chavez v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 353 (QL).

<sup>362</sup> *Jacolbe v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 797 (QL).

<sup>363</sup> In this case, the panel accepted the appellant’s testimony that the couple was compatible partially because “Pakistani and Phillipine [sic] cultures are similar”: *Rasool v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 886 (QL) at para. 4.

communicate in a common language. In the eyes of the Board Members, these factors compensated for the couples' cultural and religious differences.

Religion often played an important role in findings of compatibility. For instance, a Jamaican appellant and Guyanese applicant were held to be incompatible because the appellant was Christian and the applicant was Hindu.<sup>364</sup> Similarly, the appellant in *Beardy* was disbelieved when she claimed that she had converted to her Pakistani husband's Muslim faith. The Minister's counsel submitted that she did not have sufficient knowledge "as to why the fifth pillar [of Islam] was so important in the Muslim faith."<sup>365</sup> Conversely, a marriage between Ethiopian spouses from different tribes was considered genuine in part because both were Orthodox Christians.<sup>366</sup>

In *Sediqzada*, the appellant, a Sunni Muslim originally from Afghanistan, and the applicant, a Shia Muslim from Iran, were required to explain how they were able to reconcile their religious differences:

When asked whether she was not influenced by the cultural and religious differences between the two branches, both the appellant and her mother went to great pains to deny any such differences. They claimed that Iraq is the only country where Muslims are divided by their religious differences. The Respondent submitted that these denials are no more than an attempt to paint a picture for the Board that is not true. The panel agrees. The panel takes judicial notice of the various countries where the

<sup>364</sup> *Reynolds v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 1056 (QL) at para. 30.

<sup>365</sup> *Beardy*, *supra* note 273 at para. 27. By contrast, in *Benabdallah*, the relationship between a Christian from Canada and a Muslim from Morocco was scrutinized, but ultimately the difference in their religions was found not to be significant since neither party was particularly religious: *Benabdallah v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1896 (QL) at para. 8. Similar conclusions were made in *Wall v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1978 (QL), which involved a Canadian Christian and a Bangladeshi Muslim, and in *Kumar v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1035 (QL), concerning a Hindu applicant and a Sikh appellant.

<sup>366</sup> *Gonete v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2156 (QL) at para. 17.

schism between these two branches of Islam has resulted in conflict among followers and finds that the appellant's denials are disingenuous in the extreme.<sup>367</sup>

Thus, the preliminary assumption underlying these cases was that couples with different backgrounds were less compatible and more likely to have married for immigration purposes. In order to demonstrate that their relationship was in good faith, appellants and applicants had to show that they were able to overcome their cultural and religious differences.

For those instances where the parties had a similar cultural and religious background, but the appellant had grown up in Canada, doubts about the credibility of their relationship were raised. Appellants were compelled to demonstrate that they were willing to enter an arranged marriage with a person from their country of origin despite having "assimilated" into Western culture:

The panel took into account the explanations on kmer [sic] marriage traditions provided in the documentary evidence, but is of the opinion that it is indeed difficult to believe that a young man who has lived his entire life in Quebec and who has had romantic relationships with other young women would agree to marry a complete stranger.<sup>368</sup>

In such decisions, Western or North American society was construed as "culture-free" in contrast to "encultured" non-Western societies. Specifically, IRB Members' use of

<sup>367</sup> *Sediqzada v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2296 (QL) at para. 16. However, in a refugee decision concerning a claimant from Pakistan, the IRB Member cited documentary evidence stating that marriages between Shia and Sunni Muslims are common and that both sects abide by the same five pillars of Islam: *Saeed v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 340 (QL) at para. 16.

<sup>368</sup> *Thaing v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 51 (QL) at para. 8. See also *Devit v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2217 (QL) at para. 16; *Shokar v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 527 (QL) at para. 14; *Nandeep Sing Brar v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 2145 (QL) at para. 7; *Gehlan v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1883 (QL) at para. 13; *Palmarachetty v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1429 (QL) at para. 19; *Jatinder Aujla, supra* note 256 at para. 22; *Gurpreet Singh Gill, supra* note 345 at paras. 23-24; *Do, supra* note 276 at para. 6.

the term “westernized” in reference to appellants and applicants coded for modern, independent and sophisticated, free from cultural rules. For example, a Vietnamese appellant was described as a “westernized young woman” because she had been educated in the Canadian school system, opened her own business, and lived alone in a studio apartment. The IRB Member also pointed out that “her attire is totally western.”<sup>369</sup> Moreover, the panel held that it was implausible that the appellant would “choose to marry a fish farmer with less education than her and no knowledge of the outside world, and that she would choose to have a traditional marriage.”<sup>370</sup> In the eyes of this Member, a well-educated and entrepreneurial woman is more “Western” than Vietnamese; thus, it is unlikely that she would follow any Vietnamese cultural traditions. Furthermore, the tribunal implies that a “westernized” person would never choose to return to a state of “enculturedness” by marrying an unworldly Vietnamese farmer.

A similar approach is evident in the *Brar* decision, in which the IRB Member noted that an Indo-Canadian appellant was “very westernized, with blonde hair, very good English and works with the public in her job.”<sup>371</sup> The Member concluded from these factors that the appellant must be “fairly independent minded,” and therefore it was plausible that her family would not attend her wedding.<sup>372</sup> For the IRB Member, the applicant’s

<sup>369</sup> *Do*, *ibid.* at para. 6.

<sup>370</sup> *Do*, *ibid.* at para. 6.

<sup>371</sup> *Swarnjit Kaur Brar v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 607 (QL) at para. 21 [*Swarnjit Kaur Brar*].

<sup>372</sup> *Swarnjit Kaur Brar*, *ibid.* at para. 21.

“westernized” appearance indicated that it was likely she would engage in behaviour that runs counter to traditional norms.<sup>373</sup>

In the same way, a Board Member deemed an Iranian appellant to be “westernized” because she openly criticized the patriarchal values that exist in her country of birth:

I note that the appellant is westernized to the degree that she spoke out with defiance and rejection of the values in her home country of Iran, in the way that women are regarded there, and what she had to endure in her first marriage. I conclude that traditional values in the birth country of the appellant in regards to women are not followed or espoused by her and given this background, I find it not surprising that she as an older woman would marry a younger man.<sup>374</sup>

In these cases, the decision-maker equates “westernization” with modernity and independence and depicts non-Western cultures as traditional and culture-bound.<sup>375</sup> These remarks create a sharp division between the images of a backward “Other” culture and a liberal, culture-free North American society. Such decisions reinforce stereotypes and exclude the notion that members of non-Western minorities can be at once religious and liberal-minded, modern and encultured.

#### *3.2.4.4. Images of Non-Western Cultures*

In addition to suggesting that non-Western individuals are ruled by cultural dictates, various IRB adjudicators portrayed entire communities in a disconcerting light. Some Members seemed to characterize sexism, misogyny, and violence against women as inherent to certain cultures, while implying that such problems would not be tolerated in

<sup>373</sup> The same IRB Member in *Inderjit Kaur Sidhu* also cites the applicant’s “coloured hair” as an indication that she is “independent-minded”: [2007] I.A.D.D. 2351 (QL) at paras. 24, 29.

<sup>374</sup> *Eslami-Aralou v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 120 (QL) at para. 24.

<sup>375</sup> See also *Malik*, in which the panel held that a couple from Pakistan had a “very westernized marriage,” since they “entered marriage as individuals, not as members of a family as it is done in some more conservative cultures”: *supra* note 296 at para. 10.

Canada or North America. For instance, in the *Chohan* decision, the panel devoted many paragraphs to a discussion of the treatment of women in Pakistan, particularly the applicant's perceived duty to marry a man of her father's choosing. Even while finding that the marriage was genuine, the IRB Member expressed his disapproval of the arrangement, stating that "if there are cultural specificities, there are also individual rights, and this would not be acceptable in a Canadian context."<sup>376</sup>

Comparable statements were made regarding the treatment of women in Punjabi culture. The IRB Member in *Deol* described the appellant's "sexist and chauvinistic behaviour" during his first marriage as "rooted in the Sikh cultural norms of his community in India." According to the panel, these cultural norms "explain" the appellant's actions, lending credibility to the breakdown of his first marriage.<sup>377</sup> Thus, the panel's statements normalize the appellant's "sexist and chauvinistic" conduct by attributing it to his culture. In *Sandhu*, the appellant had survived an abusive relationship in her first marriage, which led to post-traumatic stress disorder. She called an expert witness to testify about the widespread nature of domestic violence in Punjabi culture:

Dr. Agnew testified that in Punjabi culture the female is subservient to the male and is conditioned not to question their authority. Physical abuse is not uncommon and largely tolerated as being the right of the male head of the family. In her opinion, it is

<sup>376</sup> *Chohan v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 207 (QL) at para. 13 [*Chohan*]. The IRB Member's ambivalence about his decision is revealed in the following paragraph: "The question is therefore whether this panel should refuse the sponsorship by applying a norm of evaluation of the genuineness of a marriage which relies on the respect of individual autonomy for both sexes, or should it apply that norm which seems to satisfy certain religious groups within Pakistan": *ibid.* at para. 20.

<sup>377</sup> *Deol v. Canada (Minister of Citizenship and Immigration)*, [2008] IADD No. 974 (QL) at para. 17. These words are repeated almost verbatim by another IRB Member in reference to the appellant in *Khaira v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] IADD No. 2082 (QL) at para. 19.

plausible that a Punjabi woman would do as her husband told her, even if she knew it to be illegal or wrong.<sup>378</sup>

The appellant claimed that she was merely following her abusive ex-husband's orders when she provided fraudulent documentation to immigration officials. But rather than merely describing her own abusive relationship and its impact on her actions, she presented evidence that domestic abuse is common and "largely tolerated" within Punjabi society, which was accepted by the tribunal. In this way, the appellant herself perpetuated the idea that domestic violence is inherent to Punjabi culture.

Similarly, in *Rahime*, the Board Member offered a scathing critique of "Lebanese society," asserting that violence against women was normalized in Lebanese culture:

Suffice it to say that the brutality of her culture in respect of the treatment of women is abhorrent to this Member, as it should be to most Canadians who do not ascribe to the politically correct views of the cultural relativists who seek to rationalize and normalize violence against women in the guise of multiculturalism and diversity. The abuse the appellant described is not acceptable within the norms of any civilized nation whose laws and customs are built upon the bedrock of the rule of law and respect for the secular rights of people that have emerged since the Enlightenment.<sup>379</sup>

The remarks of these Members suggest that misogyny and sexism are reflective of the parties' cultural norms, yet would be unacceptable "to most Canadians." In other words, while such behaviour is to be expected in countries such as India, Pakistan or Lebanon, it is viewed as aberrant in Canada.<sup>380</sup>

<sup>378</sup> *Gurpreet Sandhu*, *supra* note 430 at para. 21.

<sup>379</sup> *Rahime v. Canada (Minister of Citizenship and Immigration)*, [2010] IADD No. 925 (QL) at para. 20.

<sup>380</sup> This standpoint was reflected in a recent article by *Globe and Mail* columnist Margaret Wente: "So, is violence against women a non-problem? Absolutely not. It is a very large problem in a number of Canada's South Asian communities, including some not far from York University. Some of York's first-generation immigrant students are no doubt safer on campus than they are in their own homes": Margaret Wente, "Embrace your inner slut? Um, maybe not" *The Globe and Mail* (12 May 2011), online: The Globe and Mail <<http://www.theglobeandmail.com/news/opinions/opinion/embrace-your-inner-slut-um-maybe-not/article2018828>> (last accessed 14 May 2011).

### 3.2.4.5. *Visions of Multiculturalism*

Some IRB decisions also generated problematic views of “mainstream” Canadian society. In particular, principles such as multiculturalism and tolerance were construed as distinctly Western or Canadian values. Some tribunals wrote that a cross-cultural or inter-faith relationship was plausible because the applicant and appellant were living in Canada and had been “exposed to its multicultural society.”<sup>381</sup> In *Kassam*, for example, an inter-faith marriage between a Muslim and a Sikh was viewed as credible in light of the fact that they had both resided in Canada:

Do not forget that both these individuals have extensive exposure to the multicultural nature of Canadian society which our government actively promotes. The anecdotal evidence and usual observation in the Greater Toronto area supports this view, notwithstanding the existence of cultural norms previously referred to.<sup>382</sup>

Similarly, in *Cheng*, the Minister’s counsel argued that the “huge ethnic difference” between a Chinese person and an Indian Muslim person undermined the genuineness of their conjugal relationship. However, the IRB Member held that the couple’s differences could be overcome, given that “Canada is a multicultural nation”:

While the appellant is ethnically Chinese and the applicant is of Indian heritage, I do not see these antecedents as somehow causing a huge divide or chasm to the fostering and maintenance of a genuine conjugal relationship. Canada is a multicultural nation and cross-cultural relationships are frequent. Just because one party is of Chinese heritage and the other of Indian heritage does not make an alleged conjugal relationship any more (or less) likely to be genuine than, for example, a person of Swedish heritage being in a conjugal relationship with a Canadian of French heritage, as respondent’s counsel apparently submitted.<sup>383</sup>

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<sup>381</sup> *Diao v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 516 (QL) at para. 14 [*Diao*].

<sup>382</sup> *Kassam v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 242 (QL) at para. 25.

<sup>383</sup> *Cheng v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 363 (QL) at para. 23.

These remarks are troubling for various reasons. In the first place, the tribunal credits Canadian society for enabling the appellant and applicant to have a relationship in spite of their differing backgrounds. As stated in the last chapter, one of the “prevailing myths” about Canada is that it is free of racism.<sup>384</sup> Visions of Canada as a multicultural haven for people seeking a better future are constructed through narratives of its generosity, equality and tolerance.<sup>385</sup> Such comments wrongly suggest that countries such as India and China are neither culturally diverse nor open to cultural diversity.

Secondly, the tribunal implies that culturally speaking, Indian and Chinese people would not normally be open to having a relationship with people of different backgrounds. This suggests that non-Western immigrants have the additional burden of proving that a cross-cultural relationship does not contravene their cultural norms. Further, the panel’s remarks indicate that a relationship between two people of European descent (such as a French Canadian and a Swede) would not be controversial or attract suspicion as to its credibility. Overall, the IRB Member’s statements suggest that acceptance of other religious beliefs and cultures is a uniquely Western phenomenon.

### *3.2.4.6. Disability*

The task of establishing credibility before the IRB was more onerous for applicants and appellants who were at the intersection of different identity groups. In particular, South Asian appellants with disabilities faced unique obstacles in establishing that they

<sup>384</sup> See text accompanying notes 119 to 122.

<sup>385</sup> See text accompanying notes 163 to 171.

were in a genuine marriage.<sup>386</sup> They not only had to prove that their marriage was performed in accordance with the norms of their culture, but that their disabilities did not prevent them from being suitable candidates for an arranged marriage. According to many IRB Members, disabled people were viewed as “poor matches” within the culture in which the marriage was being arranged. Thus, the basic notion underlying these decisions was that the applicants and their families would not normally agree to marriage with a person with a disability unless the marriage was entered into for immigration purposes.

Some panels concluded that the applicant had not credibly explained the “advantages” of marrying a person with a disability:

As noted above, the appellant has an intellectual disability or global developmental delay. [...] According to cultural norms he is not a good match. Thus, the decision of the applicant’s family to accept the marriage proposal raises a concern that they ignored the appellant’s limitations in order to gain the applicant admission to Canada.<sup>387</sup>

Frequently, these appellants succeeded in their appeals by demonstrating that their spouses were also “less desirable” matches. Some IRB Members concluded that an appellant with disability was a good match for an applicant who had difficulty finding a marriage partner for other reasons. For example, in *Dhillon*, the IRB held that the applicant was a suitable wife for the appellant, who had a deformity in his foot from polio, because she faced stigma in the Sikh community due to her divorce:

Thus, from the point of view of their culture, neither the appellant nor the applicant is desirable marriage material. Both have a “defect”. The panel finds, on a balance of

<sup>386</sup> I identified eight decisions involving the marriages of South Asian appellants with disabilities.

<sup>387</sup> *Mohammed Shahru Khan v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 1630 (QL) at para. 5 [*Mohammed Shahru Khan*]. See also *Chandel v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1745 (QL) at paras. 5-8 [*Chandel*].

probabilities, that it is this characteristic that explains why the appellant would make a suitable bride for the applicant, who at 34 is seeing his chances of marriage and fatherhood dwindling.<sup>388</sup>

Further, in *Khan*, the panel accepted that an appellant with an intellectual disability was a compatible spouse for a divorced woman, since both were viewed as “less desirable” marriage partners:

The more difficult question is why, in a culture that discriminates against the disabled, the applicant’s family would agree to the match. The appellant’s sister testified credibly that, because of the appellant’s disability, he had to settle for less on the marriage market. The applicant is a divorcée and the stigma associated with divorce makes her less desirable on the marriage market. The appellant and the applicant are therefore compatible. They are both less desirable choices according to marriage customs in Pakistan.<sup>389</sup>

Surprisingly, the fact that one appellant was a Canadian citizen was cited by the IRB Member as a factor supporting the compatibility of the spouses, as it served to counterbalance his mental health issues.<sup>390</sup>

In cases where the applicant could not claim that he or she was also a “flawed” candidate for marriage, the tribunal was less likely to find that the marriage was performed in good faith. For example, the Board Member in *Nahal* wrote that the applicant had failed to explain his decision to marry “a divorced woman 13 years his senior and with a child, and moreover, one with a significant cognitive deficiency and with little or no prospect for

<sup>388</sup> *Sarjeet Kaur Dhillon v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 962 (QL) at paras. 12-13.

<sup>389</sup> *Mohammed Shahru Khan*, *supra* note 387 at para. 7. However, this argument was rejected by the IRB in *Chandell*, *supra* note 387 at para. 8.

<sup>390</sup> *Sharma*, *supra* note 260 at para. 26. The IRB Member stated: “... it is well known that Canadian citizenship of a spouse is a positive factor for some in viewing a marriage partner and this factor would have increased the attractiveness of the appellant. I find that the match of these two parties is not unreasonable.” This is a confusing statement, given that marriages are generally in “bad faith” for the very reason that they are entered into for immigration purposes.

employment or self-sufficiency.”<sup>391</sup> In finding that the relationship was not genuine, the Member referred to a psychological report assessing the appellant’s inability to care for her daughter or perform household work.<sup>392</sup> Therefore, the IRB Member’s analysis in such cases was often dehumanizing, since this type of reasoning defines the appellant and applicant in terms of their so-called value on the “marriage market”.

A notable exception is the *Sidhu* decision, in which the IRB Member conducted an extensive examination of the circumstances surrounding the applicant’s marital relationship with the appellant, who had Down’s Syndrome. He wrote that the appellant was seen as a “valued individual” by his family and his new spouse, rather than viewed solely in terms of his disability.<sup>393</sup> It was clear that they considered him to be a “normal” member of the family with “limitations that are only apparent when viewed through the eyes of others,” and that they were motivated to ensure his happiness by finding him a loving partner.<sup>394</sup> Hence, the panel’s treatment of the appellant reflected his family’s positive attitude toward disability.

In sum, for cases involving appellants with disabilities, parties were subjected to particular scrutiny in determining whether an arranged marriage was performed in good faith. Most IRB members adopted a perception of South Asian marriages in which the

<sup>391</sup> *Nahal v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 822 (QL) at para. 12 [*Nahal*].

<sup>392</sup> *Nahal*, *ibid.* at para. 13. See also *Sivaramakrishnan*, in which the IRB Member held that the appellant’s family had not made full disclosure to the applicant and his family about the appellant’s mental disability, a fact which undermined the genuineness of the relationship. The panel further concluded that the appellant did not comprehend the nature and purpose of the relationship with her fiancé: *Sivaramakrishnan*, *supra* note 265 at para. 23.

<sup>393</sup> *Karanpal Singh Sidhu v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 788 (QL) at para. 23 [*Karanpal Singh Sidhu*].

<sup>394</sup> *Karanpal Singh Sidhu*, *ibid.* at para. 18.

relationship was assessed in terms of whether the partners were of equal “value”. Thus, appellants with multi-faceted identities faced distinct challenges in establishing credibility.

### *3.2.4.7. Compatibility and Categorization*

Overall, decisions focusing on the compatibility of spouses created a very limited perception of non-Western marriage practices in cultures where arranged marriages are common. Many Board Members held that it was unlikely that spouses who were perceived as “incompatible” in terms of their marital background, age, religion, or ethno-cultural origin would enter a genuine relationship. This stance denies the complexity and plurality of courtship rituals and marriage practices in non-Western cultures. It is easy to imagine men and women from non-Western countries marrying “for love”. One could also imagine mainstream Canadians who might marry for less-than-romantic reasons: for financial stability or status, or in conformity with societal pressures. However, by focusing on the lack of “compatibility” between the foreign national and the sponsor, the panel negates the possibility that couples from “Other” cultures could have incentives for marrying other than those cited in these decisions.

In Chapter 2, I discussed ways in which legal decision-makers participate in the social construction of racial and cultural identities. The legal system often requires people to present their identities in reference to pre-determined racial and social categories.<sup>395</sup> Moreover, legal processes can perpetuate racialized images and harmful stereotypes.<sup>396</sup> In light of this framework, IRB decisions concerning the genuineness of marriage also

<sup>395</sup> See text accompanying notes 128 to 130.

<sup>396</sup> See text accompanying notes 131 to 133.

contribute to the creation of racialized identities. As described above, some adjudicators relied on simplistic and stereotyped depictions of Western and non-Western cultures in rendering their decisions. In addition, the identity of appellants and applicants was often constructed in terms of defined categories, such as “Western”, “Asian”, “traditional”, or “disabled”. These categories were employed by Board Members in determining whether it was plausible that the parties had entered a good faith relationship.

IRB adjudicators were not the only ones to propagate essentialized views of cultures. Parties (or their lawyers) also relied on cultural stereotypes to advance their arguments. To give an example, the appellant in *Chohan* informed the panel that his new wife was likely to take care of him because “Pakistani woman are raised to feel subservient to the will of their husband.”<sup>397</sup> In another case, the appellant tried to explain inconsistencies in the evidence regarding whether he and his spouse were in contact during the period before their marriage:

Much of the appellant’s submissions focused on the dangers of relying on cultural norms and expectations in assessing the genuineness of an individual marriage and I agree generally with the appellant’s submissions in this area. Yet the appellant, to explain the inconsistent evidence regarding on-going contact, seeks to rely on the very sort of cultural norm that he cautions against adopting -- that the applicant in her culture would be embarrassed to admit she had contact with the appellant before marriage. The applicant herself never testified that she was embarrassed.<sup>398</sup>

Thus, appellants and applicants also invoked cultural norms to explain their behaviour and add weight to their claims. In doing so, they contributed to the racialized imagery reflected in some of the IRB’s decisions.

<sup>397</sup> *Chohan*, *supra* note 376 at para. 18.

<sup>398</sup> *Jatinder Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 217 (QL).

### 3.2.5. Cultural Conceptions of Adoption

Cultural context also played a role in cases determining whether an adoption had created a genuine parent-child relationship.<sup>399</sup> Although the jurisprudence is less clear about the role of culture in adoption cases than in marriage cases,<sup>400</sup> the determination of the genuineness of a parent-child relationship requires an appreciation of all the circumstances surrounding the adoption. Therefore, culture must be considered when analyzing factors such as the motivations of the adopting parents, their authority over the adopted child, the publicity of the adoption, and the composition of the child's biological and adoptive families.<sup>401</sup>

Some adoption decisions involved situations in which the applicant was not legally adopted, but the appellant maintained that a parent-child relationship existed due to cultural norms. In *Sarpong*, the appellant testified that her relationship with her deceased's sister's son was genuine since Ghanaian "tribal custom dictates that the appellant as the eldest sister assumes responsibility for her sister's children."<sup>402</sup> The IRB Member held that cultural context was important in assessing the genuineness of a parent-child relationship, and thus called for a "flexible approach."<sup>403</sup>

<sup>399</sup> Approximately 15 of the decisions that I examined concerned the genuineness of an adoptive relationship.

<sup>400</sup> See e.g. *Kwan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 971, [2002] 2 F.C. 100; *Pabla v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 2054 (QL), 2000 CanLII 16670 (FC); *Hurd v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 719, [2003] F.C.J. No. 931 (QL).

<sup>401</sup> These are among the non-exhaustive list of factors set out in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [1995] I.A.D.D. No. 1248 (QL), 33 Imm. L.R. (2d) 28, which are used to assess the genuineness of a parent-child relationship. See also "Sponsorship Appeals", *supra* note 216.

<sup>402</sup> *Sarpong v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2386 (QL) at para. 21 [*Sarpong*].

<sup>403</sup> *Sarpong*, *ibid.* at paras. 21.

In *Vong*, the appellant argued that her stepson was regarded as her natural son in light of their duties and responsibilities toward each other, which are imposed by Vietnamese culture. The Minister's counsel in turn argued that cultural perceptions of a relationship between stepmother and stepchild are "not relevant" and consist of "an idealized generalization that does not conform to reality."<sup>404</sup> In both of the above cases, the panel considered evidence of how the relationship would be viewed according to the prevailing social and cultural mores of the community.

Other appellants invoked cultural arguments to justify their motivation for adopting a relative's child. In *Purewal*, the appellant argued that he wished to adopt his sister-in-law's nine-year-old boy due to the importance of sons in traditional Sikh culture. While the IRB Member did not dispute the cultural significance of sons among Sikhs, he also noted that it was not credible that the boy's biological parents would be willing to relinquish him, or that "someone longing for a son would adopt a grown up child."<sup>405</sup> The same argument was advanced in *Aulakh*. The applicant's biological father acknowledged that "giving up the oldest son for adoption is not in accordance with Indian culture," yet explained that he wished to give his eight-year-old son the possibility of a better life.<sup>406</sup> Each of the panels found that the adoption was not genuine.

<sup>404</sup> *Vong v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 15 (QL) at para. 11 [*Vong*]. However, the Minister's counsel also submitted two opinions on Vietnamese cultural norms, which suggested that "because blood ties are so strong in Vietnamese culture, stepmothers tend to treat their stepchildren badly": *ibid.* at para. 26.

<sup>405</sup> *Purewal v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 863 (QL) at para. 17 [*Purewal*]. See also *Johal v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 188 (QL) at para. 14 (in which the appellant argued that it was "important in his culture and heritage that there be a son to take care of him and his wife in their old age") [*Johal*].

<sup>406</sup> *Aulakh v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 654 (QL) at para. 16 [*Aulakh*].

IRB Members also considered evidence that traditional ceremonies were performed to mark the adoption within the applicant's community. The tribunal in *Aulakh* drew a negative inference from the fact that neither the appellant nor his wife had attended the applicant's adoption ceremony in India.<sup>407</sup> In *Ghinger*, evidence that the adoption ceremony had been highly publicized was presented as proof of both the genuineness and legal validity of the adoption:

In support of this submission, counsel for the appellant refers to the evidence of the religious ceremony performed by the appellant for three days, which was attended by relatives, friends, elders and dignitaries from the appellant's village, and which involved the constant reading of prayers and the symbolic placing of the applicant in the appellant's lap on the third and last day of the ceremony, and which was followed by a luncheon for the attendees.<sup>408</sup>

Hence, the performance of traditional adoption rites and ceremonies was seen as a sign of a genuine parent-child relationship. Moreover, the fact that an adoption was highly publicized within the appellant's community was also viewed as indicative of the parties' good faith. To establish a successful claim in ways that IRB Members would recognize, some appellants and applicants therefore had to "perform" their parent-child relationships.

### **3.2.6. Common-Law and Conjugal Partnerships**

To apply for sponsorship as a common-law partner, a foreign national must demonstrate that he or she has been cohabiting with his or her sponsor in a conjugal relationship for at least one year. Alternatively, a person who has not been cohabiting with their sponsor can still apply as a conjugal partner, if it is established that they have

<sup>407</sup> *Aulakh*, *ibid.* at paras. 12-14.

<sup>408</sup> *Ghinger v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 47 (QL) at para. 18.

nonetheless been in a conjugal relationship for a year.<sup>409</sup> In both cases, the existence of a conjugal relationship is influenced by cultural context. As stated by the Federal Court in *Leroux*:

It seems to me to be important to keep in mind the restrictions which apply because the partners live in different countries, some of which have different moral standards and customs which may have an impact on the degree of tolerance for conjugal relationships, especially where same-sex partners are concerned. Nevertheless, the alleged conjugal relationship must have a sufficient number of features of a marriage to show that it is more than just a means of entering Canada as a member of the family class.<sup>410</sup>

Some tribunals were open to considering cultural factors in determining whether the appellant and applicant were in a conjugal relationship. In *Quirion*, a gay couple was held to be in a conjugal relationship despite the fact that they did not fulfill most of the usual criteria. For example, the appellant and the applicant did not stay together in the applicant's family home during his visits to Morocco. The IRB Member accepted that they were unable to live publicly as a couple given that homosexuality is criminalized in Morocco:

Homosexuality is considered an offence in Morocco; the subject is taboo. Therefore, the applicant is not openly gay. The panel took this socio-cultural reality into account throughout its analysis and recognizes that there can be various models of conjugal relationships, depending on the individual circumstances.<sup>411</sup>

In various decisions, a married couple's application for sponsorship under the family class was initially refused because the applicant and appellant had not previously

<sup>409</sup> See the definitions of "conjugal partner" and "common-law partner" at notes 221 and 222. The Supreme Court of Canada has established criteria that are useful in determining whether a conjugal relationship exists. These include factors such as whether the couple resides together, mutual economic support, participation in joint social activities, the existence of a physical relationship, and societal perception: see *M. v. H.*, [1999] 2 S.C.R. 3, 1999 CanLII 686 (SCC). Among the cases that I reviewed, only about 10 decisions involved a determination of the cultural factors surrounding a common-law or conjugal partnership.

<sup>410</sup> *Leroux v. Canada (Citizenship and Immigration)*, 2007 FC 403, [2007] F.C.J. No. 606 (QL) at para. 23.

<sup>411</sup> *Quirion v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2919 (QL) at para. 9.

declared themselves to be in a common-law or conjugal relationship. Paragraph 117(9)(d) of the *IRPR* provides that a foreign national cannot apply as a member of the family class if the same sponsor had previously applied for permanent residence and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined. In *Zhang*, the appellant successfully argued that cultural norms prohibited them from living together or otherwise behaving like a married couple prior to marrying:

The panel also relies upon the evidence ... that they are a “traditional couple” – especially the applicant and her family, to the extent that co-habitation prior to marriage was simply not acceptable. This, according to the applicant, was why she stayed with a friend during her weekend visits to Shanghai.<sup>412</sup>

Similarly, in *Belgith*, the IRB Member held that the appellant and applicant were not in a conjugal relationship while they were studying together in the United States, given that the “cultural and religious traditions” of a Tunisian Muslim couple “prohibit[ed] cohabitation out of wedlock.”<sup>413</sup> In these cases, the appellants successfully relied on traditional norms to bolster their assertions that they were not in a conjugal relationship.

However, some couples argued that due to similar cultural prohibitions, they did not consider themselves to be in a conjugal relationship even though they were cohabiting. For instance, in *Liu*, the appellant and applicant were living together as a couple, but the appellant testified that he did not consider that they were spouses until they were married:

He stated that the reason that he did not declare the applicant as a common-law spouse is because he didn’t consider that they were an official couple until after their

<sup>412</sup> *Zhang v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 1741 (QL) at para. 21.

<sup>413</sup> *Belgith v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1663 (QL) at para. 11.

wedding in 2005 which took place after his landing. The appellant testified that according to Chinese culture, the applicant became his family member only after the marriage. He stated there was never any intent on his part to mislead immigration officials.<sup>414</sup>

Further, in *Gara*, a Syrian appellant argued that she did not disclose her common-law relationship to the visa officer because “in her culture, it would have brought disgrace to her family for her to be living with a man in a common-law relationship without having had a wedding in the church.”<sup>415</sup> In both decisions, the IRB Member found that the failure to disclose the common-law relationship was indeed due to cultural differences. Despite their acknowledgement that their testimony was credible, the panel ultimately held that the appellants’ non-disclosure precluded granting the application for sponsorship.

### **3.2.7. Parents and Cultural Duties of Care**

In a large number of cases, appellants invoked cultural arguments as a basis for being reunited with their elderly parents. This issue arose in two types of appeals: (1) applications to sponsor the appellant’s parent or parents<sup>416</sup>; and (2) appeals against departure orders by permanent residents who had violated their residency obligations.<sup>417</sup> In the former, appellants argued that they should be permitted to sponsor their parents on humanitarian and compassionate grounds, in cases where the parents were found to be inadmissible to Canada for health or financial reasons. In the latter, appellants submitted that they had been compelled to return to their country of origin for family reasons.

<sup>414</sup> *Liu v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2731 (QL) at para. 9.

<sup>415</sup> *Gara v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 33 (QL) at para. 16.

<sup>416</sup> Parents of sponsors are included in the family class pursuant to sub-paragraph 117(1)(c) of the *IRPR*, *supra* note 18.

<sup>417</sup> Permanent residents must be physically present in Canada for 730 days in any five-year period or risk deportation: see ss. 28, 41(b) of the *IRPA*, *supra* note 21.

The arguments advanced by appellants in these decisions were virtually identical: they sought relief on the basis of a perceived “cultural obligation” to care for their aged parents. Similar claims were made by appellants from India,<sup>418</sup> Taiwan,<sup>419</sup> Korea,<sup>420</sup> Sudan,<sup>421</sup> and Iran,<sup>422</sup> to name just a few countries. However, the IRB’s responses to this argument varied widely:

The appellant also testified about his cultural obligation towards his parents’ care, given that he is the eldest son in the family, and I find this cultural obligation favours discretionary relief as well. I find that there exists a special and long-standing bond between the appellant and the applicants.<sup>423</sup>

I have also taken into account the appellant’s statement that, as the oldest child, he is culturally obliged to care for his parents in their later years. However, the evidence did not establish that the only way to provide this care would be for the applicant and his wife to be granted permanent residence in Canada. The appellant has been providing financial support to his parents in Pakistan and could continue to do so.<sup>424</sup>

While it appears that the appellant’s culture may require him to be responsible for his parents’ well-being, and to look after them when the occasion arises, there is no persuasive evidence before the panel that the manner in which this must be done is for the appellant to be in the physical presence of his parents. Indeed the evidence on balance suggests that such is not necessary. In this regard the appellant chose to emigrate to Canada in about 2000 and he left his parents in India. He did this knowing full well that he is a Sikh with culturally mandated obligations to look after his parents in India.<sup>425</sup>

<sup>418</sup> See e.g. *Bal v. Canada (Citizenship and Immigration)*, [2007] I.A.D.D. No. 920 (QL) [*Bal*]; *Upadhyay v. Canada (Citizenship and Immigration)*, [2009] I.A.D.D. No. 793 (QL); *Sihota v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2135 (QL); *Sohal v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1439 (QL) at para. 15.

<sup>419</sup> *Hsu v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 554 (QL) at para. 10; *Chin-Tai Wu v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 815 (QL); *Lee v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 1405 (QL); *Chen v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] I.A.D.D. No. 283 (QL).

<sup>420</sup> *Choi v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1223 (QL) at para. 14; *Song v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 1442 (QL) at para. 9.

<sup>421</sup> *Abdel Monim v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1404 (QL) at para. 25.

<sup>422</sup> *Hodai v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 906 (QL); *Arfaie v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] I.A.D.D. No. 656 (QL); *Zarrinmehr v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 1205 (QL) at para. 6.

<sup>423</sup> *Bhavesh Jaswal v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 147 (QL) at para. 19.

<sup>424</sup> *Hussain v. Canada (Citizenship and Immigration)*, [2008] I.A.D.D. No. 2258 (QL) at para. 33.

<sup>425</sup> *Bal*, *supra* note 418 at para 32.

Despite the similarity of the arguments presented, tribunals rendered extremely divergent decisions on the significance of appellants' "cultural duty of care" toward their parents.

In both conjugal relationship and parental "duty of care" cases, individuals themselves appealed to the perception that people from non-Western minority groups are governed by the dictates of culture. Appellants seeking to sponsor their partners argued that they had not declared to the immigration authorities that they were in a conjugal relationship because cultural norms prohibited them from cohabiting with their spouses before marriage. Other appellants asserted that they could not meet their residency obligations because of a "cultural duty" to care for their aging parents in their country of origin. In these decisions, the parties maintained that their own behaviour was constrained by cultural norms, or cited cultural arguments as an explanation for their actions.

### **3.2.8. Opinion and Documentary Evidence**

Some parties relied on opinion or documentary evidence to bolster their claims regarding the social and cultural mores governing the appellant and applicant's relationship.<sup>426</sup> Rule 37 of the *Immigration Appeal Division Rules* permits parties to call expert witnesses, as long as they provide a report signed by the expert witness outlining their qualifications and summarizing their evidence.<sup>427</sup> However, since the IRB is not

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<sup>426</sup> Expert evidence plays a crucial role in decisions concerning the legal validity of marriage and adoption. However, I examine the use of opinion evidence only in decisions concerning the genuineness of family class relationships.

<sup>427</sup> *Immigration Appeal Division Rules*, SOR/2002-230, s. 37(1)(e).

bound by the ordinary rules of evidence, experts need not be formally qualified, or even attend in person, in order to give opinion evidence.<sup>428</sup>

### 3.2.8.1. Academic Experts

Various parties called upon academics to provide expert evidence regarding cultural practices and traditions. For example, in *Ahmed*, the appellant introduced an expert witness, Dr. Mohamud, to testify about Somali marriage customs. Dr. Mohamud stated that “it is normal for the two families to come together and to negotiate an arranged marriage between couples,” leading the tribunal to conclude that the circumstances of the appellant and applicant’s marriage were in line with Somali tradition.<sup>429</sup> In *Sandhu*, counsel for the appellant called a scholar, Dr. Agnew, who was qualified as “an expert witness with respect to women from the Punjab and domestic abuse.”<sup>430</sup> The IRB Member accepted Dr. Agnew’s testimony about the prevalence of abusive relationships in Punjabi culture. Evidence from these academic experts was cited to explain the appellants’ behaviour and lend credence to their testimony.

The tribunal in *Sadek* heard evidence from Dr. Solaiman, a professor of Muslim jurisprudence and imam of an Ottawa mosque, in determining whether the appellant’s civil marriage in Lebanon was “culturally valid.”<sup>431</sup> Although the decision does not indicate

<sup>428</sup> IRB Legal Services, “Weighing Evidence” (31 December 2003), online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/alltous/weiapp/Pages/index.aspx>> (last accessed 12 April 2011).

<sup>429</sup> *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 634 (QL) at para. 14.

<sup>430</sup> *Gurpreet Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2200 (QL) at para. 19 [*Gurpreet Sandhu*].

<sup>431</sup> *Sadek v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 884 (QL) [*Sadek*]. The appellant’s application to sponsor his wife was initially refused on the basis of paragraph 117(9)(d) of the *IRPR*. When the appellant previously entered Canada as a permanent resident, he claimed to be single

whether Dr. Solaiman was qualified as an expert witness, he testified on the cultural requirements of a Muslim marriage and stated that the appellant could technically call himself “single” since his religious ceremony had not been completed.<sup>432</sup> The IRB held that the appellant was precluded from sponsoring his wife because he had chosen not to disclose his change of civil status “for cultural considerations,” and therefore the refusal was valid.<sup>433</sup>

Further, the appellant in *Begum* presented affidavit evidence from Islamic law professor Anver Emon on Bangladeshi Muslim religious and cultural norms. Dr. Emon’s testimony supported the appellant’s argument that it was culturally and legally acceptable to marry her former brother-in-law.<sup>434</sup> The appellant further argued that it was not implausible for a Bangladeshi man to marry a significantly older, divorced mother of three. While Dr. Emon’s evidence indicates that concerns about age compatibility are not unique to Bangladeshi culture, the IRB Member viewed his testimony as supportive of the Minister’s argument that the appellant’s marriage to her former spouse’s brother was unusual, and thus not credible.

despite having married his wife in a civil ceremony in Lebanon. The appellant argued that he had not made a misrepresentation since at the time his marriage was not yet “complete” with respect to Islamic customs, because they had not undergone a public religious ceremony: *ibid.* at para. 3.

<sup>432</sup> *Sadek*, *ibid.* at para. 16.

<sup>433</sup> *Sadek*, *ibid.* at para. 34.

<sup>434</sup> *Begum*, *supra* note 351 at para. 13.

### 3.2.8.2. Religious and cultural leaders

Parties also submitted declarations from leaders in their ethnic and religious communities attesting to various cultural aspects of marriage. In *Thangamaniam*, an elder in the Tamil community provided a statutory declaration on the importance of the *thali* ritual in the Hindu wedding ceremony.<sup>435</sup> In *Jandey* and *Grewal*, the appellants produced letters from local Sikh priests testifying about Sikh marriage customs.<sup>436</sup> The appellant in *Sidhu* also sought to introduce two witnesses, both of whom were active members of Sikh temples, as experts. The tribunal did not qualify them as expert witnesses because no information was provided about their education or religious training; however, they were permitted to give evidence.<sup>437</sup>

In *Padda*, the couple's marriage was found not to be genuine, in part because the applicant had not performed *lavan* (circling of the holy book) during their marriage ceremony. Counsel for the appellant filed two affidavits from Sikh temple leaders explaining that the applicant could not perform *lavan* because she was menstruating.<sup>438</sup> The IRB Member instead relied on exhibits filed by the Minister's counsel, including a document produced by the Sikh Women Awareness Network stating that menstruation is not viewed as a hindrance to participating in Sikh religious rituals. The Member noted that the texts cited by the Minister were "very eloquent" and "adamant on the issue of female

<sup>435</sup> *Thangamaniam*, *supra* note 265 at para. 11.

<sup>436</sup> *Jandey v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 861 (QL) at para. 20; *Jaspal Singh Grewal*, *supra* note 290 at para. 31.

<sup>437</sup> *Harjinder Singh Sidhu*, *supra* note 295 at para. 5.

<sup>438</sup> *Padda*, *supra* note 249 at paras. 19-22.

equality.”<sup>439</sup> Thus, the affidavits produced by the appellant were rejected in favour of the Minister’s exhibits.

Some parties filed statements from members of local cultural associations in support of their claims. In *Hashimi*, the appellant relied on a letter from the director of an Afghani women’s counseling and community support group, which stated the following:

I would like to explain a part of cultural factors in Afghanistan. Marrying widows of close relatives such as brothers and cousins is common in the culture of some groups of Afghans. In some cases it is not only an option but it is an obligation. It is also honored, recognized and valued in Afghan culture.<sup>440</sup>

Similarly, in *Molla*, the appellant submitted a letter from the executive director of the Ethiopian Association of the Greater Toronto Area, submitting information to the tribunal about arranged marriages in Ethiopia.<sup>441</sup> In both cases, the tribunal found that their concerns were satisfactorily explained by the information provided by the cultural association.

### 3.2.8.3. Documentation

Parties also relied on general documentary evidence, including academic literature, to support the specific facts of their case. For instance, the appellant in *Gao* submitted three academic articles dealing with “differences between western and Chinese cultures with respect to communicating love, the importance of love in highly collectivistic societies and western culture’s emphasis on self-disclosure and verbal communication of personal

<sup>439</sup> *Padda*, *ibid.* at para. 30.

<sup>440</sup> *Hashimi v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 728 (QL) at para. 4.

<sup>441</sup> *Molla v. Canada (Minister of Citizenship and Immigration)*, [2010] I.A.D.D. No. 262 (QL) at para. 14.

nature.”<sup>442</sup> The panel held that these “cultural factors” did not adequately explain the applicant’s limited knowledge of her spouse.<sup>443</sup> In *Alaoui*, the IRB Member relied on a “doctoral study” by a sociology professor, Dr. Aboumalek, to find that the couple’s marriage was performed according to contemporary Moroccan marriage customs.<sup>444</sup> Conversely, in *Moore*, the same IRB Member cited his earlier decision in *Alaoui*, specifically the references to Dr. Aboumalek’s work, in determining that the appellant and applicant’s relationship was not consistent with Moroccan traditions.<sup>445</sup>

In *Ly*, the IRB assigned little weight to a document entitled *Customs and Culture of Vietnam*, which “identifies traditional Vietnamese courtship and marriage practices,” on which the Minister’s counsel based his arguments.<sup>446</sup> By contrast, the panel in *De Quiroz* considered various documents in support of the Minister’s contention that “courtships where the woman initiates the relationship are not acceptable in the Philippines.”<sup>447</sup> These documents included a Wikipedia article on “the culture of the Philippines” and an online article entitled “Women’s Rights: A Journey Around the World.”<sup>448</sup> The Minister’s counsel also referred to the contents of an opinion letter from “a visa officer in the Philippines, who is Filipina”:

<sup>442</sup> *Gao v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 875 (QL) at para. 9 [*Gao*].

<sup>443</sup> *Gao*, *ibid.* at para. 33.

<sup>444</sup> *Alaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 158 (QL) at para. 26 [*Alaoui*].

<sup>445</sup> *Moore v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1208 (QL) at paras. 27-35. In *Ménard*, however, counsel for the Minister was unable to rely on Dr. Aboumalek’s work on Moroccan marriage customs as cited in the *Alaoui* decision. The panel held that applying this decision would be a breach of natural justice, since Dr. Aboumalek’s study had not been produced in evidence: *Ménard v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 506 (QL) at para. 12.

<sup>446</sup> *Ly*, *supra* note 270 at paras. 25-26.

<sup>447</sup> *De Quiroz*, *supra* note 340 at para. 11.

<sup>448</sup> *De Quiroz*, *ibid.* at para. 11.

Relationships between older women and younger men are frowned upon in our society as this affects the man's macho image. In this kind of relationships, there is a perception that the man is henpecked.<sup>449</sup>

Hence, the panel accepted numerous sources of varying quality as documentary evidence of cultural norms.

Finally, a statutory declaration by Krishan K. Jarth, a visa officer at the Canadian High Commission in New Delhi, was cited by several IRB Members in decisions concerning Sikh marriages.<sup>450</sup> Board Members alluded to this declaration as evidence of Indian cultural norms regarding, for example, the length and nature of marriage negotiations,<sup>451</sup> spousal compatibility,<sup>452</sup> wedding garments,<sup>453</sup> and the elaborate nature of wedding celebrations.<sup>454</sup> Some panels referred to Mr. Jarth as an "expert on Indian culture" and relied on the statutory declaration as evidence of Sikh marriage norms:

In the panel's experience, as the marriages assessed by the visa officers in India diverge from the norm as described by Mr. Jarth, the greater the index of suspicion that the marriage may not be genuine. Thus, for example, when the elements of compatibility, which Mr. Jarth describes as the touchstone of arranged marriages, are

<sup>449</sup> *De Quiroz*, *ibid.* at paras. 11-12.

<sup>450</sup> In *Perhar v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 804 (QL), the document is cited as: "Statutory Declaration in the Matter of the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations*, 27 September 2002": *ibid.* at n. 15. Although most IRB Members do not provide a citation for Jarth's statutory declaration, it is likely that they all referring to the same document. In *Dua*, the panel mentions "other decisions in which his statutory declaration has been tendered in support of Indian cultural norms": *supra* note 280 at para. 17.

<sup>451</sup> *Garcha v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 1772 (QL) at para. 23 [*Garcha*]; *Fushipinder Brar v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 2325 (QL) at para. 10; *Klair*, *supra* note 302 at paras. 15-19.

<sup>452</sup> *Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 8 (QL) at para. 39; *Dutta v. Canada (Minister of Citizenship and Immigration)*, [2008] I.A.D.D. No. 2941 (QL) at para. 18; *Jaswinder Kaur Dhaliwal*, *supra* note 334 at para. 15; *Darshan Singh Kandola v. Canada (Minister of Citizenship and Immigration)*, [2006] I.A.D.D. No. 2209 (QL) at para. 24; *Perhar*, *supra* note 450 at paras. 15-16; *Bhinder*, *supra* note 282 at para. 19.

<sup>453</sup> *Barhtia*, *supra* note 279 at para. 10.

<sup>454</sup> *Amratpal Singh Sidhu*, *supra* note 282 at para. 14.

absent or dissonant, the more problematic the marriage. Mr. Jarth's qualifications are not questioned and the panel accepts his declaration as proven.<sup>455</sup>

Other Members, however, viewed the declaration as merely a source of general information about Sikh culture:

This declaration, in my view, provides some very general descriptions with respect to the cultural norms of the Sikh Jat community in India. [...] Furthermore, I adopt Member Neron's finding in *Mann* that Mr. Jarth is knowledgeable with respect to the Sikh Jat community in India, but cannot be considered an expert in this field.<sup>456</sup>

The officer appeared to have relied heavily on the statutory declaration of K.K. Jarth, even occasionally using his comments in a verbatim manner. I have reviewed other decisions in which his statutory declaration has been tendered in support of Indian cultural norms. None has ever accepted his credentials as being of an expert in Indian cultural norms.<sup>457</sup>

One IRB Member even mentioned Mr. Jarth's statutory declaration in a decision concerning a Muslim marriage; however, it was given no weight by the panel.<sup>458</sup>

Thus, there was a lack of consistency in terms of how different IRB Members treated documentation: some adjudicators viewed it as expert evidence, while others held that it was merely a general description of cultural norms.

### **3.3. Conclusion**

In this chapter, I have studied the IRB's adjudication of cultural considerations in evaluating the genuineness of family class relationships. I have also identified arguments invoked by appellants to explain their adherence or non-adherence to perceived cultural

<sup>455</sup> *Sanghera*, *supra* note 296 at para. 16. See also *Jasvir Singh v. Canada (Minister of Citizenship and Immigration)*, [2007] I.A.D.D. No. 1031 (QL) at paras. 6-7.

<sup>456</sup> *Jagwinder Kaur Aujla*, *supra* note 335 at para. 21. The panel in *Simarjit Kaur Sandhu* also noted that Mr. Jarth's opinion "does not necessarily reflect homogeneous practices in India": *supra* note 307 at para. 14.

<sup>457</sup> *Hayer v. Canada (Minister of Citizenship and Immigration)*, [2009] I.A.D.D. No. 2154 (QL) at para. 27. The same IRB Member repeats this concern almost verbatim in *Dua*, *supra* note 280 at para. 17.

<sup>458</sup> *Motala v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1415 (QL) at paras. 37-38.

norms. While details such as wedding garments and age differences between spouses may seem insignificant, taken as a whole they can lead to decisions about credibility that have serious repercussions for the applicant and the appellant. In the decisions that I examined, evidence showing whether the appellant and applicant's relationship was "culturally appropriate" and in accordance with the panel's expectations directly influenced the IRB's evaluation of their credibility.

I have argued that many IRB Members produced essentialist visions of non-Western cultures, since appellants and applicants who departed from perceived cultural values and practices were viewed as less credible. Parties were expected to "perform" their marriages and adoptions in a manner that was culturally recognizable to the decision-maker. The identities of appellants and applicants were often defined in terms of categories such as ethnicity, religion, marital background, age, and disability, which were held to determine the plausibility of their relationships. The task of establishing credibility proved particularly difficult for appellants and applicants with intersectional identities. Further, this approach often generated problematic images of both "Other" cultures and the mainstream culture. In this way, IRB adjudicators and parties contributed to the racialization of non-Western identities.

This analysis raises myriad questions about how the IRB (and other administrative tribunals) can more adequately address the diverse social realities of its applicants. Where should the IRB obtain knowledge about cultural traditions and practices? Or, as Sonia

Lawrence asks, “how do we know what we ‘know’ about culture”?<sup>459</sup> What is the role of experts, community leaders, and other “authentic insiders” in the decision-making process? How can the IRB determine who should “speak”, while acknowledging the contested nature of cultural traditions and the diversity that exists within cultural groups? The following chapter will present my reflections on how the complexities of cultural identity can be more fairly and sensitively addressed by IRB Members.

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<sup>459</sup> Lawrence, *supra* note 14 at 111.

## Chapter 4

### Reflections and Conclusion

In Chapter 2 of this thesis, I explored theoretical accounts of cultural identity, Critical Race scholarship, and immigration law in order to establish a framework for studying IRB decisions. Chapter 3 presented the results of my examination of recent family sponsorship decisions where cultural difference played a significant role in the panel's written reasons. I applied the theoretical arguments set out in Chapter 2 to illuminate the problems made apparent in these decisions.

In this chapter, I conclude my analysis by reflecting on strategies and directions that could help to ameliorate the IAD's decision-making process. First, I discuss the ways in which information about minority cultures is produced in family sponsorship decisions, and make suggestions on how Board Members could obtain information that does not rely on essentialist representations of cultures. Second, I examine the concept of "moral (or institutional) humility," arguing that IRB Members should be willing to suspend incorrect assumptions and open to hearing new perspectives. Finally, I explore the implications of increasing the level of diversity on the panel of IRB Members. These reflections are based on the starting premise of my thesis: that public decision-makers must learn to adjudicate issues of cultural identity in a fair, sensitive, and informed manner.

## 4.1. Reflections

### 4.1.1. Knowing What We “Know” About Culture

The Immigration Appeal Division is deemed to be a tribunal with specialized knowledge, to whom a higher level of deference is owed.<sup>460</sup> However, an analysis of the IAD’s decisions raises the question of how and where the tribunal obtains its knowledge relating to minority cultures. For instance, one IRB Member stated, in many decisions involving Moroccan applicants, that he had developed specialized knowledge of Moroccan customs, particularly weddings. Seemingly, this knowledge stemmed from hearing numerous spousal sponsorship cases from Morocco.<sup>461</sup> But aside from the experience developed through hearing multiple cases from the same region of the world, what are the Board Members’ sources of knowledge about cultural traditions and practices? As we have seen, adherence to perceived cultural norms is a critical factor in determining credibility, in the eyes of many IRB adjudicators. Therefore, it is necessary to understand the decision-makers’ assumptions about parties’ culturally motivated behaviour, and how they developed these assumptions.

Reflecting on how knowledge of diverse cultural groups is produced in the courtroom, Sonia Lawrence asks: “Who provides the information, how is it presented, and

<sup>460</sup> For this and other reasons, the applicable standard of judicial review with respect to family sponsorship appeals is that of reasonableness: *Thach v. Canada (Citizenship and Immigration)*, 2008 FC 658, [2008] F.C.J. No. 165 (QL) at para. 18; *Bielecki v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 442, [2008] F.C.J. No. 524 (QL) at para. 23.

<sup>461</sup> See e.g. *Raki v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1337 (QL) at para. 30; *Boivin*, *supra* note 282 at para. 28. In *Moore*, *supra* note 445 at para. 26, the Member states: “Being by nature a specialized tribunal that hears a large number of cases involving the application of section 4 in the same cultural setting, in this case Morocco, the panel has at its disposition certain points of reference for determining whether or not a marriage is genuine within a specific cultural context.”

what is considered authoritative?”<sup>462</sup> Lawrence argues that judges may not be equipped to “appreciate the complexities involved in considering evidence relating to culture.”<sup>463</sup> As described in the last chapter, many IRB decisions perpetuate simplistic or inaccurate visions of minority cultures. Thus, merely disseminating information about cultures to IRB adjudicators may not diminish the tendency to essentialize “Others”. To avoid further stereotyping, information about living cultures should not be presented as “facts”, and it should be acknowledged that material by any one author is likely to be incomplete.

Moreover, it is crucial for adjudicators to take into account that cultural norms are socially constructed, and often influenced by interactions with the mainstream culture. For example, while an IRB Member may possess accurate information about arranged marriages among Sikhs in India, marriage practices in the Sikh community in Canada may have transformed, and thus deserve their own inquiry. Further, panels should be aware of the existence of intra-group disputes and the fact that cultural traditions may be contested. It is important to explore whether practices are understood as “cultural” by all members of the community.<sup>464</sup> Adjudicators must also avoid basing decisions on anachronistic information, since traditions are continuously evolving. Overall, evidence about cultural norms should be treated as general guidelines rather than as strict templates for the behaviour of cultural minorities.

Various strategies can be implemented to mitigate the pitfalls of cultural essentialism outlined above. First of all, expert evidence can be useful in explaining why “an apparently

<sup>462</sup> Lawrence, *supra* note 14 at 119.

<sup>463</sup> *Ibid.* at 120.

<sup>464</sup> *Ibid.* at 123.

un-creditworthy presentation at the hearing is explicable” in terms of cultural factors.<sup>465</sup>

Crépeau and Nakache’s study of refugee claims revealed that IRB Members frequently gave little weight to expert evidence, such as medical reports and academic articles. This was partly owing to the fact that certain Members may have already considered themselves to be experts, as they were continuously dealing with refugee claimants from the same country.<sup>466</sup> It is possible that Members hearing cases in the Immigration Appeal Division shared similar views about their own levels of expertise. In Chapter 3, I explored the role of expert and documentary evidence, and how such evidence was received and applied by IRB adjudicators. I noted that some, but not all, Members accepted the opinion evidence of academics and religious leaders attesting to various aspects of cultural norms, which in turn bolstered the claims of both appellants and respondents.<sup>467</sup>

However, as Lawrence warns, “[e]xperts are rarely disinterested parties.”<sup>468</sup> It is problematic for one person to serve as the “voice” of an entire community, given the existence of dissent within cultures. Thus, IRB Members must recognize that intra-cultural disputes and power struggles may have an impact on the evidence that is filed for the purposes of a claim. Crépeau and Nakache’s article notes that IRB Members received training on how to read and evaluate expert reports in the context of refugee claims.<sup>469</sup> Similarly, IRB Members could be trained in interpreting and applying expert evidence

<sup>465</sup> Crépeau and Nakache, *supra* note 7 at 108.

<sup>466</sup> However, the main reason given by interviewees for underestimating expert evidence was the poor quality of medical and psychological reports presented to the IRB: *ibid.* at 108.

<sup>467</sup> A meaningful analysis of how IRB Members handled expert evidence would require obtaining copies of the affidavits filed and transcripts of witnesses’ testimony at the hearings, as well as interviews with the IRB Members.

<sup>468</sup> Lawrence, *supra* note 14 at 132.

<sup>469</sup> Crépeau and Nakache, *supra* note 7 at 95.

dealing with cultural norms. While adjudicators have no control over the quality of opinion testimony that is presented by parties, they can develop the ability to recognize intra-cultural dissent, and learn to rely on evidence that reflects the diverse experiences of cultural communities.

Similar considerations are also relevant with respect to documentary evidence. Among the IRB decisions I examined, some Members relied on documents of questionable value to support their findings about minority cultures. For example, as stated in the last chapter, the panel in *De Quiroz* accepted a Wikipedia article as a source of information about Filipino culture.<sup>470</sup> One way to address this problem would be to establish a database of documents and materials from reputable sources relating to cultural norms. In fact, the IRB already has an extensive research program for its refugee determination process, in which information on “the social, political, economic and human rights conditions in countries of origin of refugee claimants” is gathered and made publicly available.<sup>471</sup> Of course, these resources must be constantly updated and monitored to ensure that a wide variety of viewpoints are represented. Moreover, regardless of the sources of information that panels rely on, IRB Members should not assume that failure to follow traditional norms automatically renders parties less credible.

Further, it is important that cultural information relied on by IRB Members is employed consistently across decisions. For instance, IRB Members cited Krishan K. Jarth’s statutory declaration on Indian Sikh marriage in at least 18 of the decisions I examined.

<sup>470</sup> *De Quiroz*, *supra* note 340 at para. 11.

<sup>471</sup> Immigration and Refugee Board of Canada, “Research Program”, online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca/Eng/resrec/respro/Pages/index.aspx>> (last accessed 10 May 2011).

However, the declaration is treated as an “expert” statement in some decisions, and referred to as a mere source of information in others. Various panels held that the declaration was evidence of Sikh marriage norms, while others affirmed that it only provided general descriptions.<sup>472</sup> To adjudicate appeals fairly and consistently, the same document should receive an equal amount of weight and be treated in the same manner across decisions.

In another example, involving a marriage between a Sunni Muslim and a Shia Muslim, the IRB Member concluded that the appellant and applicant were not credible because they claimed they were not divided by their religious differences. The tribunal took “judicial notice” of the fact that conflicts existed in various countries among followers of these two branches of Islam.<sup>473</sup> Conversely, in a decision of the Refugee Protection Division, a different IRB Member cited evidence stating that marriages between Shia and Sunni Muslims are common and that both sects abide by the five pillars of Islam. The Member used this evidence in refusing the appellant’s claim that he feared persecution because he was Shia and married to a Sunni.<sup>474</sup> Clearly, an administrative tribunal should not rely on conflicting evidence to impute appellants’ credibility in different cases.

Another, perhaps obvious, way of addressing the lack of adequate cultural information is through the education and training of IRB Members. In addition to knowledge about the cultural norms of applicants and appellants, Rousseau et al. suggest

<sup>472</sup> See text accompanying notes 468 to 476.

<sup>473</sup> *Sediqzada*, *supra* note 367 at para. 16.

<sup>474</sup> *Saeed*, *supra* note 367 at para. 16.

that training of IRB Members should be oriented toward the development of cultural competence:

This training should avoid being just a check-list of the basic “differences” of other cultural norms, modes of communication, psychological reactions to trauma and various political upheavals throughout the world. Rather, it would propose a broader discussion concerning … the construction, perception and experience of cultural difference....<sup>475</sup>

While Rousseau et al.’s article deals with the refugee determination process, their suggestions are also pertinent to family sponsorship appeals. Rather than merely relying on a “check-list” when assessing the credibility of applicants from a foreign culture, IRB decision-makers should develop sensitivity to diverse cultural perspectives. Similarly, Crépeau and Nakache argue that cultural awareness must be accompanied by an ability to understand issues from the point of view of the claimant and to avoid “rigid convictions about what is appropriate behaviour and what is not.”<sup>476</sup> In this way, the qualities of empathy and discernment can help to offset situations where Members lack knowledge of the applicant and appellant’s particular cultural context.

#### **4.1.2. Moral Respect and Institutional Humility**

In addition to ensuring that accurate and contemporaneous information about cultural norms is available to Members, the IRB should foster a culture of respect for minority cultures. For instance, it is legitimate to learn about traditional gender roles in foreign cultures and how they might play out among members of the diaspora. However, some of the IAD’s decisions reflected a stance suggesting that entire communities are

<sup>475</sup> Rousseau et al., *supra* note 7 at 67.

<sup>476</sup> Crépeau and Nakache, *supra* note 7 at 76.

misogynist or tolerate violence against women.<sup>477</sup> Such attitudes contribute to the perpetuation of stereotypes, which in turn make it more difficult for appellants and applicants to convince decision-makers that their particular relationship is credible. In this way, public institutions such as the IRB play an important role in promoting inclusiveness and respect for different peoples, which can lead to more effective decision-making. This requires more than learning “facts” about members of diverse groups: institutions that fail to challenge stereotypes and cultivate respect for other cultures will merely enable the silencing or distortion of marginalized voices.

IRB adjudicators should also recognize, and be willing to modify their views, when they hold incorrect assumptions about minority cultures. In her article “Asymmetrical Reciprocity,” Iris Marion Young argues that our attempts to understand different standpoints must include a degree of “moral humility”, which recognizes our inherent ignorance of the other’s experience and our inability to fully understand their perspective.<sup>478</sup> According to Young, it is common for those in privileged positions to “unknowingly … misrepresent the other’s situation.”<sup>479</sup> For example, several IRB Members held that it was implausible that appellants and applicants from non-Western cultures would have sexual intercourse outside of marriage, stating that such behaviour was incompatible with their cultural norms. As a result, many parties who engaged in extra-marital sexual interaction were held to lack credibility, an assessment which comes

<sup>477</sup> See text accompanying notes 394 to 398.

<sup>478</sup> Iris Marion Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought” in Ronald Beiner & Jennifer Nedelsky, eds., *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham, MD: Rowman & Littlefield, 2001) [*Judgment, Imagination and Politics*] 205 at 219 [Young, “Asymmetrical”].

<sup>479</sup> Young, “Asymmetrical”, *ibid.* at 214-215.

dangerously close to a morality judgment.<sup>480</sup> Such instances of cultural misrecognition can be deeply problematic, especially where minorities are depicted as tradition-bound, illiberal or homogeneous.

To take another example, the IRB Member in *Ashraf* held that the appellant and applicant lacked credibility in part because they had exchanged four cards on the occasion of Eid, despite the fact that “Eid occurs annually.”<sup>481</sup> This assessment is, quite simply, incorrect: Muslims celebrate two Eid festivals, Eid-al-Fitr and Eid-al-Adha. Similarly, the adjudicator in *Goraya* remarked that it was implausible that the bride had henna inscribed on her palms because “a sweaty palm is apt to be washed often, thereby reducing the visibility of the pattern on the wearer’s palm.”<sup>482</sup> In fact, henna is generally applied to the palm as well as the back of the hand during Indian bridal *mehndi* ceremonies, and it does not wash off easily. Although these examples may be trivial in themselves, the consequences of such findings of non-credibility can be significant for parties. Thus, the decisions illustrate Young’s suggestion that a stance of humility and self-awareness about our own imperfect knowledge is required in order to exercise good judgment.

For Young, it is also critical to realize that one’s own position and outlook can be viewed as “strange” from the standpoint of others.<sup>483</sup> This implies, for instance, that the values and traditions of the dominant majority cannot be viewed as unstated norms, in

<sup>480</sup> See text accompanying notes 328 to 331.

<sup>481</sup> *Ashraf*, *supra* note 259 at para. 19.

<sup>482</sup> *Goraya*, *supra* note 3 at para. 26.

<sup>483</sup> Young, “Asymmetrical”, *supra* note 478 at 222.

contrast with those of “culturally-laden Others.”<sup>484</sup> This has important ramifications for assessing the credibility of IRB applicants and appellants. For example, the idea that Muslims or Sikhs would be reluctant to marry a divorced person because marriage is considered a “sacrament” in Islam or Sikhism ignores the fact that similar taboos exist in Western religions.<sup>485</sup> Therefore, an IRB adjudicator exercising moral humility would recognize that Canadian or North American ways of thinking are not “neutral”, but are rooted in cultural and institutional norms.

In her discussion of identity claims made by minority groups, Avigail Eisenberg introduces a similar concept, which she calls “institutional humility.” She writes that public decision-makers must have the capacity to reflect on the ways in which “norms which are putatively neutral are in fact biased.”<sup>486</sup> Eisenberg argues that administrative tribunals such as the IRB should actively interrogate their decision-making processes and determine whether they are inclusive of diverse perspectives:

To require institutions, which aspire to be fair, to assess identity claims using well thought-out criteria can effectively require them to grapple with how minorities perceive and experience political institutions, and to uncover possible inequalities.... Decision makers who are reflective of the dominant majority’s position can display arrogance about the essential soundness of their interpretation of basic values and they can be blind to the ways in which unacknowledged assumptions about identity are at work in their decisions.<sup>487</sup>

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<sup>484</sup> See text accompanying notes 58 to 63. As Martha Minow writes, “we typically adopt an unstated point of reference when assessing who is different and who is normal”: Minow, *supra* note 61 at 51.

<sup>485</sup> See text accompanying notes 348 to 355.

<sup>486</sup> Eisenberg, *supra* note 16 at 50.

<sup>487</sup> *Ibid.* at 27.

Hence, a stance of institutional humility indicates that public bodies seek to understand the biases and assumptions underlying their decision-making and to promote respect for people advancing identity claims.

How would the concept of humility be applied in the context of administrative decision-making? Young writes that moral humility involves being open to newness and willing to suspend assumptions in order to learn about the other's perspective.<sup>488</sup> She refers to this openness as a sense of "wonder", but also warns of the fine line between wonder and "a kind of distant awe before the Other," which is dehumanizing. Embracing newness means that IRB adjudicators cannot rely on existing rules or on culturally familiar stories, but instead must be receptive to innovative concepts and unique perspectives. For instance, the IRB Member in *Mujib* held that it was unusual that the appellant, a "recent immigrant Muslim daughter," would marry without her parents' knowledge. Yet despite the fact that the couple's behaviour was "outside the norm," the panel ultimately held that their marriage was genuine, acknowledging that the matter should be viewed "through the eyes of the couple and not through its own cultural or moral lens."<sup>489</sup> Thus, the IRB Member was willing to look beyond the familiar narrative trope of the obedient "immigrant Muslim daughter" to appreciate the realities of the couple's story.

The *Mujib* decision illustrates a general puzzle about how IRB Members should approach issues of cultural difference. Should the IRB Member consider the appellant's testimony with *no* presuppositions about traditional Muslim marriage practices? Or is it

<sup>488</sup> "Asymmetrical", *supra* note 478 at 219.

<sup>489</sup> *Mujib*, *supra* note 297 at para. 19.

preferable for Members to be aware of what a “typical” family relationship would look like, culturally speaking, yet be open to hearing stories which transcend familiar patterns? On one hand, the latter approach risks reinforcing essentialist stereotypes or generating expectations of “cultural performance”. On the other hand, it may not be desirable (or even possible) for an IRB Member to be free of expectations, given my earlier claim that decision-makers should be informed and educated about different cultural contexts. There is no easy solution to this puzzle, but it seems evident that asking questions and holding actual conversations with IRB applicants and appellants (rather than presuming to have knowledge of their perspectives) can be an effective means of understanding their story.<sup>490</sup> As Young notes, the only means of correcting misrepresentation of another’s position is “their ability to tell them I am wrong about them.”<sup>491</sup>

#### **4.1.3. Increasing Diversity**

Another strategy for heightening cultural sensitivity and awareness is to enhance the level of diversity of the IRB’s body of adjudicators such that it reflects Canada’s pluralistic society. Jennifer Nedelsky makes a strong case for more representative adjudicative panels, an argument that is based on Hannah Arendt’s theory of reflective judgment.<sup>492</sup> Reflective judgment is made possible by the employment of what Arendt calls “enlarged thought” or “the enlarged mentality”, which entails taking into account the perspectives of others. We

<sup>490</sup> “Asymmetrical”, *supra* note 478 at 208, 215.

<sup>491</sup> “Asymmetrical”, *ibid.* at 212.

<sup>492</sup> Arendt’s theory in turn draws upon Kant’s *Critique of Judgment*. According to Kant, human beings have the capacity to engage in reflective judgments, which deal with particulars without trying to subsume them under pre-existing rules or concepts. Reflective judgments can be distinguished from determinative judgments, which are governed by the faculty of reason and involve applying concepts or rules to particulars: Immanuel Kant, *Critique of Judgment*, trans. by Werner Pluhar (Indianapolis: Hackett Publishing, 1987) at 150-152.

are able to exercise the enlarged mentality through the faculty of imagination, which allows us to “compar[e] our judgment with the possible rather than the actual judgments of others” and “[put] ourselves in the place of any other man.”<sup>493</sup> The enlarged mentality enables us to imagine making judgments from the standpoint of others and persuading them to agree with our own judgments, which have been enriched – and perhaps reconsidered – due to their perspectives.<sup>494</sup>

Nedelsky explains that Arendt’s approach to judgment is both inherently autonomous and reliant on the multiple perspectives of others.<sup>495</sup> This seemingly paradoxical idea can be resolved by adopting Nedelsky’s understanding of relational autonomy. In contrast to viewpoints which equate autonomy with independence, Nedelsky’s conception of autonomy is grounded in relationships. Human beings are inherently interdependent, and therefore constituted by their relationships, which can serve to enhance or diminish one’s autonomy. Autonomy is made possible by a web of constructive relationships with families, friends, teachers, employers, state bureaucracies and other innumerable entities.<sup>496</sup> Nedelsky maintains that our relations with others enable us to compare their standpoints with our own, thereby freeing us from the limitations of our own experience and fostering our capacity to make truly autonomous judgments.

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<sup>493</sup> Hannah Arendt, *Lectures on Kant’s Political Philosophy*, ed. by Ronald Beiner (University of Chicago Press, 1982) at 42-43 [*Lectures*].

<sup>494</sup> *Lectures*, *ibid.* at 43-44.

<sup>495</sup> Jennifer Nedelsky, “Judgment, Diversity and Relational Autonomy” in *Judgment, Imagination and Politics*, *supra* note 478, 103 at 110 [“Autonomy”].

<sup>496</sup> “Autonomy”, *ibid.* at 111.

Hence, if we understand autonomy as relational, it becomes easy to view judgment as nourished by the perspectives of others, yet still autonomous.<sup>497</sup>

Nedelsky writes that arguments for greater diversity are often met with opponents who claim that such initiatives will lead to judges seeking to represent the “special interests” of their particular identity group.<sup>498</sup> She also notes that some judges and adjudicators have been accused of bias on the basis of their past efforts to combat discrimination.<sup>499</sup> Nedelsky suggests that this view is based on a misplaced understanding of impartiality and its relationship to autonomy. Opponents of a more representative judiciary claim that such judges “will not even try to engage in judgment, properly understood, but will instead try to represent interests.”<sup>500</sup> This stance erroneously implies that educated members of the majority can be trusted to render disinterested, impartial judgments, but women and minorities will inevitably be prejudiced in favour of their own group’s interests.<sup>501</sup> However, truly reflective judgments are only impartial when they are not constrained by private interests and biases that cloud our ability to judge freely.<sup>502</sup>

In response to claims that a more diverse board of adjudicators will only lead to the representation of “special interests”, Nedelsky argues that increased diversity will instead facilitate the development of an “enlarged mentality”. An adjudicatory body consisting only of privileged, white, middle-class males has a limited perspective, since these

<sup>497</sup> “Autonomy”, *ibid.* at 111.

<sup>498</sup> “Autonomy”, *ibid.* at 105.

<sup>499</sup> Conversely, adjudicators who have not displayed any particular awareness of discrimination are presumed to be impartial. See Jennifer Nedelsky, “Embodied Diversity and Challenges to Law” in *Judgment, Imagination and Politics*, *supra* note 478, 229 at 246 [“Diversity”].

<sup>500</sup> “Autonomy”, *supra* note 495 at 113.

<sup>501</sup> “Autonomy”, *ibid.* at 113.

<sup>502</sup> *Lectures*, *supra* note 493 at 42.

adjudicators will only be testing their judgments against the standpoints of other privileged, white, middle-class males. Including people with different backgrounds and experiences in the judging community will broaden the perspectives of judges seeking to elicit the agreement of their peers.<sup>503</sup> Nedelsky points out that even members of the most diverse judging panels cannot have “real knowledge” of the positions of every applicant that comes before them. However, she argues that a diverse judging panel can help to diminish the problem of limited perspectives, as judges who are accustomed to encountering a wide variety of views will have learned to take these views into account.<sup>504</sup>

Could the problems of cultural essentialism identified in Chapter 3 be mitigated by appointing a body of IRB Members that is representative of Canada’s multicultural society? For her thesis examining the diversity of administrative tribunals, Sandra Nishikawa obtained statistical data on current levels of representation of racialized persons on Canadian administrative tribunals.<sup>505</sup> Nishikawa observed that the IRB was, in fact, one of the only federal administrative tribunals whose proportion of self-identified visible minorities<sup>506</sup> was roughly equivalent to workforce availability: 15.22 per cent of IRB Members self-identified as visible minorities, in comparison with the national workforce

<sup>503</sup> “Autonomy”, *supra* note 495 at 114-116.

<sup>504</sup> “Autonomy”, *ibid.* at 117. Alison Dundes Renteln also advocates increased diversity among judges, lawyers, and other legal professionals: “Another crucial step is to open access to these key [legal] professions. Unless there is a much more diversified legal system, it is unlikely that culture conflicts will be minimized”: Renteln, *supra* note 41 at 210.

<sup>505</sup> Sandra Nishikawa, *Diversity on Adjudicative Administrative Tribunals: An Integrative Conception* (LL.M. Thesis, University of Toronto Faculty of Law, 2009) [unpublished] at 99-100 [Nishikawa].

<sup>506</sup> The federal *Employment Equity Act* defines “designated groups” as women, Aboriginal peoples, persons with disabilities, and members of visible minorities.” “Members of visible minorities” are defined under the *Act* as “persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour”: *Employment Equity Act*, S.C. 1995, c. 44, s. 3.

availability of visible minorities, which was 15.3 per cent in 2006.<sup>507</sup> As discussed in this study, however, many recent IRB decisions still suffer from problematic representations of “Other” cultures, questionable cultural information, and harmful stereotypes. Although further research would be required to analyze the impact of higher representativeness on individual IRB Members’ decisions, this data suggests that the presence of racialized adjudicators alone will not eliminate cultural misrecognition.

While I find persuasive Nedelsky’s argument that greater diversity leads to more optimal judgment, it is, of course, impossible to have a “delegate” from each identity group or sub-group in Canada. Even if we could do this, the idea that the perspective of “Black Caribbean women” could be represented by appointing one woman of Jamaican descent to the IRB is absurd. Since cultures are not monoliths, no single person could represent all the diverse viewpoints prevailing among a group’s members. Thus, a diverse adjudicatory panel is not sufficient in and of itself: genuine reflective judgment requires an internal process of reflection and awareness of our own limitations and biases.<sup>508</sup> While it is important for the IRB to appoint adjudicators of different communities, experiences and backgrounds, each individual Member should be able to re-think their own preconceptions as they consider the standpoints of other Members and of the parties before them. In this way, adjudicators who have problematic views about different groups might ultimately be persuaded to modify their initial judgments.

<sup>507</sup> These statistics were based on the voluntary information of tribunal members in terms of whether they self-identified as members of a visible minority group. As Nishikawa notes, numbers based on self-identification may not accurately reflect the proportion of designated group members: Nishikawa, *supra* note 505 at 100-101.

<sup>508</sup> “Diversity”, *supra* note 499 at 245.

Further, the IRB must foster an institutional culture which encourages the circulation of alternative views and takes seriously the contributions of Board Members with diverse backgrounds. In their critique of the IRB's refugee determination process, Crépeau and Nakache employ the concept of a "critical space", which is defined as "a forum where ideas can be constructively debated, free from any pressure from the powers that be, supported by a consensus on the importance of the deliberation and a common understanding of its operative principles."<sup>509</sup> The development of such a critical space would, ideally, allow IRB Members to engage in dialogue, discussing and reflecting on the cultural information that they hear and produce in their decisions.

On a more basic level, increasing diversity could help to shift the perspectives of IRB Members through daily interactions with colleagues of different backgrounds. For a person with no Muslim friends or co-workers, it may be easier to write decisions containing sweeping generalizations about the behaviour of "all Muslims." By contrast, an adjudicator who interacts with members of a cultural group on an everyday basis cannot help but recognize that they are multifaceted, complex, and human. Finally, allowing sponsorship appeal cases to be heard by panels of more than one IRB Member would also facilitate the flow of information and the inclusion of outsider perspectives.

## **4.2. Conclusion**

### **4.2.1. Further Directions**

The findings reported in this thesis are limited by its scope, which was restricted to a textual analysis of published IRB decisions from 2004 to 2010. While it is not possible to

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<sup>509</sup>Crépeau and Nakache, *supra* note 7 at 52.

make conclusive pronouncements on the basis of such an analysis, the preliminary findings of this thesis could justify further empirical inquiry. Future studies of the IRB's treatment of cultural difference would be enhanced by field research, including observations of IRB hearings and interviews with IRB Members, applicants, appellants, expert witnesses, and lawyers. Such qualitative research would allow us to gain the perspectives of these actors on how the IRB addresses issues of cultural difference.

#### **4.2.2. Concluding Remarks**

It appears that the IRB has made strides in cultural sensitivity since its member selection criteria were introduced in 2004. The decisions examined in this study reveal that Members of the Immigration Appeal Division clearly attempted to evaluate the genuineness of family relationships according to the cultural norms of the parties. However, my research demonstrates that several adjudicators also had a tendency to adopt a rigid view of culture, such that parties who did not adhere to traditional customs were held to lack credibility. In addition, many decisions had the effect of propagating essentialist and one-dimensional portraits of minority cultures, as well as problematic images of Canadian society.

Overall, IRB adjudicators have further progress to make in assessing cultural considerations in a sensitive and informed manner. In particular, decision-makers should reflect on how cultural minorities are portrayed in family sponsorship decisions, and develop awareness of their own assumptions and biases. Hopefully, this work contributes to a deeper understanding of how IRB Members approach cultural difference, and the findings presented here will enrich legal and policy arguments for institutional change.

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