

## *Persons and Family Law*

Professor Pascale Fournier

### University of Ottawa

**FACULTY OF LAW**

**DRC 4392** Persons and Family Law

**Term:** Fall 2015

**Type:** Seminar (Fauteux 137)

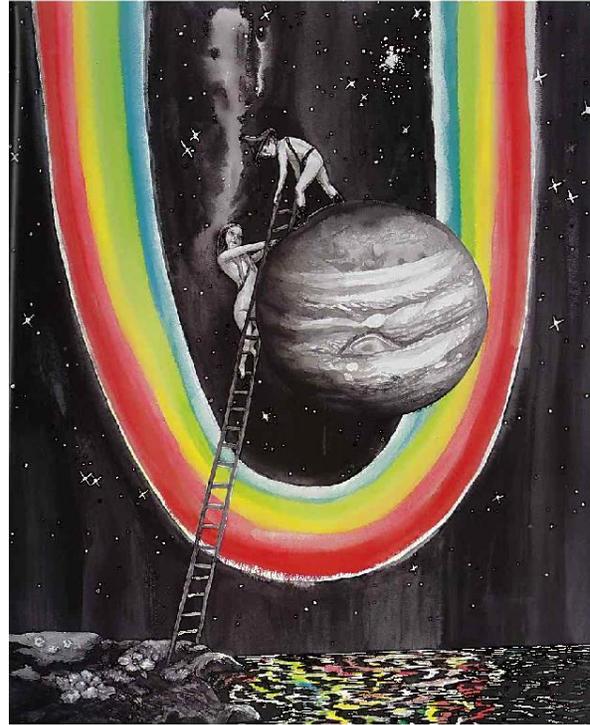
**Class Meetings:** Monday, 13h-16h

**Professor:** Pascale Fournier

**Office:** Fauteux 207

**Phone:** (613) 562-5800 (3083)

**E-mail:** [Pascale.Fournier@uottawa.ca](mailto:Pascale.Fournier@uottawa.ca)



*Sheila Heti*

### **Course Description and Objectives**

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This seminar examines conceptions of person(s) and families as regulatory orders and as relationships constituted in part by the legal domain in which shadow they interact. In particular, it will study the Quebec family law rules relating to persons, the household, marriage and its dissolution, parent-children relationships and other intimate relations, by simultaneously questioning the specificity and peculiarity of “civil law” in relation to other family law disciplinary fields, such as common law, Islamic law, rabbinical law, etc. Some of the questions we will address include: What is the relationship between persons, altruism and our socio-legal conception of families? Does the Quebec civil law tradition treat “family law” as a distinct area of legal analysis? How does Quebec family law discursively interact with other legal domains such as contract law, constitutional law, criminal law, and public law more generally? What is comparative family law? How does family law influence conceptions of minority citizens, the regulation of gender, the distribution of power between groups and individuals and the definition of national insiders/outsideers? Our conversation will also inquire into the ways in which theoretical approaches (feminist, queer, identity politics, post-colonial, law and economics, etc) have dealt with person(s) and families as legal discourses and as social practices.

## Evaluation

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- **Class Participation (15%):** regular attendance and active participation in class discussion are required.
- **Two reaction papers (30%)** of one page each (single spaced), consisting of your critique or comments on at least two or three of the assigned readings (or more) for the week in question. No external research is required. Your paper should contrast, reflect upon, or work to reconcile the positions of the authors you have chosen to analyze. You are of course invited to think “outside the box”. Please note that your reaction paper must be submitted to me by email ([Pascale.Fournier@uottawa.ca](mailto:Pascale.Fournier@uottawa.ca)) on the Friday before the session you have chosen to write about, at 10ham at the latest.
- **Final Essay of 10 pages (double spaced) (30%) and oral presentation/teaching of 20 minutes (25%):** Your paper should directly involve two or three of the critical readings discussed during the course. You must identify an actual case issue not included in the course material and contrast, critique, or work to reconcile the positions of the authors you have chosen to analyze. The only “research” involved in this assignment is to find good cases to reflect upon. You are of course invited to think “outside the box”. The cases should involve “Persons and Family law”, though this theme need not be explicitly part of the cause of action that initially brought the case into adjudication. Ensure that a copy of the case is attached to your paper. Please feel free to meet with me to choose and discuss your paper topic. You are asked to submit your topic and a one-paragraph abstract at the beginning of the class session of **October 28<sup>th</sup>, 2015**. **The final version of your essay shall be sent to me on November 26<sup>th</sup> at 5hpm.** Your oral presentation/teaching will take place either on **November 30<sup>th</sup>** or **December 7<sup>th</sup>**.

## Detailed Course Outline and Readings

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### PLEASE NOTE:

- The October 5<sup>th</sup> session is cancelled and rescheduled on Friday, October 2, from 13h-16h.
- The October 12<sup>th</sup> session (Thanksgiving) is rescheduled on Friday, November 6<sup>th</sup>, from 13h-16h.

### 1. Introduction: September 14<sup>th</sup>, 2015

### 2. Changing Conceptions of Marriage and Families: Surrogate Mothers (Canada and the United States): September 21<sup>st</sup>, 2015

Surrogacy arrangements are the subject of very controversial debates, as they challenge traditional conceptions of the family structure and alter the “natural” process of female

reproduction. In 2004, Canada adopted the *Assisted Human Reproduction Act*, which regulates different aspects of reproductive technologies, from stem cell research to cloning and the collection/distribution of sperm and eggs for reproductive purposes. Our current legislative regime forbids the *commodification* of sperm and eggs, thereby prohibiting commercial surrogacy while avoiding the issue of non-commercial surrogacy. In Quebec, the Civil code is clear: surrogacy is illegal, whether it is commercial or not. Section 541 C.c.Q. provides: “Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null. » Section 543 C.c.Q. further specifies that: “No adoption may take place except in the interest of the child and on the conditions prescribed by law. »

In the American decision *In the Matter of Baby M*, the New Jersey Supreme Court invalidated a commercial surrogacy contract on the basis of public policy: “While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a “surrogate” mother illegal, perhaps criminal, and potentially degrading to women.” The Court granted custody to the natural father, restored the “surrogate” as the mother of the child (with the issue of visitation rights to be determined by the trial court) and voided the adoption of the child by the wife. If the State cannot prevent surrogate arrangements from being secretly implemented, how can it best safeguard the interests of the gestational mother, the child and the intended parents? Compare this American decision with the Quebec decisions in *Adoption 091* and *Adoption 1445*. In your opinion, do they provide a convincing argument for the legalization of surrogacy? If not, how is the prohibition on commercial surrogacy arrangements defensible? Is the fear that surrogacy contracts result in the exploitation of women legitimate? Can the non-enforcement of surrogacy contracts produce harm to women’s status and women’s autonomy? Do you agree with the public policy assumption that “altruistic” surrogacy respects the “free choice” of women in the (private) family context? In your opinion, is there less exploitation in non-commercial surrogacy contexts? If not, what conception of the family is being portrayed by this assumption?

In her article, **Susan B. Boyd** introduces a feminist approach to our understanding of legal parenthood and explores a gendered approach to bio-genetics ties. What meaning(s) should we give to reproductive freedom? How is **Boyd's** approach affected by the “unsexed” conceptions of parenting put forward by **Darren Rosenblum**, and the answer provided by **Libby Adler**?

### Reading List:

- *Assisted Human Reproduction Act* (S.C. 2004, c. 2): <http://laws-lois.justice.gc.ca/eng/acts/a-13.4/page-1.html>
- *In the Matter of Baby M*, New Jersey Supreme Court, 1988, 109 N.J. 396, 537 A.2d 1227 (summary)
- *Adoption 091*, 2009 QCCQ 628
- *Adoption 1445* 2014 QCCA 1162
- Susan B. Boyd, “Gendering Legal Parenthood: Bio-Genetics Ties, Intentionality and Responsibility” (2007) 25 *Windsor Y.B. Access Just.* 63 (excerpts)

- Darren Rosenblum, “Unsex Mothering: Toward a New Culture of Parenting”, 35 *Harvard Journal of Law & Gender* 57 (2012) (excerpts)
- Libby Adler, “Of Cheerios and Sequined Heels: A Response to Darren Rosenblum’s *Unsex Mothering: Toward a New Culture of Parenting*”, Unsex Mothering Online Colloquium, *Harvard Journal of Law & Gender* (2012): <http://harvardjlg.com/2012/02/unsex-mothering-responses-libby-adler/>

### 3. The Criminalization of Family Relations (Canada and the United States): September 28<sup>th</sup>, 2015

In this session, we will continue our dialogue on family law’s discursive encounter with other legal domains by investigating the particular field of criminal law in Canada and the United States. A central theme that we will explore during this meeting is the effect on individuals of the criminalization of family behaviours. How are the feminist discourses on the (positive) uses of criminal law influencing our conception of the family? What is the role that morality plays in shaping the identities of those involved in domestic violence, i.e. the protective State assisting the vulnerable woman vs the criminal spouse personified as the bad man? How are these images (re)producing women as victims and men as perpetrators? How do background legal structures and economic conditions at a macro level affect relationships and bargaining power between men and women at a micro level?

In *R. v. Lavallée*, a decision considered by many as a feminist victory, the Supreme Court of Canada adopted the “battered wife defence” as a valid criminal defence and acquitted Mrs Lavallée of second degree murder. Read this decision and compare its assumptions about power and structural subordination with **Foucault’s** conception of power as diffuse in nature, circular in action, and generative of subjects always-already constituted as effects of power. Can Foucault’s frame of reference be applied to the phenomenon of domestic violence? What does this reading entail? In “The Feminist War on Crime”, **Aya Gruber** explores the feminist criminal law reform in the United States as replicating a conservative agenda in which (victimized) women are perceived as pure objects and (violent) men are described as pure agents, with increased criminalization as an obvious goal. What could we gain from portraying men *and* women involved in domestic violence as complex actors constrained by conflicting realities and desires?

#### Reading List:

- *R. v. Lavallee*, [1990] 1 S.C.R. 852: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/599/index.do>
- Aya Gruber, “The Feminist War on Crime”, 92 *Iowa L. Rev.* 741 (2007) (excerpts)
- Michel Foucault, *The History of Sexuality, Volume One*, trans. Robert Hurley (Vintage Books 1978), at 92-114: <https://suplaney.files.wordpress.com/2010/09/foucault-the-history-of-sexuality-volume-1.pdf> (PLEASE ONLY READ 92-114)

#### 4. Break-up of Relationships: Contractual Arrangements as an Alternative to State Division of Property outside Québec: October 2, 2015

In several Canadian provinces, spouses can preclude the equalization of family properties by entering into a valid and enforceable domestic contract that deals with their property rights. Some provinces, however, specifically empower courts to override the property provisions in a domestic contract under certain circumstances. In *Moge v. Moge*, the Supreme Court of Canada held that the spousal support objectives of the *Divorce Act* are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown. This substantive conception of gender equality, which recognized the disadvantaging effects of unpaid domestic work and child care responsibilities, was not applied in *Miglin v. Miglin* and *Hartsborne v. Hartsborne*, where the Supreme Court preferred to emphasize the importance of individual choice in entering a domestic contract. In suggesting that the judiciary should respect private arrangements in the family context, does the Supreme Court favour a formal equality model based on “economic rational actors”? In your opinion, does the Court sufficiently address issues such as gender, race, national origin and discrimination in the workplace? What are the distributive consequences of this judicial trend towards an increasingly privatized response to economic inequalities?

Different economic theories of the household have developed in the last thirty years. According to the Nobel Prize of economics **Gary S. Becker**, female spouses should invest their time in household activities while male spouses should invest in the market. His theory on the division of labour, which privileges the economic concept of the housework as productive, has been highly criticized. In your opinion, is “economic rationality” an appropriate assumption to translate and explain the (emotional) relationship between spouses and women’s labour within the family unit? Can economic methodology enable us to transcend the male/female dichotomy? Is it desirable to do so? In their article, **Trebilcock** and **Keshvani** provide a law and economics analysis of the role of private ordering in family law. Is there a conflict between principles of freedom of contract and the courts’ desire to protect women from exploitation? Do you agree that economic methodology can help redirect attention to women’s agency and women’s autonomy? Why has economic thought been so negatively received within feminist circles? Compare **Becker**’s vision of the household to **Frances Wooley**’s, which is based on field research of the ways in which couples in the Ottawa-Gatineau region manage their family wealth.

#### **Readings:**

- *Moge v. Moge*, [1992] 3 S.C.R. 813: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/946/index.do>
- *Miglin v. Miglin*, [2003] 1 S.C.R. 303: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2055/index.do>
- *Hartsborne v. Hartsborne* [2004] 1 S.C.R. 550: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2134/index.do>
- Gary S. **Becker**, "Human Capital, Effort, and the Sexual Division of Labor", Journal of

Labour Economics, Volume 3, Issue 1, Part 2 (1985)

: <http://faculty.smu.edu/Millimet/classes/eco7321/papers/becker01.pdf>

- Ejan Mackaay, *L'analyse économique du droit*, (Montréal : Thémis, 2000), pg. 1-8.
- Michael J. Trebilcock, “An Introduction to Law and Economics” (1997) 23 Monash U. L. Rev. 123, pg. 125-133, 148-152.
- Frances Wooley, “Control over Money in Marriage”, in Shoshana A. Grossbard-Shechtman, eds., *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, (Cambridge, UK ; New York, NY : Cambridge University Press, 2003), chapter 5 : <http://carleton.ca/economics/wp-content/uploads/cep00-07.pdf>

## 5. The Child at Law: Rights, Capacities, and Personhood / Invited Speaker, Lisa Kelly, Columbia Law School: October 19<sup>th</sup>, 2015

This session will consider “the child” at law. We will examine the paradoxical, often shifting ground that the child occupies as both a *subject* and *object* of law and legal surveillance. Minors are recognized under the *Quebec Civil Code* as legal persons—*subjects* who possess certain rights and capacities. At the same time, they are also defined under the *Code* as *objects* of legal supervision and tutelage by parents, guardians, and the state. The first core question we will consider is: how is this subject-object status distributed in law? That is, in what areas are youth afforded greater rights and decision-making capacity and in what areas is this capacity restricted or non-existent? We will examine two Supreme Court of Canada cases as a foil for these questions: (1) *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 (conscientious refusal of necessary medical care by a minor); (2) *R. v. D.B.*, [2008] 2 S.C.R. 3 (whether the state can place an onus on youth offenders to demonstrate why they should not be subject to adult sentences and identity publication for certain serious offences). How do the majority and dissenting judgments navigate the tension between recognizing youth capacity and preserving a protectionist or welfare role for the state? What work does the open-ended “best interests of the child” standard play in this analysis? When is chronological age understood as an appropriate proxy for capacity or culpability? When are individualized determinations viewed as necessary and/or sufficient demonstrations of capacity or culpability?

As we grapple with this subject-object understanding of the child, we will consider the broader triangular relationships between families, the state, and children. Here we will focus on the dominant binary in child welfare law and discourse: “family privacy” versus “state intervention.” Drawing on Hester Lessard’s work, we will interrogate the political work of this binary. Who is empowered or disempowered when childrearing is cast as *private*? What consequences might flow from framing children as *public* actors with specific public welfare needs? What modes of legal regulation do we usually treat as “state intervention” in the family and which forms of state action do we background or treat as “natural”? Why does this matter?

We will conclude by applying our insights about the legal constructions of childhood, childrearing, and the family to the question of corporal punishment. The Canadian Truth and Reconciliation Commission in its summary report on the legacy of residential schools recommended the repeal of section 43 of the Criminal Code of Canada. Section 43 provides

a defense to assault charges for parents, teachers and persons acting in the place of parents who use “reasonable correction” against children. In 2004, the Supreme Court of Canada upheld the constitutionality of the provision but read in a number of limits on what constitutes “reasonable” correction. The Court also specified that teachers are only permitted to use force to restrain a student who poses a danger to herself or others, not as corporal punishment: see *Canadian Foundation for Children, Youth and the Law v. Canada (AG)*, [2004] 1 S.C.R. 76. In “Policing Child Discipline,” Lisa M. Kelly critiques the turn to criminal law by children’s rights advocates. What forms of “protection” or support for families and children do punitive approaches preclude or crowd out? What is the relevance of studies showing that parental stress, poverty, and prior exposure to corporal punishment increase the likelihood that a parent will physically discipline her children? Finally, what are the uses of history in debates about the contemporary legal regulation of physical force against children? We will discuss the relevance of Canada’s historical treatment of Aboriginal families and children for contemporary criminal and child welfare policies. We will also consider how transformations in Canadian childhood writ large have shaped the legal regulation of force against young people.

### **Reading List:**

- *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (excerpts).
- *R. v. D.B.*, [2008] 2 S.C.R. 3 (excerpts).
- Hester Lessard, *The Empire of the Lone Mother: Parental Rights, Child Welfare Law and State Restructuring*, 39 Osgoode Hall Law Journal 717 (2002) (excerpts).
- Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) (excerpts).
- Lisa M. Kelly, “Policing Child Discipline” (MS, chapter of unpublished doctoral thesis) (excerpts).

## **5. Break-up of Relationships: De Facto Spouses in Québec: November 2, 2015**

The *Quebec Civil Code* imposes a property regime based on an equal share of the family patrimony which will be determined when the marriage or the civil union ends. Christine **Morin** writes: « Avec le patrimoine familial, le législateur a veillé à ce que le « rapport de force » entre les conjoints soit plus équilibré au moment de la négociation, c’est-à-dire à la fin de la relation. » The basic premise underlying the regime is that married or registered spouses make a vital contribution to the economic viability of the family unit and hence to the acquisition of wealth by both parties. Section 401-430, 432, 433, 448-484 and 585 of the *Code* guarantee patrimonial rights only to married and registered spouses, to the exclusion of *de facto* spouses. Recently, in *Quebec (A.G.) v. A.* (better known as “Éric c. Lola”), the Supreme Court of Canada upheld this regime and dismissed a widely publicized

constitutional challenge. The Court held that the disputed articles of the *Quebec Civil Code* respect the autonomy of individuals and *de facto* spouses' freedom to organize their relationship based on their needs. Furthermore, while *de facto* unions fall outside the legislative framework which applies to marriage and registered civil unions, *de facto* spouses are still free to enter into agreements in order to organize their financial relationships during cohabitation, and to provide for the consequences of a potential breakdown of the union. In your opinion, do these regulations violate s. 15 of the *Canadian Charter*? Should unmarried or unregistered partners be treated by the State as though they were married for distributive purposes? What are the public policy considerations at stake? What are we to make of the arguments of “freedom of choice” and “autonomy” raised in support of the existing regime? Is the enactment of the family patrimony regime the appropriate response to gender inequality? Are you convinced by the arguments presented by Angela **Campbell**, Louise **Langevin** and Régine **Tremblay**?

### Reading List:

- **Quebec (A.G.) v. A.**, 2013 SCC 5: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10536/index.do>
- Angela **Campbell**, “Supreme Court’s common-law decision may be good for women”, *The Globe and Mail* (January 25, 2013): <http://www.theglobeandmail.com/commentary/supreme-courts-common-law-decision-may-be-good-for-women/article7864692/>
- Louise **Langevin**, “Quelle liberté de choix et pour qui?”, *Le devoir* (December 20, 2010): <http://www.ledevoir.com/societe/justice/313341/libre-opinion-quelle-liberte-de-choix-et-pour-qui>
- Christine **Morin**, « La contractualisation du mariage : réflexions sur les fonctions du *Code civil du Québec* dans la famille », *Les cahiers de droit*, Volume 49, numéro 4, décembre 2008, p. 527-549: <http://www.erudit.org/revue/cd/2008/v49/n4/037456ar.html>
- Régine **Tremblay**, « Sans foi ni loi : Appearances of Conjugality and Lawless Love », dans *Les apparences en droit civil*, Cowansville, éd. Yvon Blais, 2015

## 6. Citizens in Conflict: The Jewish Get in Family Law Matters (Canada, France and Israel): November 9<sup>th</sup>, 2015

The Jewish *Get* is a written document authorized by the husband and delivered to his wife, stating that all marital bonds between them have been severed. Under rabbinical law, a wife is not considered divorced and cannot remarry until the *Get* has been obtained upon the husband’s assertion to the rabbinical court that it is being sought of his own free will. If the husband refuses to give the *Get*, the wife is without religious recourse, and will officially remain his wife in the eyes of rabbinical law. She will be referred to as an *Agunah* or “chained wife”. Moreover, rabbinical law considers any child born of a subsequent civil marriage as illegitimate. For an observant Jewish woman living in Western states, the complex relationship between the religious and the secular spheres presents an impossible dichotomous space: under Canadian or French law, for instance, she is free to divorce her husband regardless of his consent, whereas under rabbinical law, she remains married to him

unless he accepts to divorce her. This means that while she can remarry under civil law, she is prevented from remarrying in accordance with her religion.

In balancing competing rights and values such as freedom of religion, gender equality and autonomous choice in marriage and divorce, the Supreme Court of Canada in *Bruker v. Marcovitz* was willing to attach civil consequences to the husband's refusal to provide a *Get* and thus recognized that the inability to remarry within one's religion represents a serious compensable injury. Similarly in France, the Cour de cassation (*Chambre civile 2, 15 juin 1988, no. 86-15476*) and the European Commission of Human Rights (*D. c. France*) held that the refusal to provide the *Get* is a delictual fault and French courts have routinely awarded substantial damages to the wife. In your opinion, does the fact that the *Get* has a religious aspect make it non-justiciable? Will the judicial recognition of harm by the secular court address gender disparities in the religious sphere or will it further separate both spheres? Do you agree with **Benoît Moore's** and **Louise Langevin's** critiques of the decision? In 1995, Israel adopted *The Rabbinical Courts (Enforcement of Divorce Decrees) Law*, which permits rabbinical courts to issue various restraining orders against recalcitrant husbands, including the right to leave the country, to hold a driving license, to hold a passport, and even incarceration for a specified period of time. In reading **Fournier's** article, try to envision what are the strategies used by Jewish women to navigate between the religious and secular spheres in Israel. How do they differ? Is the use of criminal sanctions an appropriate means to counter religious gender imbalance? What could be the unintended consequences for Jewish women?

### **Reading List:**

- *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2397/index.do>
- Cour de cassation, *Chambre civile 2, 15 juin 1988, no. 86-15476*
- *D. c. France*, application No. 10180/82, 6 décembre 1983, D.R. 35, 199-202
- Benoît **Moore**, "À la volonté de Dieu ou des contractants? Commentaire sur l'affaire *Marcovitz c. Bruker*" (2009) 43 R.J.T. 219. (excerpts)
- Louise **Langevin** « L'affaire *Bruker c. Marcovitz* : variations sur un thème », (2008) 49 *C. de D.* 655. (excerpts)
- **Fournier**, Pascale, McDougall, Pascal & Lichtsztral, Merissa, "Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel", (2012) 18(2) *William & Mary Journal of Women and the Law* 333-362: <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1333&context=wmjowl>

## **7. Citizens in Conflict II: The Islamic Divorce and Private International Law: November 16<sup>th</sup>, 2015**

In the era of globalization, the family is increasingly politicized. This session is devoted to the relationship between domestic and international legal orders in family law matters. More specifically, it will ask whether international private law rules function to relegate the family as a site of identity formation and, if so, what special relationships are being formed between

“freedom of religion” and “gender equality”. In *M.H.D. v. E.A.*, a 1991 Québec Court of Appeal decision, the wife filed for divorce in Montréal and claimed the enforcement of deferred Mahr (a form of dowry). In applying Syrian law to the marriage contract according to private international law rules, the appellate Court concluded that the wife had to waive Mahr because she embarked on an Islamic form of divorce (*Kbul*) which dissolves the husband’s duty to pay the deferred *Mahr*. Furthermore, the principles established by Syrian Islamic law in general and *Kbul* divorce in particular did not, according to the court, violate any provision of the *Canadian Charter*. Do you agree with this decision? Was the *Canadian Charter* applicable in the first place? If the *Divorce Act* gives the opportunity to both spouses to initiate divorce proceedings, do you think that punishing a female spouse on the basis that she exercises her rights according to the *Act* is a violation of gender equality? Is this case about foreign law? Gender equality? Both?

In *Vladi v. Vladi*, a 1987 decision from Nova Scotia, the Court refused to enforce Mahr on the basis of “substantial justice”. Justice Burchell considered that Mahr was attached to Iranian Islamic family law, and that under such a legal regime women could not benefit from the principle of equal sharing: “In Iran, a wife in the position of Mrs. Vladi would be entitled to minimal support and a nominal award in relation to a so-called "mahr" or "morning-gift". Otherwise she would have no direct claim against assets standing in the name of her husband (...) To put it simply, I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province”. Having found Iranian law inapplicable, Mrs. Vladi was entitled to an equal division of matrimonial assets (a generous amount of \$246 500).

In the narrow issue of the enforcement of Mahr, the same Muslim woman will get different outcomes (i.e. be better or worse off economically) depending on the position adopted by the judge. Given that actual decisions on the enforceability of Mahr by courts in Canada produce disparities in economic outcomes, and confirm (both implicitly and explicitly) their connection to underlying ideological positions, what does this entail for Muslim women? Compare the *Droit de la famille – 1466* and *Vladi* decisions. How differently do the judges approach the issue of Islamic law? How does the judicial role compare to that of the legislative branch, specifically in the context of the adoption of *Projet de loi n°59*? What would **Fanon** and **Memmi** have to say about the migration, translation, and transplantation of Islamic law in Canada?

### Reading List:

- **Fanon**, Frantz, *Les damnés de la terre*, (Éditions François Maspero : Paris, 1961), pg. 29-57.
- **Memmi**, Albert, *Portrait du colonisé Portrait du colonisateur*, (Éditions Gallimard : Paris, 1985), pg. 33-55, 101-110, 124- 30, 157-164.
- *Projet de loi n°59* : Loi édictant la Loi concernant la prévention et la lutte contre les discours haineux et les discours incitant à la violence et apportant diverses modifications législatives pour renforcer la protection des personnes (2015)
- *Droit de la famille – 1466*, *M.H.D. c. E.A.*, 42 Q.A.C. 144, J.E. 91-1560
- *Vladi v. Vladi*, 1987 CarswellNS 72

## 8. Thinking about Families in the Context of Immigration: the Case of Polygamy / November 23, 2015

This session will provide an opportunity to critically examine the field of immigration law as a form of family law, in the specific legal contexts of Canada. We will try to assess what is at stake in talking about family law and immigration law as an overlapping legal field. How is family law used to delineate national insiders from foreign outsiders? Why does immigration law use marital relations as a key organizing feature? How is the institution of marriage differently shaped by immigration rules and regulations? What is the relationship between illegal global markets, welfare gains (for the non-immigrant) and family vulnerability (for the immigrant)? How is the paradoxical description of the public sphere as “open markets, closed borders” reflected in the private sphere of immigrants’ lives? These questions will be explored and addressed using the theoretical literature of **Kleinbans & Macdonald** on legal pluralism. In their article, they adopt the “critical legal pluralist” methodology of decentering the concept of law to account for its impact on subject-constitution and its constant openness to transformation at the hands of legal subjects. As you read *Otti v. Canada*, *Ali v. Canada* and *Gure v. Canada*, try to apply the legal pluralist framework in evaluating the distributive role of law and conceptualizing both state law and cultural norms as background rules of socio-economic bargaining. What do you see? As you analyze the outcome in *Otti v. Canada*, *Ali v. Canada* and *Gure v. Canada*, try to think of the causes and effects of prohibiting polygamous relationships from the purposes of Canadian immigration and criminal law. If polygamy continues to be a prohibited form of marriage, how is the bargaining power of polygamous wives reduced or enhanced by the current legal arrangements? Should there be limited recognition of polygamy to protect the property rights of women already involved in a second, third or fourth marriage? Does the growing symbolic and institutional power of the international feminist movement, especially in criminal law matters, affect our national conception of polygamy? In “Bountiful Voices”, **Angela Campbell** presents a counter-narrative to the popular image of the polygamous wife as weak, oppressed and lacking agency. Does criminalization actually contribute to the harms associated with polygamy (vulnerability, exploitation, etc)? In your opinion, what is the constitutional validity of s. 293 of the *Criminal Code* under section 2 and 7 of the *Canadian Charter*? Can the prohibition be justified under s. 1 of the *Charter*? Is the **Reference re: Section 293 of the Criminal Code of Canada** convincing?

### Reading List:

- **Kleinbans, Martha-Marie & Macdonald, Rod**, *What is critical legal pluralism?* 1997 : 12 Can. J. L. & Soc. 25.
- Angela Campbell, “Bountiful Voices” 47:2 *Osgoode Hall Law Journal* (2009): <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1149&context=ohlj>
- *Otti v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1031 (CanLII)
- *Ali v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8816 (F.C.)
- *Gure v. Canada (Citizenship and Immigration)*, 2002 CanLII 47141 (I.R.B.)

- Reference re: Section 293 of the Criminal Code of Canada, [2011] BCSC 1588:  
<http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm>

## 9. Law, Literature and the Name: November 30<sup>th</sup>, 2015

From Camus to Anouilh, from Anouilh to Kertész, literature continues to stimulate reflections on law as a social institution and to undermine the legitimacy and fictions of existing or anticipated legal rules. **Camus'** *Stranger* and **Anouilh's** little *Antigone* are willing to die for the truth, the former because he refuses to simulate regrets which he does not feel for a murder that he is accused of, the latter because she refuses to compromise her desires. **Kertész'** (Nobel Prize in Literature) young György, meanwhile, emerges from the concentration camps with a certain melancholy of the camps, the content of which we cannot accept in the face of the guessed oppression and the widespread horror of the tragedy.

Just before dying, the character from *The Stranger* declares confidently :

“Of course, I had to own that he was right; I didn't feel much regret for what I'd done. Still, to my mind he overdid it, and I'd have liked to have a chance of explaining to him, in a quite friendly, almost affectionate way, that I have never been able really to regret anything in all my life. I've always been far too much absorbed in the present moment, or the immediate future, to think back. Of course, in the position into which I had been forced, there was no question of my speaking to anyone in that tone. I hadn't the right to show any friendly feeling or possess good intentions (...) He then explained that his duty was a painful one, but he would do it without flinching. “This man has, I repeat, no place in a community whose basic principles he flouts without compunction. Nor, heartless as he is, has he any claim to mercy.” (...) It might look as if my hands were empty. Actually, I was sure of myself, sure about everything, far surer than he; sure of my present life and of the death that was coming. That, no doubt, was all I had; but at least that certainty was something I could get my teeth into—just as it had got its teeth into me.”

Before the death that awaits her, *Antigone* answers proudly to Creon :

“So much the worse for you, then. I didn't say yes. I can say no to anything I think vile, and I don't have to count the cost. But because you said yes to your lust for power, all that you can do, for all your crown and your trappings, and your guards — all that you can do is to have me killed. (...) I frighten you. That is why you talk about saving me. Everything would be so much easier if you had a docile, tongue-tied little *Antigone* living in the palace. But you are going to have to put me to death today, and you know it. And that's what frightens you. God! Is there anything uglier than a frightened man! (...) Poor Creon! My nails are broken, my fingers are bleeding, my arms are covered with the welts left by the paws of your guards — but I am a queen!”

Coming out of the concentration camp, and responding to the insistence of the people who require from him an almost graphic description of the slaughter, György has only his disarming truth to offer :

“Despite all the deliberations, sense, insight and sober reason, I could not fail to recognize within myself the furtive and yet – ashamed as it might be, so to say, of its irrationality— increasingly insistent voice of some muffled craving of sorts: I would like to live a little bit longer in this beautiful concentration camp (...) For even there, next to the chimneys, in the intervals between the torments, there was something that resembled happiness. Everyone asks only about the “atrocities”, whereas for me perhaps it is that experience which will remain the most memorable. Yes, the next time I am asked, I ought to speak about that, the happiness of the concentration camps. If indeed I am asked. And provided I myself don’t forget.”

The Stranger, Antigone, and György resist in their own way, passionately and without any regret, from consenting to the text, the letter and the recipe of homogenous happiness imposed on them by society. They are alone and yet free before the facade of great silence. Is freedom painful? Is dissent inevitably a carrier of freedom? Is compromise peculiar to legal language? Why should we obey the law if it seems illegitimate and flawed? According to the texts of **Camus**, **Anouilh** and **Kertész**, what is the relationship between law and literature? Is it conflictual? Is this relationship constitutive of one sphere and the other? Read these sublime literary texts by closely examining the struggle of transsexual and transgender people towards a more adequate and equal recognition by the law. What do you see? Does **Bill n°35** seem appropriate to you? What comes to light from the special consultations and public hearings on the draft regulation concerning the *Regulation respecting change of name and of other particulars of civil status for transsexual and transgender persons*? Do you agree with the *Montreuil c. Directeur de l'état civil* case? Why? Is Dorian **Needham's** proposal of abolishing permanent classification according to gender far-fetched? Convincing? Necessary?

### Reading List:

- **Camus**, Albert, *L'Étranger*, (Édition Gallimard : Paris, 1957), pg. 7-20, 144-150, 158-179.
- **Anouilh**, Jean, *Antigone*, (La Table Ronde : Paris, 2000), pg. 76-100.
- **Kertész**, Imre, *Être sans destin*, (Actes Sud : Paris, 1998), 253-261, 326-361.
- Dorian **Needham**, "A Categorical Imperative ? Questioning the Need for Sexual Classification in Québec" *Les Cahiers de droit*, vol. 52, n° 1, 2011, p. 71-106 : <http://erudit.org/revue/cd/2011/v52/n1/1005512ar.pdf>
- Projet de loi no 35 (2013, chapitre 27) Loi modifiant le Code civil en matière d'état civil, de successions et de publicité des droits : <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2013C27F.PDF>
- *Gabriel v. Directeur de l'état civil* [2005] Q.J. No. 145.
- *Montreuil c. Directeur de l'état civil*, 2002 CanLII 41257 (QC C.A.), 2002-11-07

### 10-11. Student presentations: December 7<sup>th</sup> and 9<sup>th</sup>, 2015