Lost in Translation? Why there is a Need for Stronger Cultural Competency and Awareness in Punjabi Spousal Sponsorship Immigration Application Decisions

by

Kevin Sharma

A Thesis submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfillment of the requirements of the degree of

MASTER OF LAWS

Faculty of Law

University of Manitoba

Winnipeg, Manitoba, Canada

March 2022

This thesis is dedicated to a number of people.

To my Guruji. For without his blessings and guidance, this would not be possible.

To my parents. For without them and their sacrifices, I would be not able to have the opportunities I have today.

To my late Uncle Dinesh Sharma, a pure divine soul who saw the good in everyone and was a guiding light during dark times.

To my late colleague, close friend, and someone I was fortunate enough to consider a brother for the better part of over a decade, Darius Maharaj-Hunter.

ACKNOWLEDGEMENTS:

I am most grateful to my supervisor for my thesis, Dr. Amar Khoday, for allowing me the opportunity to constantly discuss, analyze, and explore options in the making of this thesis. His guidance and consistent support have been most impactful on the completion of this topic and my research. In particular, his patience during the completion of this thesis, while I also handled the duties of life and work, was immensely appreciated. I count myself lucky to have had Dr. Khoday as my supervisor.

I am also grateful to the University of Manitoba's Robson Hall where I had the pleasure of obtaining my Juris Doctorate Degree (J.D.) and was awarded a Graduate Fellowship in support of the completion of my Master's Thesis.

I am grateful to my family for their encouragement, love, support, and patience during the writing of this thesis and throughout my entire legal education.

ABSTRACT

This thesis analyzes the decision-making process of the Immigration Refugee Board (IRB) of Canada with respect to Punjabi spousal sponsorship immigration applications. Drawing on the legal theories of legal pluralism and critical legal pluralism, it examines the Immigration Appeal Division's (IAD) use of credibility assessments in reaching independent decisions on the appeals before them. Previous studies have focused on the inconsistent application by decision-makers of statutory criteria and administrative guidelines on appeals in the Refugee divisions. This thesis examines the inconsistency, when conducting credibility assessments, in the IAD when dealing with East-Indian Punjabi applicants seeking spousal sponsorships. This thesis argues that the process by which individuals applying for spousal sponsorship have had to demonstrate the genuineness of their relationships, based on credibility assessments conducted by the IAD, is flawed as there is a significant degree of discrepancy among various decision-makers. The flaw stems from having to prove this genuineness in a way that accords with the subjective perceptions of IAD members regarding Indian marriages, and the norms and practices governing those marriages. In examining IAD decisions, it is clear that some decision-makers have, and continue to hold, narrow understandings of marriage practices. Such understandings are rooted in customary norms and practices. It can be argued that these customary norms can be seen from a legal pluralistic view by some IAD members, in that they are used to create objective standards for the applicants and appellants when, in actuality, studies and surveys have shown marriages are no longer consistently observing such norms. While some of these norms and practices still have some resonance, some IAD decision-makers have elevated these norms to such an objective extent that they contributed to a negative impact on Punjabi spousal immigration applications.

In conclusion, this thesis argues that the legal theory of critical legal pluralism should be more strongly employed when conducting credibility assessments. The reasoning behind this is so that applicants and appellants that do not seem to adhere to these socio-cultural norms surrounding marriage practices, or the normative socio-cultural identities of their cultural backgrounds, should not be punished or have to deal with a negative outcome on their applications. This thesis further makes recommendations to improve cultural competence within the IRB, and perhaps other immigration administrative institutions, when assessing spousal sponsorship applications where culture and cultural norms play a crucial role.

TABLE OF CONTENTS

Table of Contents

CHAPTER 1: INTRODUCTION

"Sameness is the formula of nation building, but Bharat [*India*] stands in defiance of this mediocrity. This culture is the most complex and colorful culture on the planet. The way people look, their language, their food, their way of dressing, and their music and dance – everything changes every fifty or hundred kilometers in this country."

- Sadhguru[1]

1.1 Introduction: Inconsistencies in Immigration Decisions?

In 1989, the Parliament of Canada created the Immigration and Refugee Board (IRB), Canada's largest administrative tribunal that deals primarily with immigration and refugee applicants.[2] The IRB is considered a quasi-judicial body. It is an administrative tribunal that makes findings of fact, interprets and applies the law, and it is an institution that holds the power to make the first, and sometimes final, determination of an individual's legal rights.[3]

Balancing the legal rights of immigration applicants, ensuring the security of the nation, and seeking to sustain the objectives of immigration law within Canada are all objectives that the IRB seek to uphold.[4] The decision-makers of the IRB constitute one level of state control. From a technical standpoint in the immigration context, Parliament created the IRB as an independent body to contribute to the decision-making process and determine which individuals are permitted to legally cross our national borders when other government officials reject applications made in the first instance.[5] These objectives of immigration law, that officials seek to sustain, are referenced in the *Immigration Protection and Refugee Act* (IRPA) and include the desire to

[1] Sadhguru, *Bha-ra-ta: The Rhythm of a Nation* (India: Isha Foundation, 2015) at 1.
[2] Immigration and Refugee Board of Canada, "Background", (accessed 23 January, 2020) online: <https://irb-cisr.gc.ca/en/transparency/atip/Pages/infosource.aspx#s1>
[3] Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials,* 7th ed (Canada: Emond Montgomery Publications Limited, 2015) at 14.
[4] *Immigration Protection and Refugee Act,* SC 2001, c 27, s 3(1)(f.1), (h), (f).
[5] Vic Satzewich, "Visa Officers as Gatekeepers of a State's Borders: The Social Determinants of Discretion in Spousal Sponsorship Cases in Canada" (2013) 40:9 J of Ethnic & Migration Studies.

ensure just and fair procedures that uphold the integrity of the Canadian immigration system.[6] It also includes the aspiration to see that families are reunited in Canada, via sponsorship applications such as spousal sponsorship.[7]

This thesis shall demonstrate that some Immigration Appeal Division (IAD) decisions concerning spousal sponsorship applications, submitted by Punjabi applicants, affirm the rejection of *IRPA*'s objective to reunify families. This thesis strives to fill a gap in the scholarly literature by specifically focusing on this subgroup of applicants and their cases within the IAD, while also filling a gap in the scholarly literature concerning immigration decisions within the IRB.

This thesis argues that such decisions run contrary to *IRPA's* objectives and may be rooted in the inconsistent approach by IAD decision-makers regarding the diversity of marriage practices. Such discrepancies, in turn, have an effect on the credibility assessments and determinations of individual IAD members. Furthermore, the inconsistent approaches of IAD members regarding cultural norms is worrisome in itself.

Such contradictions regarding the objectives set out in *IRPA* thus come from some IAD decision-makers failing to demonstrate necessary cultural competency and awareness, with respect to marriage processes arising from different cultural contexts. When stating that there is a lack of "cultural competency", I use this term with respect to the idea of approaching the fluidity of socio-cultural practices with a closed-mind. In the context of this thesis, those socio-cultural practices relate to marriage practices in Punjab, and by extension India, where there is a lack of recognition in the subjective ability for individuals to deviate from these socio-cultural scripts and norms surrounding marriage traditions and norms.

[6] *IRPA, supra* note 4, s 3(1)(f.1).
[7] *Ibid*, 3(1)(d).

This in turn may leads to questions about whether there is a reasonable apprehension of bias, when IAD decision-makers perceive cultural norms and practices as rigid legal codes governing applicants/appellants outside of their rightful context.[8] When individuals do not conform to the decision-makers' perceptions of what cultural norms or customs concerning marriage and mating rituals demand, this may have led to their adverse assessments. The approach currently employed by some decision-makers is to effectively elevate certain cultural norms and customs that are known to apply to a certain cultural population, and hold them as akin to objective legal standards that are in turn used against the applicant, who comes from that cultural background. However, rather than arguing that this may lead to a reasonable apprehension of bias, it may be best argued to be a fettering of discretion, given the independence decision-makers have under *IRPA*.

Such an approach follows a legal pluralistic pathway which recognizes that non-state (in this case, socio-cultural) norms govern human conduct in particular social fields, or what is otherwise known as legal pluralism.[9] This thesis posits, however, that this understanding falls short in key ways. First, culture is fluid and customs and traditions change over time. Secondly, such socio-cultural norms are not inexorable commands that invalidate the genuineness of a marriage, or relationship, for those who deviate from them.

Drawing from critical legal pluralism, one should consider how individual applicants/appellants view their marriage alliances and actions, despite prevailing marriage customs and practices that operate in their community or communities. Where non-conforming,

[8] Proving a Reasonable Apprehension of Bias is difficult, as case law would affirm, particularly in the Immigration and Refugee context. Instead, this thesis focuses on the inconsistency amongst decision-makers in an effort to bring awareness for more consistent and just decision-making.

[9] Legal Pluralism has many different definitions that reflect the same concept. I choose to use the definition that the brilliant legal mind, Sally Engle Merry, identifies in that legal pluralism is generally defined as a situation in which two or more legal systems coexist in the same social field: Sally Engle Merry, "Legal Pluralism" (1988) 22:5 *L & Society Rev* 869 at 870.

such actions or perspectives might suggest an alternative conception of legal normativity[10] as it relates to marriage customs and practices, rather than an invalid marriage. In line with the socio-cultural implications, it may further allow for growth towards better cultural competency and awareness.

This thesis contends that IAD decision-makers should not draw adverse inferences about the legitimacy of certain marriages where applicants/appellants do not follow prevailing marriage practices or customs, or for that matter, the IAD members' perceptions of such marriage customs and practices. Instead, IAD members must better understand that not all people of a specific culture or background will fit under an external normative set of cultural norms and traditions. They cannot be subsumed under one homogenous label, through identifying or categorizing individuals based on normative orders that reside in their population's culture.[11] Instead, individuals can have subjectivity in their lives and can fall outside an otherwise well known cultural norm or tradition, and have the right to not be punished for doing so.

This thesis, therefore posits further, that, during credibility assessments, IAD members should display consistency in their consideration of evidence provided to explain deviations from cultural norms, through the testimonies of applicants and appellants. Members should more strongly take into consideration the individual's own personal choices and beliefs related to their culture, as their personal choices may fall outside of normative customs and practices of their community. Not taking the individual's personal beliefs into account, based on the prevailing customs and norms that are practices, but instead continuing to assess their credibility based on

[10] Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25 at 45.
[11] *Ibid* at 36-37.

conformation to prevailing marriage traditions, is an unjust practice in the administrative decision-making sphere and, in turn, may jeopardize the integrity of the IAD.

1.2 Credibility Assessments: To believe or not believe….that is the….problem?

Credibility determinations are factual findings. IAD members, like members of other divisions of the IRB, have a great deal of flexibility in how they make these findings[12]. The purpose of credibility assessments in immigration matters, and specifically in regard to spousal sponsorship applications, is to determine whether the applicant and appellant have entered into a genuine marriage or one simply for the purposes of securing immigration status. Under s. 63(1) of *IRPA,* individuals have the right to appeal the refusal of a visa for family class status.[13] Spousal sponsorship visas fall under this right. Under s 4(1) of *IRPA's* regulations, members of the IAD assess whether a marriage is genuine or is simply entered into, on bad faith, for the purposes of immigrating into the country.[14]

Parties seeking judicial review of IAD decisions must submit applications to the Federal Court of Canada. Consistent with general judicial review standards and practices, the Federal Court has shown deference to the IAD regarding its decision-makers' credibility assessments of the applicants that come before them. This deference is based on the nature of work by the IAD, namely, the hearing and observing of testimonies of said applicants pleading their cases and their assessment of such evidence.[15]

---

[12] Sean Rehaag, "'I Simply Do Not Believe…': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38:1 Windsor Review of Legal and Social Issues 38 at 40.
[13] *IRPA, supra* note 4, s 63(1).
[14] *Immigration and Refugee Protection Regulations,* SOR/2002-227, s 4(1).
[15] *Granata v Minister of Citizenship and Immigration*, 2013 FC 1203 at para 28.

In addition to this deference, the Federal Court has also stated that, when considering evidence, the IRB more generally, and not just the IAD, must be careful about imposing Western or Canadian paradigms on individuals coming from non-Western cultures.[16] If a decision was made without considering the proper cultural and socio-political context, this can constitute grounds for the court quashing a decision and sending the matter back to the IRB for reconsideration.[17]

In IAD decisions dealing with spousal sponsorships from India, some IAD members show recognition of non-state socio-cultural customs and norms, which in turn they tend to uphold as governing norms for marriage practices. By following this practice, IAD members follow one of the well noted flaws of legal pluralism, as noted by Kleinhans & Macdonald; using non-state cultural practices and traditions as an objective legal standard. A standard which is assumed or believed to apply to everyone, based on norms and practices believed to shared and followed by all members that would fall under those non-state legal orders.[18]

Unfortunately, this understanding also leads to the creation of a socio-cultural identity on the applicant and appellant, whether done consciously or unconsciously on the part of the decision-maker in some instances. Alongside the creation of an objective legal standard, in order to be seen as credible, the applicant/appellant must demonstrate their conformation to such normative marriage practices coinciding with the aforementioned socio-cultural identity. Decision-makers, due to this narrow minded-approach and lack of cultural competency, fail to take into account the individuality surrounding one's own beliefs about their cultural norms. This failure arises from a lack of attention to the applicants' own personal (and complex) socio-

[16] *Bains v Canada (Minister of Employment and Immigration),* [1993] 63 FTR 312.
[17] *Bhatia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 2010 at para 16.
[18] Kleinhans & Macdonald*, supra* note 10 at 36.

cultural identity, and the understanding that cultural norms and practices can be contested, deviated from, and be fluid and ever-changing.

This thesis argues that such a closed and narrow-minded approach when dealing with cultural norms may be responsible for the inconsistency in decision-making at the IAD level. The implications on applicants and appellants that this flawed approach has, on individual immigration spousal sponsorship cases, may be better understood after an examination and discussion on culture and identity in chapter 3. In addition, comparing the practice of creating objective standards from these customary marriage norms to the legal theories of legal pluralism and critical legal pluralism, may lead to a better understanding of some of the issues when assessing credibility. This is due to the heavy reliance on the testimonies, whereby IAD members measure the credibility of the individuals before them against the backdrop of these customary laws and norms.

The main purpose of this thesis is related to ensuring that the objectives mentioned earlier under the *IRPA* are met.[19] In the context of this thesis, it relates to the lack of cultural competency and awareness of the nature of the norms surrounding marriage. Specifically, this thesis argues that any deviation from those norms should not render such deviation as illegitimate, nor should it impugn the credibility of applicants from a Punjabi background. This thesis argues that the inconsistency in decisions made by IAD members, arising from this closed-minded and narrow approach that coincides with the tendency of legal pluralistic views of recognizing socio-cultural norms as objective standards, is a present concern in the IAD. Moreover, these inconsistencies amongst different decision-makers, related to the acceptances and rejections drawn from deviations of certain cultural norms, must consequently be addressed.

[19] *IRPA, supra* note 4.

The lack of competency and closed-minded approach may very well extend to applicants and appellants from other backgrounds as well. Yet, the objectives of reuniting families and ensuring a just decision-making process for immigration claims continues to clash with the reality of some of the IAD's decisions. *IRPA's* objectives not only include family reunification, but also the requirement, when dealing with spousal sponsorships, that such marriages be found to be genuine. However, assessing the genuineness of a marriage, and by extension finding against it, contradicts the objective of reuniting families in some instances. As such, it is time that this issue be addressed so that the objectives of *IRPA* can be fulfilled more consistently and in a stronger just manner.

1.3 What is the IRB?

The IRB is Canada's largest independent administrative tribunal.[20] Its duties include adjudicating immigration and refugee law claims. The IRB is separate from Immigration, Refugee, and Citizenship Canada (IRCC), a department of the government of Canada. An administrative tribunal is intended to be a specialized body created by legislatures that has subject matter expertise in certain domains, which allows it to stay involved in a dispute over a longer period of time.[21] There are tribunals that adjudicate disputes between citizens and the state in relation to decisions made by government agencies, and there are tribunals that adjudicate disputes between private and public actors, such as labour relation boards for example.[22]

[20] Immigration and Refugee Board of Canada, "About the Board", (accessed 2 January, 2020) online: <https://irb-cisr.gc.ca/en/board/Pages/index.aspx>
[21] Coleen Flood & Lorne Sossin, *Administrative Law In Context,* 3rd ed (Canada: Emond Montgomery Publications Limited, 2018) at 46.
[22] *Van Harten et al*, *supra* note 3 at 14-15.

The IRCC, as the government department, determines the eligibility of all claims made in Canada by citizens and applicants. It then refers those claims, which are deemed eligible, to the IRB for adjudication and for a decision to be made.[23] Although the IRB reports to Parliament through the Minister of the IRCC, it remains independent from both the IRCC and the Minister.[24]

The IRB consists of four divisions: the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID), and the Immigration Appeal Division (IAD). The first two divisions, the RPD and the RAD, both relate to refugee protection matters with the RPD hearing and deciding refugee protection claims in the first instance. The RAD has jurisdiction to consider appeals from decisions rendered by the RPD.[25] This jurisdiction, however, is subject to limitations set out in the *Immigration and Refugee Protection Act.*[26]

The ID and IAD adjudicate matters concerning Canadian immigration claims. At the request of the Canadian Border Security Agency (CBSA) or the IRCC, the ID will conduct admissibility hearings for foreign nationals or permanent residents believed to be inadmissible to or removable from Canada under the *IRPA.*[27] The IAD hears appeals on immigration-related matters and decisions rendered from the IRCC and the ID.[28]

Within the IAD, the panel members assess appeals for family class sponsorships, including spousal sponsorships, which are the main focus of this thesis. The IRB has made it known that their members are able to have independence in their decision-making.[29] Within this independence, however, they are expected to ensure a duty of fairness in that hearings conducted

[23] Immigration and Refugee Board of Canada, *supra* note 20.
[24] *Ibid.*
[25] *Ibid.*
[26] *IRPA*, *supra* note 4, s.110 (2).
[27] *Ibid* at Division 4.
[28] Immigration and Refugee Board of Canada, *supra* note 20.
[29] Immigration and Refugee Board of Canada, "Members", (accessed 2 January, 2020) online:<https://irb-cisr.gc.ca/en/members/Pages/index.aspx>

by members demonstrate cultural sensitivity, fairness, and overall good faith.[30] They further elaborate how their members' decisions reflect many different factors, such as the law, as well as the merits and credibility of the persons in the case.[31]

Based on these expectations listed of its members, it is fair to assume it applies to the assessment of the credibility of applicants before them. Within an assessment of credibility and the merits of the case, the extension of common law duty of fairness is also present, via impartiality in the hearings. Impartiality has been defined by the Supreme Court in the case of *R v S(R.D)*:

> "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind"[32]

Unfortunately, this impartiality is lacking in certain decisions, especially when assessing applicants seeking spousal sponsorship applications. Many IAD members simply do not display an open minded approach when considering the acceptance or rejection of cultural norms related to marriage practices, by the individuals in sponsorship appeals before them.

TS v Canada: Culture vs Identity

TS v Canada (Minister of Citizenship and Immigration) was a 2017 IAD appeal decision that highlighted the issue of the IAD using cultural norms and practices against an appellant's

[30] *Ibid.*
[31] *Ibid.*
[32] *R v S. (R.D.),* [1997] 3 SCR at para 119.

own personal choices, as a detriment to the appellant's own credibility. The appellant, T.S. and the applicant, P.S.D. entered into a marriage that was the second marriage for both parties.[33] Both are in their early 50s and originate from the same East-Indian Punjabi cultural background, as they both originally hail from the state of Punjab, in India. However, it was noted by the IAD member presiding over the hearing, that the appellant is significantly more affected by Canadian culture; having resided in Canada for 38 years.[34] The couple met in India by chance, as the appellant was asked by the applicant's friend in Canada, who had done some work on the applicant's home, to deliver a package to him since she was travelling to India. Once she reached there, the appellant had the applicant come to pick up the package from her sister's residence where she was staying. Subsequently, there was another meeting between the two when T.S. went to deliver another package to a relative, whom the applicant happened to know as well. It was at this second meeting that they connected over their mutual discussion about being previously trapped in abusive and unhappy marriages. They then stayed in communication for another week until they confessed their liking for one another and expressed their desire to get married.[35] This communication continued for another year, before both decided to engage on this marital desire.

A visa officer found that their marriage was not genuine or was done with the purpose of gaining immigration and refused the applicant a permanent resident visa. During the appeal, the IAD member acknowledged that the Federal Court has stated that the genuineness of a marriage is to be examined through the eyes of the parties against the cultural background in which they have lived.[36] The IAD member quoted the words of the appellant in that she is a Canadian who

[33] *T.S. v Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 4200 WDFL 4833 at para 1.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid* at para 11.

"hates" Punjabi culture because of the decades in which she was trapped in an abusive marriage due to the traditional Punjabi beliefs her siblings held on marriage and divorce, whereby divorce is heavily looked down upon.[37] The IAD member then stated that because she must take into account the appellant's perception of the Canadian and Punjabi cultures, as the appellant believes them to be, that the IAD member must therefore look at the marriage through the appellant's eyes.[38]

After her counsel finished making submissions during the IAD hearing, the appellant turned to the Minister's counsel and asked why she could not be treated as a Canadian, when assessing her life choices, rather than have them be judged solely against what is perceived as the traditional cultural norms of her community of origin.[39] While it was not noted as to whether or not the Minister's counsel replied to this question, the IAD member took it into account. The IAD member agreed with this comment, in part, stating that while the appellant is influenced by both Punjabi and Canadian cultures, she lives her life selecting from what she prefers from each culture. An individual may have powerful cultural influences from more than one country. Yet their personal experiences and deeply held beliefs can affect which aspects of a culture they accept, reject, or prefer; perceptions of cultural norms can differ from one person to another.[40]

After listening to the testimonies of the appellant and applicant, and assessing all the evidence, the IAD member allowed the appeal. Despite the concerns relating to the genesis of the relationship, the previous marital histories of the parties, and the applicants previous immigration history all being seen as suspicious from the Minister's counsel's point of view, the IAD member heavily weighed the sincerity of the testimonies themselves and allowed the appeal.

---

[37] *Ibid* at para 13.
[38] *Ibid* at para 14.
[39] *Ibid* at para 15.
[40] *Ibid.*

The *T.S.* decision is one that is commonly faced for East Indian residents looking to sponsor their spouses for immigration—that is, their marriages are many times not considered genuine, instead being considered to have been entered into solely for obtaining immigration. The IAD member in the *T.S.* decision was very open-minded and stated that individuals have the right to live their life and choose which beliefs of a culture they wanted to accept or reject. The perception of the cultural norms must be examined through their eyes. This extends to an understanding that an individual creates their own cultural identity, and should not be based on an external perspective of that individual's socio-cultural identity stemming from the cultural norms and practices which are common in their origin of culture or background.

In this thesis, I argue that some decisions show that not all IAD decision-makers are similarly culturally competent and acknowledge that individuals may hold their own personal beliefs and perception of cultural norms and practices. This is especially true in relation to those norms which govern marriages, such as arranged marriages, in Punjab and the Indian subcontinent as a whole.

I examine whether this inconsistency between IAD members who are open-minded and appreciative, and those who are not, can be found to be a rooted problem within the IAD when assessing cultural norms related to marriage practices of Punjabi applicants seeking spousal sponsorship. I use this T.S. decision as an example to support this argument and to set the foundation for this thesis, as many IAD members recognize the legal pluralism in the cultural legal orders surrounding marriage norms, but use this as an objective measurement to create a socio-cultural identity to which the applicant must conform.

If the IAD member in the *T.S.* decision, having all the information and taking the appellant's perception of the cultural norms into account, can come to a reasonable decision by

showing sensitivity and competence in understanding the appellants' subjective cultural identity, why is it that other decision-makers cannot do the same? Instead, why do other decision-makers simply rely on objective perceptions of the cultural norms and assume one's cultural identity based on the requirement for conformation to those norms?

It can indeed be said that marriage practices are evolving in India, with many individuals now proactively finding their own spouses. However, it is still a predominant norm and practice for the relatives of an individual in Canada, who still live in India, to search for a suitable spouse and to arrange marriages. Therefore, it is common for couples to not know much about each other prior to the marriage. Canada is multicultural, both in fact and in policy.[41] Yet, with respect to marriage practices, it is very much governed by mating and marriage practices where couples get to know each other within Canada prior to marriage. This may be done through social media or other online mediums with people who may even be living in other countries.

Adjudicators have been instructed, as previously mentioned, by the Federal Court not to impose Western cultural norms or paradigms on applicants from another culture.[42] However, by extension, adjudicators assessing applicants based on the applicant's own cultural paradigms should also be more understanding to the individual beliefs within those paradigms and the individual's own acceptance or rejection of aspects in their own culture. This is where the concept of critical legal pluralism comes into account, and how it differs from legal pluralism.

Legal pluralism recognizes that there are non-state customary laws that operate and govern human conduct, yet it fails to recognize that individuals are more than just objects upon whom these customary laws and norms are imposed. Critical legal pluralism, on the other hand, focuses on the individuals as subjects and not as objects. It focuses on their individuality and

[41] *Canadian Multiculturalism Act,* RSC 1985, c 24 (4th Supp).
[42] *Bains v Canada, supra* note 16.

subjectivity in governing themselves and their lives, even if their choices fall outside those customary laws and norms which are seen to govern most of the society from which they originate.[43] Both of these legal theories will be discussed further in chapter 3.

For the purposes of this thesis, I advocate for critical legal pluralism to be understood and more strongly employed within the IAD, such that IAD members can understand, recognize, and intertwine the subjectivity of the applicants' and appellants' views on cultural norms, without having it be to the detriment of the said applicants' and appellants', when conducting credibility assessments. This advocacy may address the concern amongst various IAD decisions in which cultural norms were assessed with great variance amongst different decision-makers.

Scope of the Research

In this thesis, I primarily analyze recent IAD decisions to examine the criteria and methodology behind their members' decision-making when dealing with East Indian Punjabi immigration applicants residing in Canada and who are seeking to sponsor their spouses in India. I decided to focus on Punjabi applicants as it is the home state of my family and, by extension, my community. As such, I have seen members of this community, including family, deal with immigration issues related to decision-makers' perceptions of cultural norms and therefore wished to research into this.

By analyzing IAD cases while focusing on various factors and gauging the cultural understanding of Indian marriage customs and norms that inform adjudicators, the hypothesis I seek to test is whether stronger cultural competency and awareness is needed within the IAD when assessing spousal sponsorship applications from Punjab. This thesis seeks to outline the

[43] Kleinhans & Macdonald*, supra* note 10 at 31.

problematic inconsistencies and perceptions that are rooted within the IAD's assessments of cultural norms and factors, in the engagement of cultural marriage practices in India.

As I shall demonstrate in my examination of the cases and decisions in chapter 4, many cultural norms and viewpoints on traditional marriage factors such as age, educational backgrounds, and marital histories have been considered by IAD members when assessing East Indian immigration spousal sponsorship applications. Additionally, caste has also frequently been a cultural norm and factor which has also been consistently referred to in determining compatibility between spouses in sponsorship applications.

India's caste system is amongst the world's oldest surviving forms of social stratification and social hierarchy. It is a centuries old system that divides Hindus (India's major religious following) into four separate hierarchical groups based on social status.[44] In these hierarchical groups, both "upper"- and "lower"-class groups have a specific role and place within the hierarchy.[45] However, this does not just extend to Hinduism. Sikhism, another major religion followed in India and Punjab, holds its own hierarchical caste system similar to Hinduism.[46]

As a matter of constitutional law, the government of India prohibits any negative discrimination based on the caste system, proclaiming: "The State shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them."[47] However, it is still a common social belief and practice that is followed today and, as such, is one additional factor that IAD members take into account when assessing spousal sponsorships.

---

[44] Jennifer Bowman & David Dollahite, "'Why Would Such a Person Dream About Heaven?' Family, Faith, and Happiness in Arranged Marriages in India" (2013) 44:2 *Journal of Comparative Family Studies* 217.
[45] Anderson Jeremiah, "Caste and Christianity in India", in Kenneth R Ross et al, eds, *Christiantity in South and Central Asia,* (Edinburgh: Edinburgh University Press, 2019) at 409.
[46] Paramjit S. Judge, "Caste Hierarchy, Dominance, and Change in Punjab" (2015) 64:1 *Sociological Bulletin* 55 at 56-57.
[47] *The Constitution of India,* c.1950, Part III – *Fundamental Rights* – s.15-16.

IAD members consider the relevance of caste when assessing the genuineness of a marriage due to the fact that many followers of the caste system believe that individuals must only marry within their caste. However, this can extend to subtler external forces as well. Most individuals may not wish to risk tearing apart their own family relationships and becoming ostracized or the next "honour killing" in the process when considering to pursue an inter-religious or inter-caste relationship, let alone marriage.[48] The perpetration of honour killings also extends to Indo-Canadians as well who may fall victim to disobeying the cultural marriage practices that their parents have carried over as immigrants.[49] These beliefs are emphasized and supported by a recent 2016 report from India's National Council of Applied Economic Research (NCAER), which found that 95% of East Indians living in India still marry within their caste.[50] While 5% may seem like a small number, in a country with an immense population like India in which over 1 billion people live, 5% quantifies into approximately 50 million; greater than the population of Canada.

The overarching issue, however, is that, aside from the caste system, other factors and norms that are assessed by the IAD during credibility assessments such as the aforementioned age, education and previous marital histories do not always hold as strong an influence when it comes to marriage in today's world, specifically in India. Yet these cultural norms are still heavily scrutinized at a concerning inconsistent rate.

India has begun undergoing transformative changes in relation to marriage practices. While arranged marriages are still the heavily followed, individuals are slowly moving against

---

[48] Srinivas Goli et al, "Exploring the Myth of Mixed Marriages in India" (2013) 44:2 *Journal of Comparative Family Studies* 194.
[49] *See:* Amar Khoday, "'Honour Killings" hide racist motives', *The Toronto Star,* (8 March 2005) at A19.
[50] "95 pc marriages within caste: Report" (12 May 2016), online: Tribune India <https://www.tribuneindia.com/news/archive/nation/95-pc-marriages-within-caste-report-235469>

arranged marriages in favour of finding their own alliances. Furthermore, even within arranged marriages today, certain norms such as age and education are not being held as rigidly as they were previously. With an increase in urbanization, education, and employment of women, alongside the socio-economic development and globalisation of the Indian economy, these changing trends in relation to some of these previously held norms in marriage practices are now showing through.[51]

The Indian Human Development Survey (IDHS) is a collaborative research panel study project between the University of Maryland, the National Council of Applied Economic Research, Indiana University and the University of Michigan. This panel had collected data in 2005, questioning 41,544 households in 1503 villages and 971 urban neighbourhoods across India. Topics included education, health, employment, and of course marriage. Punjab was ranked as the state with the highest number of inter-caste marriages (12.2%) and inter-religious marriages (7.8%) in comparison to the nation's overall average of 5.1% for inter-caste and 2.1% for inter-religious marriages.[52] This higher number of inter-caste and inter-religious marriages could also be due to the sex-selective abortion practices that are greatly present within India. Punjab has had one of the higher skewed sex ratios in the country.[53] This practice of sex-selective abortions has led to the possibility of the numbers of inter-caste and inter-religious marriages being as high as they are in Punjab. As there are not enough women within one's own caste or religious group, it likely has forced people to be more non-traditional in their approaches to marriage formations and thus has led to marriages outside of caste and religious community.

[51] Goli et al., *supra* note 48 at 202.
[52] *Ibid*.
[53] Mattias Larsen & Ravinder Kaur, "Signs of Change? Sex Ratio Imbalance and Shifting Social Practices in Northern India" (2013) 48:35 *Economic and Political Weekly* 45.

However, it may also be attributed to couples falling in love and rebelling against the normative practice of marrying within one's own caste.

A 2011 report by the All India Democratic Women's Association (AIDWA) has also shown that urban women in India have indeed begun to rebel against the arranged marriages as well as the caste system commandments by choosing their own mates.[54] Many individuals now search for partners themselves through dating and other new avenues, such as marital and dating websites, all aiming to seek potential romantic partners before deciding on marriage.

However, many general misconceptions surrounding the practices and norms of arranged marriages, outside the still well-followed caste system, in societies in the Global North still persist, and these misconceptions lead the way to misunderstandings behind other factors assessed by the IRB.

A perfect example of these general misunderstandings in action would be the consideration of age and educational status. Today, many women in the urban areas of India exhibit independence and are able to pursue higher education, which was previously not the case as many restrictions were placed on women.[55] Those restrictions reflected the social practice of wives simply moving into their husbands' home for a life of servitude, while the men would instead benefit from higher education and/or be the primary wage-earners within the family. However, with the easing of differentiated gender roles and with large participation of women in the labor market, this has also led to a major shift towards assortative match-making.[56] Where

[54] *Ibid.*
[55] *Ibid.*
[56] Ravi Prakash & Abhishek Singh, "Who marries whom? Changing Mate Selection Preferences in Urban India and Emerging Implications on Social Institutions", (2012) 33:2 *Population Research and Policy Review* 207.

women were also once seen by societal norms to need to be married by a certain age, educational advancements have also led to delayed marriages in terms of age as well.[57]

Additionally, as noted in IAD decisions and the *T.S.* decision above, divorce is still considered a taboo in Punjabi culture and in East-Indian culture as a whole. As also outlined in the *T.S.* decision, IAD spousal sponsorship applications usually consider and heavily scrutinize previous marital histories when assessing applications for spousal sponsorship, where the appellant has had previous marriages and the applicant is entering the union as the applicant's first marriage. However, the practice of sex-selective abortions could also lead to the explanation as to why this taboo is no longer as firm as it once was.

Therefore, these factors should no longer hold the same weight or consideration as they may have previously. Caste, however, is still a major compatibility factor that is heavily followed in marriages, even today as individuals seek to marry within their own caste. As such, this may also be reflected in the fact that few IAD decisions focusing on the genuineness of a marriage have turned on the question of inter-caste marriages. However, given the studies and higher percentage, relative to the national average, of inter-caste marriages in Punjab, this may signify that there may likely be a decrease in the importance of caste going forward, as supported by these studies.[58] Thus, future research studies may show this cultural norm becoming a more common challenge in IAD decisions.

This thesis, however, examines and focuses on the consideration of three other socio-cultural factors (age, education, and marital histories) in Punjabi spousal sponsorship applications in chapter 4, in an effort to highlight the inconsistency and unfair practice of

[57] *Ibid* at 222.
[58] *Ibid* at 219.

assessing these cultural norms when the trends are currently shifting, and are projecting to shift even further.

Moreover, laying undue stress on these factors may potentially lead to unfavourable immigration decisions for Punjabi spousal sponsorships that are based on culturally generalized and outdated perceptions, in addition to the consideration of irrelevant factors among IAD decision-makers. The personal choices and beliefs of individuals and how they themselves see these norms must be approached with an open mind and therefore be given greater weight in credibility assessments, rather than being seen with suspicion.

Thesis Overview

This thesis is divided into five chapters. The second chapter further examines the IRB and its role in Canada's immigration system in addition to the legislation that governs the IRB, the *Immigration Protection and Refugee Act* (the *IRPA*). Specifically, I set out the specific provisions and regulations within the *IPRA* that overlay the topic of this thesis (spousal sponsorship). I follow this by outlining the structure, protocols, and overall systematic processes of the IRB. I discuss the training and hiring methods used in determining who is appointed to be a member of the IRB and the IAD and the IAD members' role in appeal decisions for rejected spousal and family sponsorship applications. The chapter then concludes with a literature review of previous studies relating to the IRB and their decision-making process in relation to cultural understanding, misconceptions and miscommunication when adjudicating refugee cases. This is done to both draw an analogy from these studies to point out similar issues that exist in the immigration context, while further obtaining a better understanding of the continued lack of competency, appreciation and awareness surrounding cultural fluidity and changing cultural

norms that is present in the IRB as a whole. Chapter 4 demonstrates these issues in the immigration context from an analysis of cases stemming from Punjab.

The third chapter then examines key concepts of cultural and legal theories to establish a framework for the analysis of the cases in chapter 4. I begin chapter 3 by examining the issues with creation of socio-cultural identities and its relation through repeated performance of cultural norms. This is followed by discussing Canada's view on multiculturalism. The chapter then briefly discusses some general cultural norms and practices surrounding marriage in India, to outline some of the factors that IAD members take into account during credibility assessments.

I then highlight key concepts of two legal theories legal pluralism and critical legal pluralism. I outline and explain how each theory, and the concepts which underlie them, apply to and play a role in my critique and analysis of IAD decisions when assessing the decision-makers' cultural competency and misunderstandings behind each case's circumstances, norms, and overall situation.

The fourth chapter consists of an analysis of recent IAD decisions (from 2007 onwards) dealing with Punjabi spousal sponsorship applicants that highlight the cultural perceptions that inform IAD members. The reasoning for the choice of timeline from 2007 onwards is to highlight the shifting trends, as demonstrated in studies, that Punjab has undergone with respect to marriage practices and the lack of awareness and appreciation of these changes by IAD decision-makers. These trends highlight the need for cultural competency and awareness in allowing for the subjectivity and personal choices of individuals appearing before the IAD to be employed during credibility assessments. These new trends have played a significant role in shifting away from traditional practices and beliefs surrounding marriage in India, and it is imperative to take note of.

Moreover, in chapter 4, I begin my analysis and critique of the IAD decisions related to appellants and applicants appealing their spousal sponsorship applications. Firstly, I examine the assessment methods that IAD members in these decisions made with respect to the cultural factors and facts of the cases presented before them in those spousal sponsorship decisions. I then examine how age, education and marital histories are all cultural norms and factors that are considered and weighed differently by varying members in different IAD decisions. This examination is done to develop the critique that IAD members have failed to employ sufficient and consistent cultural competency and an open-minded approach, across a wide variety of decisions when dealing with these individuals' cases.

Despite acknowledging the cultural norms and practices surrounding marriage, there is still much inconsistency as some IAD members seem to hold them as socio-cultural legal standards against which the applicants and appellants must conform to and view deviation suspiciously, while others simply accept the explanation of the deviation, without further thought.

In the fifth chapter, I outline reflections and recommendations on how stronger cultural competency and awareness should be employed within the IAD. This will be followed by a reflection of the presentation of the cases which highlight the inconsistency in assessments of various cultural norms and factors. I then conclude the chapter with recommendations and suggestions for better understanding and competency, when dealing with Punjabi immigration spousal sponsorship applications more generally. I also recommend that further studies be conducted in the event that other cultures do in fact fall into this account, as it will contribute to ensuring more integrity and just practices within the IAD.

CHAPTER 2: THE IMMIGRATION AND REFUGEE BOARD

This chapter explains the role of the Immigration and Refugee Board of Canada (IRB) and further delves into the *Immigration and Refugee Protection Act* (*IRPA*). It is divided into several parts. The first part provides a brief introduction of the history of the IRB. The following section then focuses on the *IRPA* and the provisions within it that govern the main rules concerning immigration law as well as the powers, structures, and membership of the IRB. The chapter then examines the framework of the IRB, including the IRB's mandate, board member appointment methods, and the general expectations for those members. The chapter concludes by providing a literature review with respect to previous scholarship and studies on the IRB, particularly regarding issues of cultural competency and awareness, and the inconsistency among decisions-makers over decisions that analyzed cultural norms.

In the first chapter, I briefly described the IRB's four divisions, and how, for the purposes of this thesis, I will focus mostly on the IAD's decisions. The primary reason for focusing on the IAD is the type of cases it adjudicates. However, it is worth discussing, briefly, the work of the other divisions. The RPD and RAD deal with refugee claims, and, as such, their decisions do not concern immigration cases or the subject matter of this thesis. On the other hand, while the ID adjudicates immigration matters, their work is primarily occupied with conducting admissibility hearings. These hearings are held for foreign nationals or permanent residents who are deemed inadmissible or removable from Canada under the *IRPA* in addition to detention reviews.[59]

This thesis is focused on the IAD's work and responsibilities. While the IAD hears appeals concerning admissibility decisions made by the ID, their work extends to appeals that are

[59] *Immigration Refugee Board*, *supra* note 20.

held in relation to sponsorship applications.[60] The IAD considers the appeals of family class sponsorship applications that have been refused by officials of Immigration, Refugees, and Citizenship Canada.[61] IAD decisions with respect to such appeals are important as members of the IAD set out the various criteria for determining what constitutes a genuine marriage and offer their assessments of such marriages after considering the identified factors. These decisions also illustrate how some IAD members' views on what constitute genuine marriages, are rooted in non-state legal orders related to cultural norms surrounding the marriage and mating practices of the applicants and the societies from which they arrive. They then assess the genuineness of the marriage based on the applicants' perceived conformity or lack thereof with these norms.

IAD decisions may be further reviewed by the Federal Court of Canada. Some judicial review decisions of the court have criticized the assessments of IAD members for demonstrating, or for perceiving, what constitutes a genuine marriage through narrow-minded lenses. Along with this, some Federal Court decisions highlight that various IAD decisions show widespread inconsistencies and variations among decision-makers with respect to the weight placed on the evidence being considered. I seek to criticize this practice in my analyses of IAD decisions with reference to these comments from Federal Court decisions. I critique and examine these decisions in chapter 4.

[60] *Ibid.*
[61] Immigration and Refugee Board of Canada, "Immigration Appeals Statistics", (accessed February 4, 2020) online: < https://irb-cisr.gc.ca/en/statistics/immigration-appeals/Pages/index.aspx>

2.1 A Brief History of the IRB

Parliament created the Immigration and Refugee Board of Canada in 1989.[62] At the outset, the IRB was organized into two main divisions: the Convention Refugee Determination Division and the Immigration Appeal Division (IAD).[63] In 1993, amendments to the *Immigration Act* established the Immigration Division (ID), which assumed responsibilities previously held by the adjudication division of Citizenship and Immigration Canada.[64] Consequently, the ID conducted inadmissibility hearings and detention reviews for foreigners seeking to establish their admissibility for immigration into Canada.

The passing and coming into force of the *IRPA,* which covered all aspects of immigration and refugee law and granted wider powers to the government when dealing with claimants, was primarily due to security reasons.[65] Through this new legislation*,* Parliament made substantial changes to the IRB's structure. The Convention Refugee Determination Division was renamed the Refugee Protection Division (RPD) in 2002. In the same year, it was also decided that hearings that were previously conducted with two IRB members would be shifted to single-member hearings due to cost saving reorganizing by Parliament, which was undertaken at the same time the *IRPA* was put into force.[66] In 2012, the Government of Canada once again instituted major changes with respect to adjudication of refugee cases. Within the IRB, this led to the operationalization of the fourth and latest division, which *IRPA* had notionally created in 2011, the Refugee Appeal Division (RAD).

---

[62] Catherine Dauvergne, "International Human Rights in Canadian Immigration Law – The Case of the Immigration and Refugee Board of Canada" (2012) 19:1 Ind J Global Leg Stud 309.
[63] Immigration and Refugee Board of Canada, "The Immigration and Refugee Board of Canada celebrates 30 years", (accessed June 10, 2020) online: <https://irb-cisr.gc.ca/en/stay-connected/Pages/30-years-irb.aspx>
[64] *Ibid.*
[65] *Ibid.*
[66] Rebecca Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia" (2012) 37:4 *Law & Social Inquiry* 949.

2.2 The Immigration and Refugee Protection Act and Regulations

The *Immigration and Refugee Protection Act* is the primary legislation that sets out and governs immigration and refugee law in Canada.[67] Subject to other provisions, the *IRPA* assigns to the Minister for Immigration, Refugees, and Citizenship, primary responsibility for the administration of the *IRPA* as a whole.[68] The *IRPA* came into force on June 28, 2002 and replaced the former 1976 *Immigration Act* as the principal statute governing immigration matters.[69] In 1999, the Liberal government had announced a legislative review with the intent of developing policies with respect to the areas of family-class and economic immigration, and refugee protection.[70] This resulted in the creation of *IRPA* which came into force by mid-2002.

The *IRPA* is the enabling legislation that grants the IRB jurisdiction to hear and decide cases on immigration and refugee matters. It sets out core principles and concepts that govern Canada's immigration and refugee protection programs.[71] There are also regulations alongside *IPRA* which apply to each division within the IRB. The regulations give forth a set of rules that govern the practices and required procedures within that division.[72] The current regulations, which govern the Immigration Appeal Division and the Immigration Division, came into force on June 28, 2002.[73]

---

[67] *IRPA, supra* note 4.
[68] *Ibid*, s 4(1).
[69] Robert Russo, "Security, Securitization and Human Capital: The New Wave of Canadian Immigration Laws" (2008) 2:8 *International Journal of Social, Behavioral, Educational Business and Industrial Engineering* 881.
[70] *Ibid,* at 881.
[71] *IRPA*, *supra* note 4*,* s 166.
[72] *Ibid,* ss 169-174.
[73] Immigration and Refugee Board of Canada, "Act, rules and regulations", (accessed November 3, 2020), online: <https://irb.gc.ca/en/legal-policy/act-rules-regulations/pages/index.aspx>

2.3 The Provisions Governing the IRB

The *IRPA* confers upon the IRB jurisdiction to undertake decision-making processes. Beginning at Part 4, sections 151–158 outline the composition of the board, including its chairperson and other members. Section 159 delineates the duties of the Chairperson of the Board, with one of the duties being to issue guidelines that may assist the members in carrying out their duties.[74] This issuance of guidelines are important, given that it plays a role in ensuring a just and fair procedure when members of the IRB conduct hearings.

Section 162 of the *IRPA* introduces the provisions that apply to all four divisions of the IRB, with respect to the procedure when conducting hearings and attending to matters. It states that each division has "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction."[75] Section 163 states that matters before any of the divisions "shall be conducted before a single member unless, except for matters before the Immigration Division, the Chairperson is of the opinion that a panel of three members should be constituted."[76]

Section 166 governs the process of a hearing before a division, primarily regarding the proceedings to be held in public.[77] The IRB divisions still have the option to conduct a hearing in the absence of the public, should confidentiality be of concern or if an individual is the subject of a proceeding in another division within the IRB concomitantly.[78] These governing provisions are relevant to the structure of the IAD when hearing and dealing with sponsorship applications. All

[74] *IRPA, supra* note 4, s 159(h).
[75] *Ibid*, s 162 (1).
[76] *Ibid*, s 163.
[77] *Ibid*, s 166 (a).
[78] *Ibid*, s 166 (b)(c).

divisions, the IAD included, hold the authority and jurisdiction to hear the evidence and, in most cases pending judicial review, make the final decision.

IRPA allows for applicants to have the right to appeal matters directly to the IAD, in the event of a refusal of the sponsorship.[79] Of importance for provisions governing the IAD is Section 174. In particular, it notes, in subsection 174(2), 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."[80] Section 175 governs the proceedings of the IAD and states that the IAD is "not bound by any legal or technical rules of evidence."[81] This section also states that members of the IAD "may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances."[82]

These provisions demonstrate that the IAD has the sole discretion to make credibility assessments without being bound by the rules of evidence, which govern judicial proceedings. While this would be acceptable considering the tribunal's role and specialization, it makes the need for cultural competency, and more open-minded understandings, that much more important. The reasoning behind this importance is that IAD hearings are *de novo* hearings. As such, members are to consider the totality of any and all evidence presented during the hearing, even if it was not addressed previously with the previous decision-maker. With such a wide evidentiary consideration, IAD members should approach all evidence attesting to credibility with a more open mind, in order to better consider the contribution and importance of the evidence being presented on behalf of the appellant and applicant.

[79] *Ibid*, s 63.
[80] *Ibid*, s 174(2).
[81] *Ibid*, s 175(1)(b).
[82] *Ibid*, s 175 (1)(c).

Section 175 appears to be the one provision that emphasizes the need for this open-minded approach. This provision is one in which sponsorship applications face the most issues. During proceedings, any information or evidence provided is only seen as credible or trustworthy in the discretion of the members presiding over the case. This provision essentially allows for the members of the IAD to assess any information and evidence put before them and make findings of fact they see as just, depending on their belief and trust in said information.

This subjective decision-making power, however, comes with its own faults. As this thesis emphasizes, when assessing cultural norms and traditions, some IAD members hold rigid views on well known socio-cultural norms and traditions that are present in non-Canadian cultures. This leads to an improper imposition of IAD members' own understandings of non-Canadian cultural norms when assessing credibility and may lead to a question of bias.

This bias comes from the belief that some IAD members hold, in that a set of socio-cultural norms must apply to an entire subsect of individuals, who come from that particular cultural background. Furthermore, that any deviation is likely an attempt to simply gain immigration into Canada and not due to the applicants' and appellants' own acceptance or rejection of cultural practices or beliefs.

This improper imposing by IAD members of their own limited understandings of non-Canadian cultures runs afoul of Federal Court rulings on such assessments. The Federal Court has stated that IRB members must view the evidence against the applicant's background and ensure not to impose any of their own understandings on a culture that is not their own.[83] Simply because a set of common socio-cultural norms is practiced by the majority of a population of that cultural background, does not mean that the IAD should think it therefore must apply to

[83] *Nadasapillai v Canada (Citizenship and Immigration),* 2015 FC 72.

everyone and thus any deviation renders claimants untrustworthy. Furthermore, the Federal Court has also commented that, when assessing the genuineness of a marriage where the relationship involves parties exposed to two cultures, certain Indian cultural norms and traditions surrounding marriage and divorce must also be applied with caution.[84]

These references by the court are where cultural competency and awareness come into account. IAD members need to better understand that culture is fluid and ever changing. As such, any deviations should be understood with an open-mind as individuals have the freedom to make their own choices which may depart from cultural practices of those within their own community, either through exposure to new cultures and ideas or through simple acceptances and rejections of the norms of one's culture they have grown up in.

Additionally, when assessing Section 175, there are inconsistent assessments and considerations of new evidence that are presented in the testimonies from appellants and applicants during IAD hearings. This new evidence is testimonial evidence that may not have been disclosed or fully disclosed by them to the previous decision-maker, the visa officer, inquiring about certain incompatibilities that they noted or flagged. Many IAD members have viewed these new detailed explanations addressing such incompatibilities as suspicious or simply rehearsed for the appeal hearing and viewed it as less credible, while other members acknowledged that, although it sounded rehearsed, the parties simply came better prepared.

However, in the event that an applicant is not satisfied with the decisions rendered by the IAD on their case, and they wish to appeal a decision further (outside the IRB), they have the option to do so. As mentioned, they may file an application to be granted leave to have judicial review by the Federal Court as per the *IRPA*.[85]

---

[84] *Gill v Canada (Minister of Citizenship and Immigration),* 2010 FC 122.
[85] *IRPA, supra* note 4, s 72(1).

2.4 The IRB's Organizational Structure

The IRB's mission includes efficiency and fairness in carrying out their duties to resolve immigration and refugee cases. The IRB specifically states, within its mission statement, that "on behalf of all Canadians, [it] resolves immigration and refugee cases efficiently, fairly and in accordance with the law."[86] The ability to resolve matters fairly and efficiently in accordance with the law is highly dependent on those who are appointed as members of the IRB.

The IRB's structure consists of individuals, all of whom are appointed in their respective positions by the Governor in Council (GIC), as per the *IRPA*.[87] At the apex of the IRB is the Chairperson, who, by virtue of holding office, is a member of each division of the board and is also the Chief Executive Officer of the Board.[88] Below the Chairperson, there are the Deputy Chairpersons and Assistant Deputy Chairpersons for each individual division of the board.[89] In addition, there are the Directors below the Chairperson who are each in charge of certain designated duties (i.e., the Director of Values, Ethics, and Disclosure and the Director of General Policy, Planning, and Corporate Affairs).[90] Then, there are the actual members who are the decision-makers within each division in the board. An IRB member is usually only a member who makes decisions in the particular division in which they work.

The members play an important part when considering how their independence in decision-making relates to the message of this thesis. The IRB states that it has certain expectations of all its members and that its members undergo extensive training and orientation.[91] In addition to the *IRPA* provisions governing the IRB, its members are governed by

[86] *Ibid*.
[87] *IRPA, supra* note 4, s 153(1)(a).
[88] *Ibid*, s 159(1).
[89] *Immigration and Refugee Board, supra* note 20.
[90] *Ibid.*
[91] *Immigration and Refugee Board, supra* note 29.

a code of conduct. Within this code, the IRB states their dedication to values such as honesty, good faith, fairness, and cultural sensitivity, amongst others.[92] However, as this thesis demonstrates in Chapter 4, the inconsistent assessments regarding certain cultural factors in sponsorship cases, may suggest otherwise. This is not to say that the members of the IRB are in full disregard of these rules and expectations, but perhaps the cultural gap between some members of the IRB and applicants who come from different backgrounds explains the disparate outcomes. While this cultural gap could be attributed, and by extension addressed, to a lack of diversity on the board, it primarily comes down to training methods within the IRB.

Numerous guidelines have been issued to guide Board members with respect to their assessments of various factual circumstances. These include situations regarding detention, procedural issues when dealing with vulnerable persons appearing before the IRB, and women and child refugee claimants.[93] These guidelines are listed as Chairperson's guidelines, and are meant to serve as guidance for decision-makers, which includes their adjudicative functions. These guidelines are not mandatory. Yet, decision-makers are expected to apply them which otherwise makes them mandatory, as a functional matter. Otherwise, decision-makers are expected to provide a reasoned justification for not employing them.[94] The most recent additions to the Chairperson guidelines were in 2017 and were with respect to proceedings before the IRB involving sexual orientation and gender identity and expression.[95]

There are also the jurisprudential guides, which are decisions that are more detailed and contain persuasive reasoning. These guides are to facilitate fair and consistent decision-making

[92] Immigration and Refugee Board of Canada, "Code of Conduct for Members of the Immigration and Refugee Board of Canada", (accessed February 3, 2020) online: < https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>
[93] Immigration and Refugee Board of Canada, "Chairperson's guidelines", (accessed February 3, 2020) online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/chairperson-guideline.aspx>
[94] *Ibid.*
[95] *Ibid.*

in accordance with the IRB's statutory obligations to deal with all proceedings informally and as quickly as the circumstances and considerations of fairness and natural justice permit.[96] However, the current jurisprudential guides for members only deal with refugee claims or appeals and are not for immigration matters.

In fact, even within the Chairperson guidelines, there has yet to be a guideline concerning sponsorship applications in any family relationship class, let alone the spousal class. The lack of guidelines in the immigration context is a huge gap, and consequently could lead to more room for inconsistency among decision-makers as there is no objective standard to follow. This is something that the IRB should consider implementing when addressing immigration matters. Setting out jurisprudential guidelines on decisions and cases heard by the IAD may better serve to guide future IAD members when dealing with issues of cultural competency and awareness regarding applicants from various backgrounds, such those as from India.

2.5 Literature Review: Criticisms of the IRB's Lack of Consistency and Sensitivity

To date, much of the scholarship focusing on the IRB's lack of cultural competency and awareness with respect to applicants, and the inconsistency among decision-makers, has been centered on the decisions of their refugee divisions. Despite criticisms of the IRB's inconsistencies as a whole, there has been a lack of criticism on the IRB's immigration divisions, particularly the IAD and its decision-makers. This thesis strives to fill this gap.

Despite the focus on the decisions of the IRB's refugee divisions, such scholarship may provide useful guidance in approaching decisions of the IAD in connection with spousal sponsorship applications. While the first few articles below focus on quantitative data, they touch

[96] Immigration and Refugee Board of Canada, "Jurisprudential guidelines", (accessed February 3, 2020) online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/jurisprudential-guides.aspx>

upon a qualitative analysis when discussing the reasoning of the various factors that may be present and give rise to the skewed adjudicative decisions in the refugee divisions. Of particular relevance, relating to this inconsistency and variance in decisions, I examined those articles that review possible adjudicator bias that may be present within the IRB.

Extrapolating from such work, one might uncover similar issues in connection with IAD decisions. The inconsistency can be attributed to possible bias, in that adjudicators are not open to taking into account the applicants' personal beliefs of the applicant's own cultural customs and their departures from the generalized customs of their cultural background. The last article discussed below, takes a multi-disciplinary approach and demonstrates how cultural miscommunication and a lack of cultural competency and awareness are impeding factors when members make decisions on individual applicants.

The first article was written by Professor Sean Rehaag, a well-known refugee law specialist in Canada.[97] Rehaag analyzed a database of 9,984 refugee claims involving principal claimants who had their cases heard by IRB members of the Refugee Protection Division (RPD).[98] Drawing from this data, Rehaag argued that an applicant's chances of their leave application, with respect to seeking judicial review by the Federal Court, being granted was ultimately dependant on the decision-maker assigned to their case and on whether the decision-maker had a higher grant rate or a lower one.[99] For example, Rehaag posits that, in a one year span, one IRB board member granted refugee status to all applicants over whose cases they had presided, whereas there were other RPD members who barely granted refugee status in more

[97] York University's Osgoode Hall, "Sean Rehaag" (accessed March 31, 2020) online: <https://www.osgoode.yorku.ca/faculty-and-staff/rehaag-sean/>
[98] Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39:2 Ottawa L Rev 335.
[99] *Ibid* at 342.

than 2% of the cases they had presided over.[100] The IRB argued that patterns in case assignments were a contributing factor that affected the grant rates.[101] Specifically, the number of claims that an individual member may accept or reject is related to the nature of the claims that the member hears and the countries of origin involved.[102] However, Rehaag argues that while patterns in case assignment may in fact affect grant rates, they do not account for the full variations evident in the data. He concludes that outcomes in refugee adjudication hinge, at least in part, on the identity of the adjudicator assigned.[103]

In another article, Hilary Cameron points out that some external factors may also be at play, namely, political influence. Cameron notes that it would be naïve to suggest that the decision-makers are impervious to the political currents circulating around them.[104] For example, when Prime Minister Justin Trudeau had tweeted in 2015 that Canada will welcome refugees, the refugee protection division of the IRB was accepting a greater percentage of claims than it had in the previous 27 years.[105] Whereas, when former Conservative Immigration Minister Jason Kenney, in the early 2010's, claimed that major change was needed because IRB Board members in the refugee protection division were giving protection to individuals who did not need it, the acceptance rate was approaching an all-time low.[106]

This inconsistency and political influence can even be appreciated in judicial reviews of refugee cases. Rehaag, in another article, similarly to Cameron, notes that some of the factors regarding a federal judge's judicial review decision regarding a refugee case could be explained

[100] *Ibid.*
[101] *Ibid* at 361.
[102] *Ibid* at 343.
[103] *Ibid* at 361.
[104] Hilary Cameron, "The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-Making" (2019) 42:1 Dalhousie LJ 1 at 14.
[105] *Ibid.*
[106] *Ibid.*

by the political ideologies they follow and even by their gender.[107] Rehaag found that female judges were more likely to grant leave applications than their male counterparts. While most judicial reviews are going to proceed on a reasonableness review, which inherently involves deference, Rehaag notes an interesting factor regarding political influence.

In line with political influence, Rehaag mentions that judges appointed by the Conservative government, and identifying as Conservative party supporters, are less likely to grant leaves and judicial reviews of refugee claims, often deferring to the IRB's decisions.[108] Rehaag also attributes this to then-Minister Jason Kenney's insistence that the Federal Court show deference with respect to immigration and refugee matters decided by the IRB. On the contrary, judges appointed by Liberal governments are more likely to grant leave and judicial reviews and do not insist on deference.[109] Furthermore, Rehaag notes that absent exception circumstances, one should generally resist the temptation to argue that judges whose grant rates are higher or lower than average provoke a reasonable apprehension of bias and should thus recuse themselves from hearing applications for judicial review in the refugee law context. Instead, Rehaag suggest that we should focus on whether there are institutional impediments to consistent decision making in this area of judicial review – and if so, what might be done about it.[110]

Another article that recognizes potential bias among adjudicators and the outcome of decisions, analyzed more various characteristics beyond just political influence and independence in the decision-making of board members of the RPD. Innessa Colaiacovo

[107] Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1 at 13.
[108] *Ibid* at 32.
[109] *Ibid.*
[110] *Ibid* at 33.

examined 68,000 cases from 2006 to 2011 in her study and found some interesting variations with respect to how decisions were accepted or rejected based on an adjudicator's background.[111] Whereas Rehaag's and Cameron's studies took into account gender and political ideology, Colaiacovo takes into account factors that can explain the lack of duty of fairness and consistency one sees among adjudicators.

While her study also took gender into account, Colaiacovo examined two other significant characteristics – prior work experience and education. Initially, Colaiacovo found that adjudicators who had prior experiences working with refugees and immigrants had a higher likelihood of granting leave and accepting claims.[112] These prior experiences ranged from previous experience working in the IRB or CIC in another role or capacity and previous adjudication experience in review boards such as Social Assistance, Rental Housing, Parole, etc.

Colaiacovo's study also scrutinized decision-makers' previous work with immigrants in settings such as legal and consultancy work and settlement services and whether there was previous work with human rights organizations and previous work in law enforcement.[113] This finding is interesting as it may support the concept that adjudicators with prior experiences in certain categories or areas may also come with stronger training in respect to this area of law. That additional experience and training in turn may allow them to better understand how to deal with claimants in a more open-minded manner and employing the use of cultural awareness and competency.

Additionally, Colaiacovo analyzed a data set for adjudicators with law degrees or master's degrees and found that those adjudicators in the refugee divisions who held either or

[111] Innessa Coliacovo, "Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)", (2013) 1:4 *J on Migration & Human Security* at 122-147.
[112] *Ibid* at 137.
[113] *Ibid* at 132.

both degrees had a higher likelihood of granting leaves and accepting claims.[114] She also found that refugee division board members educated outside of Canada and the US were also much more likely to grant or accept claims, and she mentions this could be due to the intercultural interaction that these adjudicators have had outside of North America.[115]

These two points are important for the scope of this thesis as this demonstrates the importance of cultural competency and awareness. Adjudicators who have previous experience working with refugees and immigrants in different settings or capacities prior to joining the IRB as members have more relevant training in cultural differences. They have more experience with understanding and communicating with immigrants and refugees from different backgrounds and thus may be able to better understand and connect more strongly with claimants by realizing that these claimants have their own personal understandings of their culture, and the fluidity that may be present within that culture.

Furthermore, as Coliacovo also recognizes, those adjudicators who are educated and come from outside of North America may simply better recognize cultural factors and have stronger cultural literacy and awareness.[116] This cultural literacy and awareness may therefore lead to better communication and competency during hearings, which allows adjudicators to sympathize with claimants and connect to their story, even if the claimant and adjudicator do not come from the same country of origin outside North America.[117]

The last article is imperative to understanding why bias is believed to be a key reason for inconsistencies present in the IRB, especially in a cultural context. Cécile Rousseau et al. undertook a multidisciplinary study where they analyzed decisions within the IRB limited

[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid* at 137.
[117] *Ibid.*

primarily to the refugee determination process.[118] Rousseau et al. had conducted a thorough analysis of hearings for refugee claimants coming into Canada. Many professionals, including lawyers and psychologists, had indicated their displeasure with the IRB's decision-making methodology. Of course, the IRB and their members did not agree.[119]

One of the major points of emphasis from this study, which supports this thesis' argument in favour of stronger cultural competence in the IAD, is the role that culture played in this multidisciplinary study when dealing with refugees. Rousseau et al. identified that cultural misunderstandings and lack of cultural intelligence played a heavily influential role during the IRB member's credibility assessments of refugee claimants.[120] The intersection of vastly different cultures alongside different belief systems between the IRB members and the claimants before them was highly problematic during the hearings.

The study highlighted how these cultural misunderstandings lead to many negative interpretations of the claimant's testimonies and oral evidence and how the inability to appreciate the cultural norms and beliefs that claimants held and followed in their own family relations, led to them being seen as acting suspiciously or seen as giving false testimony.[121] Such cultural misunderstandings can further lead to frustration, impatience, and sometimes subsequent aggression on the part of the Board members who then fail to listen properly to testimony or distort or even dismiss altogether key evidence provided.[122]

The lack of cultural awareness and comprehension in turn leads to Board members demonstrating and portraying a generally overall lack of competence and respect. In some cases,

---

[118] Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board" (2002) 15:43 Journal of Refugee Studies 43.
[119] *Ibid* at 46.
[120] *Ibid* at 51.
[121] *Ibid* at 64.
[122] *Ibid* at 63.

Board members would repeatedly interrupt the claimant's testimony and attempt to find holes in it, while deflecting any clarifications provided; this results from the anger of not understanding the cultural implications and the role that culture plays.[123] Even the predisposition of imposing their own understanding of Canadian culture can lead to cultural misunderstandings. In one instance, members of the IRB did not believe a woman's account of being raped due to that woman being unable to produce medical evidence to support her claim. However, these members seemed to dismiss the idea that in some cultures, rape is considered a loss of a woman's honour and affects the reputation of the family, which, as a result, causes women not to seek resources because of the shame of it being known to the public.[124]

Credibility assessments are, however, complex and messy in their own right. Credibility findings are often based on a variety of factors, and it is not uncommon for decision-makers to draw negative credibility inferences from unexplained inconsistencies or omissions in a claimant's evidence.[125] These negative inferences that are drawn can also extend to testimonies that are inconsistent with country conditions, or in the context of this thesis, in appeals in which testimonies may be inconsistent with prevailing cultural norms. However, whereas some members draw negative inferences when assessing applicants and appellants following cultural norms, due to inconsistencies in the testimonies regarding other factors; other IAD members draw no negative inference.

Through these studies, scholars have thus questioned and critiqued IRB decision-makers, suggesting the notion that a bias may exist within the IRB, and can be attributed to the inconsistency in decision-making that must be addressed. These studies, while focusing on the

[123] *Ibid.*
[124] *Ibid* at 62.
[125] Rehaag, *supra* note 12 at 40-41.

refugee divisions of the IRB, still support the concern that similarly exists in the immigration divisions as well. The next chapter will discuss culture in terms of cultural bias and identity, in addition to the legal theories of legal pluralism and critical legal pluralism. This will set the foundation for understanding the cultural bias that is present in the engagement of the credibility assessments conducted by IAD members.

CHAPTER 3: CULTURE, IDENTITY AND IMMIGRATION

"Culture comprises the enduring norms, values, customs, and behavioral patterns common to a group of people. It can manifest itself in shared knowledge, beliefs, art, law, morals, attitudes, customs, behaviors and habits. Culture is a dynamic meaning-making system that directs thinking and suggests appropriate emotions and behaviors."

– Jennifer Schulz[126]

"But culture itself is a dynamic and alchemical mix of many variables, including religion, philosophy, history, mythology, politics, environmental factors, language, and economics. The interaction of these variables – both within the culture and through influence by other cultures produces competing social visions and values in any given society.

– Makau Mutua[127]

Cultural identity is something that all humans possess. This chapter begins with two quotes that demonstrates the complexity of culture itself. The first quote by Jennifer Schulz can simply be interpreted to show that culture is comprised of similar values and norms that are common to a group of people. However, the second quote, by Makau Mutua, shows the complex fluidity within those common norms, that shows that they are not really so homogenous and common to each individual and, therefore by extension, an individual's cultural identity.

[126] Jennifer L. Schultz, *Mediation and Popular Culture* (New York: Routledge, 2020) at 5.
[127] Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 22.

Myron Lustig states that cultural identity refers to one's sense of belonging to a particular culture, or ethnic group. It is formed in a process that results from membership in a particular culture, and it involves learning about and accepting the traditions, heritage, language, religion, ancestry, thinking patterns and social structures of a culture. Individuals internalize the beliefs, values, norms, and social practices of their culture and identify with that culture as part of their self-concept. [128] When accepting or rejecting these beliefs, values and norms, individuals shape their own personal cultural identity. Cultural norms and traditions that our elders and the communities have taught us, passed down through generations from our ancestors dating back to the ancestral lands from where we originate, may not as likely, today, be commonly perceived and accepted to all from the same background.

Over generations, and within today's generation, individuals are exposed to new ideas, beliefs and concepts that, in turn, change their views about the culture in which they have grown up. Debra Chopp believes that, to understand culture, one must understand that the norms associated with a particular culture may change and that people who associate with a given culture may, therefore, naturally, diverge significantly in their practices and beliefs.[129] As marriage customs are part of any given culture, it is therefore only logical that such divergences from such cultural marriage practices will naturally follow.

Unfortunately, some IAD members do not follow this logical understanding. Instead, some seem to believe that it is not possible. These members view such divergences surrounding Indian cultural marriage practices with deep suspicion and view no other plausible reason for such divergence aside from simply gaining admission into Canada. Some IAD members do not

[128] Myron W Lustig & Jolene Koester, *Intercultural Competence,* 7th ed (New York: Pearson, 2013) at 129.
[129] Debra Chopp, "Addressing Cultural Bias in the Legal Profession", (2017) 41:3 *NYU Rev of L & Soc Change* at 372.

view the appellants' and applicants' cultural identities as one that the appellants' and applicants' have constructed themselves. Instead IAD members problematically associate the appellants' and applicants' cultural identity with the socio-cultural practices of their cultural subgroup, and mistakenly assume the existence of an unquestioned marginalization to those practices. If a certain marriage custom is observed to be traditional to a subgroup of individuals based on their cultural traditions, it is assumed by IAD members that all members of this subgroup observe said marriage custom.

I begin this chapter by briefly discussing cultural identity and identity-based assessments. This discussion leads into the understanding of the role that normative practices in a culture play in shaping cultural identity. This may, in turn, contribute to understanding why some IAD members view the cultural norms surrounding marriage for Punjabi and East-Indian applicants in a potentially biased and unnuanced manner.

This is then followed by examining Canada's approach to multiculturalism. Identifying the state's approach to identity-based assessments and multiculturalism is crucial as it outlines Canada's belief on how the state appreciates cultural identity and the cultural differences and traditions amongst our society. While Canada's view on multiculturalism is such that one would think that our government-appointed public bodies, tribunals, and institutions would have an open-minded appreciative approach to cultural backgrounds and differences, it is not always the case.

The chapter then briefly examines a few cultural norms and practices surrounding marriages in India. Examining these norms and practices helps to better understand the biased generalizations that some IAD members hold and apply to the identities of the applicants before them. This is followed by a discussion on the legal theories of legal pluralism and critical legal

pluralism. Legal pluralists identify the multiplicity of legal systems and orders that fall outside state law, such as customary laws arising from cultural norms and practices.[130]

Legal pluralism recognizes that more than one normative legal order may be acting upon an individual simultaneously. However, legal pluralists fail to recognize that individuals are not merely "objects" upon which these customary laws and normative orders, and state laws as well, simply apply to.[131] To view individuals as objects upon which objective standards in the form of customary laws must uniformly apply to, takes away one's own subjectivity in creating their own identity. Instead, there is a greater need for a stronger focus on how individuals redefine their own cultural identity whether in conformity with cultural norms or the refusal to abide by them. This is where an approach drawing from critical legal pluralism likely helps to catalyze this.

Critical legal pluralists identify this subjective basis within individuals. It emphasizes recognition of how individuals may choose to live, construct and create their own cultural identity. I argue that a critical legal pluralism approach is a more just and fair manner in credibility assessments of the IRB. One in which legal subjects (appellants and applicants in the context of this thesis) have their own self-perception individualistic construction of their identity recognized.

My analysis of these theories and the cultural practices and norms comes into account during my critique and examination of IAD decisions in chapter 4. In chapter 4, I connect the explanation of the applicants in regard to their divergence from their culture's marriage practices, the assessment and analysis of the IAD members, and the applicants' individual circumstances and background with the theories and perceptions of IAD members as outlined in the decisions of the immigration application hearings over which they presided.

---

[130] Kleinhans & Macdonald, *supra* note 10 at 31.
[131] *Ibid* at 35.

3.1 Cultural Identity and the State: Constructing Identities

When it comes to understanding cultural identity, the state and other levels of government, including administrative tribunals and their decisions-makers should seek to ensure that their approach to cultural identity is sensitive to diversity and the fluid nature of culture. This includes assessing and approaching the understanding of cultural norms and traditions of non-western cultures.

Avigail Eisenberg advances the argument that the identity politics of individuals being judged or assessed are associated with the attachments and relation those individuals have to ethnicity, religion, language and so forth.[132] One major risk with this approach, however, is that if the state, tribunals and public institutions do not take into account the person's own choices in shaping their own cultural identity, it leads to unjust practices.

Identity approach that treats a group's identity as immutable, static, and non-negotiable, constrains individuals and groups in several ways. First it does so by tying them to static understandings of their identity, including cultural identity. Second it constrains individuals and groups by entrenching the stereotypes about their identities. Lastly, it confines such persons by deepening internal hierarchies that are associated with defining a group's identity in particular ways.[133] In the case of spousal sponsorships, these stereotypes include factors in relation to arranged marriages such as differences in education, age and previous marital histories that are used to identify a group's identity and norms.

The state may reinforce stereotypes about a group or static boundaries about who counts as a member of the group in the course of legally validating particular collective practices or

[132] Avigail Eisenberg, "Rights in the Age of Identity Politics" (2013) 50:3 Osgoode Hall LJ 609 at 613.
[133] *Ibid* at 619.

commitments as core and immutable features of a group's identity.[134] However, where a group's identity is publicly recognized to be fluid and hybrid, it is that much more difficult for judges and other public decision-makers outside the group to endorse conformist and stereotypical understandings about that identity.[135]

In the case of East-Indian Punjabi spousal sponsorships, these stereotypical understandings of Punjabi marriage practices are established through a requirement of conformity to normative arranged marriage practices. In a sense, the normative practices and norms that have been followed through repeated performance in innumerable numbers of marriages over the years, have thus formed a stereotypical socio-cultural identity that is now being applied to individuals who come from that cultural background.

As such, marriages that typically fall in line with established normative practices such as marrying someone with a similar educational background, being close in age with the male being older, etc. are seen as genuine as they conform to the norms and the cultural identity associated with the subgroup. Thus, when determining whether a marriage is genuine, those that may not fall in line with such normative practices are naturally viewed with suspicion and scrutiny. Such circumspection requires an explanation that must satisfy the IAD member as to why the deviation took place and whether or not they find the reasons credible.

Eisenberg argues that when institutional actors are subject to appropriate forms of accountability and transparency, and when minorities may then challenge how their identities are being characterized, the potential then exists for institutional actors to counteract distortions. These distortions include essentialism, co-optation, and social exclusion and the counteracting

[134] *Ibid*.
[135] *Ibid* at 620.

leads to identifying and addressing legitimate grievances that identity based claims raise.[136] Eisenberg's argument in the context of administrative decision-makers needing to be held accountable provides support to the position advanced in this thesis. Specifically, the IRB and the IAD must implement a policy and ethical awareness to cultural diversity regarding people coming to Canada from other countries. This will assist institutional actors to counter their conscious and unconscious biases. By incorporating and implementing it in decision-making processes, specifically in the IRB and IAD, this in turn will ensure that issues pertaining to cultural identity bias stereotypes are combated, and allows for a more fair and just immigration system.

3.2 Multiculturalism in Canada

In 1971, under then Prime Minister Pierre Trudeau, Canada was the first country in the world to adopt multiculturalism as an official policy.[137] The intent of the policy was to preserve the cultural freedom of all individuals and allow for cultural pluralism to be considered an essence of Canadian identity.[138] The policy has since undergone many changes and was officially reaffirmed and given a statutory basis in the *Canadian Multiculturalism Act* of 1988.[139]

The *Canadian Multiculturalism Act* states numerous policy goals including the promotion of understanding and creativity that arises from the interaction between individuals and communities of different origins.[140] Importantly, this legislation also provides that all federal institutions shall promote policies, programs and practices that enhance the understanding of and

[136] *Ibid* at 632.
[137] Eddy Ng & Isabel Metz, "Multiculturalism as a Strategy for National Competitiveness: The Case for Canada and Australia" (2015) 128:2 *Journal of Business Ethics* 253.
[138] Patrick K. Wood & Liette Gilbert, "Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice" (2005) 29:3 *International Journal of Urban and Regional Research* 680.
[139] *Multiculturalism Act, supra* note 41.
[140] *Ibid*, s 3(1)(g).

respect for the diversity of the members of Canadian society.[141] While an argument can be made that immigration applicants are not yet members of Canadian society and as such these goals would not apply to them, that is an unjust conclusion, given the intent of the *Canadian Multiculturalism Act* itself.

Canada is a settler nation and has depended on and continues to depend on new immigrants coming from different cultural backgrounds. The IRB, being Canada's largest administrative tribunal, does in fact fall under the policy goals of the *Canadian Multiculturalism Act* in that it is also considered to be a federal institution. Thus, the promotion and application of these goals extends to their field of work; regardless if the applicant is not considered a member of Canadian society. In fact, the *IRPA* incorporates the notion of multiculturalism as one of its objectives.[142] From the inception of the *Canadian Multiculturalism Act*, the Government has ensured that it has coordinated actions with institutions such as the IRB to ensure that the policy has been implemented in all institutions dealing with an immigrant/refugee base.[143]

Multiculturalism can also extend to showing cultural competency and awareness in that individuals have experienced different cultural experiences and thus, have individualized perceptions and adaptations of their own culture, something that the state and state-appointed tribunals, such as the IRB, should recognize. As Patrick Wood and Liette Gilbert articulate, "multiculturalism is fundamentally about recognition, of the self and others of similar or different cultural experiences and such recognition is ideologically constructed and can be officially endorsed by a state and/or other levels of government."[144]

---

[141] *Ibid* at s 3(2)(c).
[142] See *IPRA, supra* note 4, s 3(1)(b): "to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada."
[143] Fernando G. Mata, "The Multiculturalism Act and Refugee Integration in Canada", (1994) 13:9 *Refuge*: *Canada's Journal on Refugees* 20.
[144] Wood & Gilbert, *supra* note 138 at 685.

The IRB does in fact promote and state that their members receive cross-cultural sensitivity training and that the code of conduct to which their members adhere emphasizes the importance of its members to recognize, understand, and take into account the many cultural backgrounds and differences the applicants have when presiding over their cases.[145]

Yet, despite Canada being a celebrated leader on multiculturalism and having its members of society preserve and express their culture with pride, there is still some discrepancy regarding the cultural competency and awareness in those evaluating immigration applications. Specifically, the lack of it in recognizing individualized acceptances or rejections of cultural marriage norms of immigration applicants. While this thesis focuses primarily on spousal sponsorship issues and the cultural practices and norms surrounding Indian marriages, the ideal situation would be for the intent of the *Canadian Multiculturalism Act* and *IRPA* to include in its goal of promotion and understanding of cultural differences, the concept in recognizing that culture is fluid and so are individuals' cultural identities based on which aspects of culture they choose to accept or reject.

Yet, there are instead often instances where the understanding of this is not present and applicants do not benefit entirely from the multicultural and open-minded approach that Canada prides itself on. Instead, often the case arises where the deference in decision-making given to members of the IRB offers some leeway for biased views of marriage practices, based on the assumed rigidity of cultural norms and traditions related to marital unions.

As will be seen in chapter 4, in some cases it can be argued that IAD members' legal pluralistic viewpoint in recognition of customary laws surrounding marriage practices, leads to conflict when they uphold these customary laws as legal standards to which appellants and

[145] *Code of Conduct for Members of the IRB, supra* note 92.

applicants must adhere. This then equates to a biased lens that fails to take into account the choices one makes with respect to which practices and norms amongst societies in the Global South, such as India, one chooses to accept or reject when creating their own cultural identity. Instead of recognizing that the individual is the author of their own life and choices, applicants and appellants are asked to demonstrate the genuineness of their relationships in a way that conforms to this generalized cultural biased lens that IAD members use to analyze a claimant's case. These generalized biases stem from the dominant practices and norms surrounding marriages in Punjab and India as a whole, and an IAD member's perspectives on them.

3.3 Marriages in India

In many cultures based outside the Global North, love is not always a requirement for entering into a marriage. In India, arranged marriages are still highly practiced and the marriage system is still dominantly based on social stratification. This means that most marriages would take place between people from the same religion, caste, educational similarities, and economic group.[146] In an arranged marriage, the parents (grandparents and/or other household heads), would take responsibility for finding eligible partners for their children.[147]

However, India is changing in regard to marriage practices. Modernization, skewed sex-ratios, urbanization, globalization, and socio-economic developments of the Indian economy have also contributed to the changing trends in marriage practices and patterns.[148] Within these shifts, there has been more of an emphasis on individual values as opposed to group values.[149]

---

[146] Minakshi Vishwakarma et al., "Variation in Marriage Squeeze by Region, Religion, and Caste in India" (2019) 50:4 *Journal of Comparative Family Studies* 315.
[147] *Ibid.*
[148] *Ibid.*
[149] Rajagopal Ryali, "Matrimonials: A Variation of Arranged Marriages", (1998) 2:1 *International Journal of Hindu Studies* 108.

Some scholars had predicted over time that the modernization theory, the theory used to explain the process of modernization within societies, would lead to non-western countries converging to western models of societal practice including marriage where individuals would choose their own spouses.[150] While the overarching norm is still for arranged marriages to be initiated by family or a "match-maker" to search for a spouse for their relative from a similar socio-economic background, in today's arranged marriages, practices are modified to various degrees. These modifications are done to lessen or eradicate these certain norms and in turn introduce elements associated with Western love narratives, like companionate marriage and freedom of choice, in which two people choose to marry each other out of love but still have the family arrange the marriage for traditional purposes.[151]

But what happens when individuals depart from the traditional cultural norms regarding arranged marriages that are rooted in such socio-cultural norms? When some IAD members fail to recognize the ability of individuals to engage in these modern non-traditional marriage alliances, due to personal choices and beliefs, it demonstrates a lack of awareness to these changes in cultural practices.

The failure to recognize these changes also applies to IAD members' views on arranged marriages where, while assessing them against the normative orders held as legal standards in their assessments, a conflict arrives when it challenges or deviates from these standards. These standards most commonly, in Punjabi IAD spousal sponsorship decisions, include cultural norms and views on factors such as age differences between the spouses, educational differences and even previous marital histories of one or both of the spouses.

[150] Keera Allendorf & Roshan Pandian, "The Decline of Arranged Marriage? Marital Change and Continuity in India", (2016) 42:3 *Population and Development Review* 435.
[151] Bowman & Dollahite, *supra* note 44 at 208.

The reasoning for this potential lack of recognition could be attributed to the concern of fraudulent marriages that are entered into in order to gain entry into Canada, which in the case of India, has been documented in Canadian media.[152] But such concerns, while valid in their own right, are also still perhaps rooted in a misunderstanding that individuals cannot depart from broader cultural practices of the community to which they belong. Or to put it in another way, and to coincide with Eisenberg's argument, culture is effectively made static and thus any deviations from IAD members' understanding of another's cultural practices becomes registered as suspect or fraudulent.

Factors such as education, age and previous marital histories are all heavily scrutinized by IAD members when assessing spousal sponsorship cases. However, IAD members' understanding and assessment of these factors, in determining whether or not a deviation from them may lead to a question of bad faith marriage, may be flawed due to the contrast between what they know as the normative practice via repetition in traditional arranged marriages and being presented with situations where the factors do not fall in line with tradition. This in turn leads to a negative credibility finding against the appellants and applicants, due to the IAD members' failure to understand these factors and the beliefs related to them through the eyes of the applicant and appellant.

Examples of these normative practices held as legal standards in respect to these factors (age, education, and marital history) in marriages will be examined in the decisions presented in chapter 4. In these decisions, we will see how IAD members explain their understanding of the

[152] See David McKie, "Marriages of convenience problems persists", *CBC* (08 Nov 2010), *online: CBC* <https://www.cbc/ca/news/politics/marriages-of-convenience-problems-persist-1.876101>, "Government launches campaign to warn Canadians of immigration fraud", CTV Montreal (24 March 2013), *online: CTV NEWS* <https:montreal.ctvnews.ca/government-launches-campaign-to-warn-canadians-of-immigration-fraud-1.1209471>

customary normative practices related to these factors and how they require explanation when the appellant and applicant before them do not adhere to them.

3.4 Legal Pluralism

The apparent recognition of traditional non-state-based cultural norms regarding marriages have consequently been given some heightened normative value by IAD members. Accordingly, IAD members have applied them as rigid legal norms. Yet, what might explain this elevation of cultural norms?

The legal theory of legal pluralism is defined as a situation in which two or more legal systems coexist in the same social field.[153] Contemporary legal pluralism is the recognition that, within any social group or space, there may be multiple legal orders operating simultaneously (based in both state law and non-state law), sometimes in harmony and other times in conflict.[154] There are two views from which legal pluralism can be seen. The first is a "juristic view"[155] and the second, a "social science view". This thesis focuses on the social-scientific view of legal pluralism, as it relates to socio-cultural practices and norms related to marital practices in India and its relation to being elevated as legal orders by the IAD.

Social-scientific legal pluralism rests on an image of law as an external object of knowledge, within which norms, institutions, and processes and agents of every legal order, however multiple and however incommensurable, can be measured.[156] Social-scientific legal pluralists tends to reify "norm-generating communities" as surrogates for the State.[157] As such,

---

[153] Merry*, supra* note 9 at 870.
[154] Kleinhans & Macdonald, *supra* note 10 at 31.
[155] Merry, *supra* note 9 at 871*:* A legal system is considered pluralistic in the juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality or geography and these legal regimes are all dependent on the state legal system.
[156] *Ibid* at 37.
[157] Kleinhans & Macdonald, *supra* note 10 at 35.

legal subjects are exclusively constituted by law, and legal subjectivity is associated with the criteria of identification, or conformation, to a particular measurable norm or process within in each legal order.[158]

Coinciding with the previous discussion and Eisenberg's argument on how the state shapes identities through stereotypical normative practices, social-scientific legal pluralism can be argued to show that it recognizes socio-cultural norms as rigid legal norms. Through such treatment, it recognizes individuals in some social spaces and societies to identify with, or conform to them, while ignoring the agency of the individuals themselves.

Therefore, while social-scientific legal pluralism provides an important space to consider the roles that non-state legal orders, such as cultural norms, play in governing individuals and human societies more broadly, there seems to be two major issues in its theory. First, the social-scientific legal pluralist corresponds with an essentialist and/or positivistic image of law. One that sees that legal subjects, within a legal order governed by cultural norms, must identify to those cultural norms.[159] This gives an image that the cultural form of law is objectified and reified in that a cultural legal order always operates instrumentally, even in the present, without taking into account or considering a challenge to these cultural normative practices[160]

Furthermore, it disempowers the subject and its construction of law in that the legal subject (individual) is viewed only as an abstract individual.[161] This tends to ignore any legal subjectivity an individual may have within a specific context. The individual, as a legal subject, is simply looked at based on the norms that the individual is subjected to and is thus required to identify with some normative legal order.

---

[158] *Ibid.*
[159] *Ibid* at 35.
[160] *Ibid* at 35.
[161] *Ibid* at 36.

This leads to legal subjects simply being subsumed to homogenous labels under this social-scientific view of legal pluralism, rather than being seen to exist as heterogeneous, multiple individuals.[162] Social-scientific legal pluralism and the objective measurements it places on normative orders, and customary laws, invokes the shaping of stereotypical cultural identities. Individuals are assessed to demonstrate their conformity to the normative order, or have a valid reasoning for rejecting it, and are assessed against the normative order rather than the subjectivity in their reasoning behind conforming or rejecting said norms.

3.5 Critical Legal Pluralism

Critical legal pluralism is a challenge to social-scientific legal pluralism, related to cultures and communities.[163] Critical legal pluralism treats legal subjects as "law inventing" and not merely as "law abiding".[164] It rejects the fact that law is a social fact, instead presuming that knowledge is a process of creating and maintaining myths about realities. Legal knowledge is seen as creating and maintaining self-understandings. It is how legal subjects recognize and react to relations within and between legal orders that is contributive to their own recognition and self-understanding in any given time.[165]

Critical legal pluralism corresponds with cultural awareness and competency as, in its treatment of subjects as "law inventing", it allows for consideration of the subjectivity and choices of the individual and not just a measurement of their choices against their cultural norms. Critical legal pluralism posits that individuals are not simply objects of law, but rather possess a constructive capacity with the ability to manipulate and transform the contours of their own

[162] *Ibid.*
[163] *Ibid* at 38.
[164] *Ibid* at 39.
[165] *Ibid.*

normative behavior.[166] This approach allows us to understand that law is not simply an external measurement, but instead is internal to each individual's own subjectivity.

This legal theory assumes that subjects control law, as much as law controls subjects, within its normative sphere. It is a call for a more intense consideration of the legal subject, conceived as carrying a multiplicity of identities.[167] A critical legal pluralism requires human beings to appreciate their own norm-constituting potential, that is, to accept that interaction is fundamental to all normativity.[168] Legal subjects learn about the law, first and foremost from themselves. This is not to say that they reject law itself, but they reject the notion that the pre-existing word and accompanying institutional rituals, norms, sacraments, are the source and force of law.[169]

While legal pluralism recognizes the norms and customary laws that regulate society and social practices, such as marriage, it is critical legal pluralism that recognizes the norms through the subjective eyes of the individual being scrutinized. It recognizes the personal freedom, choices, and experiences individuals have in their multiplicity of identities they carry and the aspects or normative orders that they choose to accept, reject, or manipulate without needing to be measured against those norms.

Critical legal pluralism as a legal theory, simply resonates more with the need for cultural awareness and competency. The need for understanding that individual's form their own perspectives about cultural norms as an alternative conception of legal normativity is crucial. The IRB must recognize that individuals form their own perspectives about cultural norms and, in

---

[166] *Ibid.*
[167] *Ibid* at 40.
[168] Roderick A Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism", (2011) 26:2 *Canadian JL & Soc* at 311.
[169] *Ibid.*

turn, shape their own cultural identities and this recognition will allow for stronger communication and fair practices.

In connection with determining the validity of a marriage, it is valid for the IAD to consider the cultural norms that govern marriage practices within the culture of the individual applicants or appellants that are before them. However, the analytical process must go further. In adopting a critical legal pluralist approach, IAD members need to also consider the individual perspectives and constructions of legal normativity regarding relevant marriage customs. Such an approach aligns with the Federal Court's decisions with respect to examining applicants' subjective perspectives on marriages within their cultures through their own eyes.[170]

This is especially important when applicants engage in types of marriages that depart from those that follow more traditional norms. Such an approach illustrates a degree of awareness to the fluidity within cultures and a sensitivity to individual subjectivity to make choices with respect to cultural norms. It also avoids a close-minded approach that looks at the relevant cultural norms as determinative.

3.6 Conclusion

Cultural norms and traditions may be used to shape cultural identities in a stereotypical and biased manner in legal systems. One that, in a way, does not take into account the individual's subjectivity in viewing how they, the individual, see their own cultural identity. By not mitigating this, the legal system may continue to instead reinforce these stereotypes. Canada is known for its stance on multiculturalism and respect for the cultural differences and

[170] *Khan v Canada (Minister of Citizenship and Immigration),* 2006 FC 1490 at para 16.

perspectives of all of its citizens. However, aside from respecting such differences, we must also seek to recognize and accept their own individuality within those cultural differences.

Incorporating cultural competency and awareness, through recognition of an individual's subjectivity in viewing and formulating their own cultural identity, on a more consistent basis can allow for a more just immigration system. This further ensures that impartiality is strived for and decision-makers adopt a more open-minded approach. An approach that recognizes that departures from traditional cultural norms concerning marriages, are not to be viewed as illegitimate or not genuine.

In considering legal pluralism, as this thesis does, it appears that IAD decision-makers are not only recognizing non-state socio-cultural norms governing marriage customs, but also acknowledge them effectively as legal norms. This leads to an objective, non-negotiable stance in that customary laws are treated as legal criteria to which individuals are measured against. This may further enforce cultural stereotypes and shaping cultural identities in a negative manner, by seeking to establish that all individuals must adhere to these customary laws, simply because they fall within the subgroup to which these normative laws seemingly apply to.

Instead, this thesis argues that critical legal pluralism should be incorporated in the IAD's decision-making. Critical legal pluralism may allow for a better incorporation of cultural awareness, in that it takes into account the subjectivity of the individual and their own experiences and viewpoint of their own culture. This subjective perspective of the individual allows for more challenges to normative orders in a way that provides knowledge to decision-makers on the ever-changing and fluidity of cultural norms. Thus, the individual is not simply portrayed as an individual who must adhere to normative cultural practices, but rather should be

seen as having the freedom to decide how these cultural norms translate into their own lives and whether to comply with them.

CHAPTER 4: ANALYSIS AND CRITIQUE OF IAD DECISIONS

This chapter presents IAD decisions related to spousal sponsorship applications for Punjabi appellants and applicants. I have chosen decisions between the years of 2007 to 2021. The reasoning for this timeframe is in relation to the shifting trends in India with respect to marriage practices, and the changing fluidity in the cultural norms associated to these marriage practices.

The first part of this chapter discusses the structure commonly followed by IAD decision-makers, when assessing and analyzing these decisions, in relation to the cultural norms and factors that are taken into consideration during credibility assessments. IAD members' analyze a set of cultural norms in order to consider the compatibility between the spouses. This is done in an effort to determine whether the marriage is genuine, or one that is entered into in bad faith for immigration purposes, in breach of section 4(1) of *IRPA's* regulations.

The chapter then leads into the methodology used in selecting the decisions examined for this thesis. Following my presentation and discussion on IAD decisions in this chapter with respect to the cultural norms that were assessed, I examine the inconsistencies and variations between IAD members drawing on the framework outlined in chapter 3 on cultural identity and the legal theories discussed. As will be demonstrated, some IAD members recognized the socio-cultural norms and traditions surrounding marriage practices yet applied them rigidly when assessing the genuineness of the marriages. Meanwhile other IAD members have acknowledged the existence of the same norms, but have taken the individual's own views and subjectivities into account.

4.1 IAD Decision-Makers: Assessing Cultural Norms

Members of the IAD rely on the cultural norms and traditions of the cultural background of the parties appearing before them, in order to aid them during the credibility assessments of the appellants and applicants. Examinations of such cultural norms and traditions are undertaken to assess the compatibility between the spouses, as the parties must address the cultural norms and factors flagged by IAD members.

Under s 4(1) of the *Immigration and Refugee Protection Regulations*, members of the IAD must assess whether a marriage is genuine or is simply entered into on bad faith for the purposes of immigrating into the country.[171] Section 4(1) outlines that a bad faith relationship is one for which it has been established, that: 1) the relationship was entered into primarily for the purpose of acquiring any status or privilege under *IRPA,* and 2) the relationship is not genuine.[172] Within this, appellants must bear the burden of proof to prove that one of the two prongs of this test does not apply to their marriage, in order to be successful in their spousal sponsorship appeal. If they are not, then section 4(1) allows for the exclusion of the spouse being sponsored from the family class.[173]

The determination of whether a marriage is genuine, is done by assessing and scrutinizing the cultural factors and norms, traditional to the cultural marriage practices from which the parties reside from, in this case being the Punjabi cultural – and, by extension – Indian cultural norms. Naturally, the question arises in that where and how do IAD members get their understanding of cultural norms and traditions surrounding Indian marriages? How do they

[171] *Immigration and Refugee Protection Regulations, supra* note 14.
[172] *Ibid.*
[173] *Ibid.*

understand and apply their understanding or knowledge on these norms and traditions in order to come to a just decision?

While IAD hearings are *de novo,* members frequently referred to the immigration or visa officer's notes for rejecting the application in the first place. Within these notes, it was common for the visa officer to outline certain cultural norms and factors which they found to prove the incompatibility between the parties. This led the officers to conclude that the marriages constituted bad faith relationships and were not genuine marriage for the purposes of section 4 of the *Regulations*. Additionally, aside from just the visa officer's notes, these factors and norms that IAD members are to consider, when making a decision, have also been outlined by both other IAD decisions,[174], and the Federal Court.[175]

Common to both Punjabi and Indian spousal sponsorship applications, IAD members consider the following factors: age difference, educational differences and previous marital histories. IAD members use these factors as guides to govern marriage practices, as they pertain to the Punjabi socio-cultural norms of the applicants' and appellants' that come from India. The more compatible the parties were deemed to be in respect to each factor, when viewed in relation to the cultural background that the parties come from, the greater positive influence on their appeal. The less compatible, the less favourable.

Consistent with a legal pluralist approach, many IAD members have in fact recognized these factors as non-state cultural norms and traditions that govern marriages practices. However, for these members, it is the approach in their decision-making through a rigid stance with these norms and factors that is problematic.

[174] *Chavez v Canada* (*Minister of Citizenship and Immigration),* 2005 CarswellNat 7250, [2005] IADD No 353.
[175] *Khera v Canada* (*Minister of Citizenship and Immigration),* 2007 FC 632 at para 10.

When assessing the explanations as to the deviation from cultural norms, and consistent with critical legal pluralism, many IAD members seemed to take into account the subjectivities of the claimants. In particular, such decision-makers understood that there are exceptions to cultural norms as parties have the right to choose and have a say in shaping their own socio-cultural identity, even if it departs from these traditional norms. Furthermore, parties may do so without it affecting their credibility in the appeals process. Furthermore, there were also instances in which certain cultural norms and factors that may have been highlighted by the visa officer or noted by the IAD member, seemed to be given no weight or were given a neutral consideration when assessing compatibility and credibility of the parties.

4.2 Methodology

The methodology I have employed to find relevant IAD decisions involved searching the Westlaw Canada legal database, and applying certain filters and key search words. I narrowed the search to English language decisions. Furthermore, I used certain filters to search for cases specifically within "Board and Tribunal Decisions" and relating to "Immigration" from 2007 to 2021. The reasoning behind this time frame is to correspond with the argument, previously presented, that India is now modernizing and shifting away from traditional cultural norms and conventions related to marriage traditions, which has always been attributed to the country. As such, decisions within this timeframe are to likely include some reflection regarding these departures and explanations provided by IAD members.

In addition, key search words were used within these filters to yield a specific result relating to spousal sponsorship applications from Punjab. Such key search words included "immigration appeal division", "punjab", "genuine marriage" and "spouse". The use of these

filters and key search words yielded approximately 2,253 IAD decisions, which were arranged by relevance. Despite these search parameters, the search yielded many decisions where the appellant and/or applicant were not from India, let alone Punjab.

In order to limit the focus to Punjabi applicants, I reviewed those decisions where the names of the appellants reflected a common Punjabi surname (e.g. surnames such as Sandhu, Grewal, etc.) or had some relation to Punjab and Punjabi culture. From my review of those decisions, I included those which displayed contradicting acceptances or rejections, by IAD members, of similar explanations provided by appellants and applicants in relation to deviations from certain factors and norms.

This yielded a sample of cases in which the credibility assessments of the parties, when examining compatibility concerns, were shown to be inconsistent with one another. This inconsistency is attributed to the decision-makers' explanations regarding their understandings and beliefs related to the parties' divergence from certain cultural norms and factors. Additionally, the weight attributed to each factor based on the explanation of the facts and whether a negative, positive or no implication was drawn towards the credibility of the applicants and appellants, also varied between members and decisions.

While it is difficult to present a complete and total widespread qualitative presentation of the decisions involved within the scope of a master's thesis, I nonetheless reviewed and present a number of decisions below. These decisions, while limited in quantity, nevertheless substantiate my argument and highlight the inconsistency amongst IAD decisions and members in their credibility assessments and determinations regarding the genuineness of the marriages before them. It further strengthens the argument of this thesis in that the IRB must implement stronger

cultural awareness and competence training and employ perhaps Chairperson guidelines concerning the diversity of marriage practices, among other issues, to address this inconsistency.

4.3 Analysis of Decisions: Inconsistencies amongst critiques of Cultural Norms and Factors

While each of the norms and factors discussed below are not exhaustive of the factors considered in East-Indian Punjabi spousal sponsorship applications, they are the ones most scrutinized when applicants depart from cultural practices concerning marriages. It is important to reiterate that the Federal Court has asserted that caution must be employed when assessing these factors and cultural norms.[176] Yet, the scrutinizing of whether a marriage is genuine, based on normative practices and the assessing of compatibility between the spouses is seemingly flawed. First, there were many inconsistencies with respect to IAD members drawing a positive or negative inference from the consideration of deviations from these cultural norms and factors, based on explanations given by the parties. Secondly, there were also times in which IAD members comments were simply inappropriate and contrary to Federal Court directions.

Additionally, while these cultural norms and factors are not determinative in themselves when assessing the genuineness of the marriage between the parties, the difference amongst different decision-makers in the assessment and consideration given to each factor and norm in different decisions, is concerning.

[176] *Gill, supra* note 84.

4.3.1 Compatibility in Age

The ages of the parties was one factor that was frequently questioned, particularly in arranged marriages, when assessing compatibility decisions related to Punjabi appellants' and applicants'. Similarities in age were often seen as a positive inference from IAD members, and members often noted that within the Punjabi and Indian culture, it is usually the cultural norm for the male to be older than the female and marriages where younger males marry older females are suspicious in arranged marriages.[177] Some IAD members have criticized age differences between the parties as the basis for determining whether the marriage was genuine, or entered into in bad faith.

IAD members have red-flagged, as questionable, marriages in which the female spouse was older than the male. Regarding questions of age and incompatibility, IAD members relied on the visa officers' comments of age differences and whether the differences were in line with, or contrary to what is a normative cultural norm in Punjabi and Indian culture. IAD members made it clear and identified that, when assessing a marriage where the female spouse was older than the male spouse, such relationships were not in conformity with standard cultural practices or one consistent with Punjabi and Indian cultural norms:

> "The Panel is aware that the appellant is 5 years older than the applicant, her husband, which was a concern for the immigration officer who interviewed the applicant. The age

[177] *See Aujla v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 8911 at para 14, [2017] WDFL 1716; *Grewal v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 9185 at para 22, [2017] WDFL 1855; *Mehmi v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 8835 at para 16, [2016] WDFL 2035; *Dhaliwal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9310 at para 13, [2016] WDFL 2294; *Bedi and Canada (Minister of Citizenship and Immigration),* 2018 CarswellNat 9151 at para 26.

difference was a red flag as generally in Indian culture husbands are older than their wives."[178]

"The five-year age difference between the appellant and applicant was a concern for the immigration officer and remains the same for this Panel given Indian culture and norms in relation to arranged marriages. In this instance, the female applicant is five-years older than the male appellant."[179]

However, in one decision, and inconsistent with this common understanding, one member found that it was in fact within the cultural norm for arranged marriages, where the female appellant was a few years older than the male.[180] Furthermore, in similar instances where the female was older than the male, the member did not consider it a relevant factor or drew any negative inference from it at all.[181]

During IAD hearings, parties where the female spouse was older than the male spouse provided explanations for these gendered aged difference. The IAD members varied on their acceptances or rejections of the parties' explained departures. A number of members approached the explanations with an open-mind that took the parties subjectivity into account and accepted

[178] *See Padda v Canada (Minister of Citizenship and Immigration)* 2014 CarswellNat 7682 at para 15, [2015] WDFL 4924.
[179] *Dhaliwal, supra* note 177 at para 13; *See also Chhokar and Canada (Minister of Citizenship and Immigration),* 2019 CarswellNat 9784 at para 18; *Chauhani v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 6421 at para 17, [2017] WDFL 171.
[180] *See Sidhu v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 3343, {2016] WDFL. 4425 at para 13*:* The member noted that despite the female appellant being two years and four months older than the male applicant, this was within the cultural norm for arranged marriages in India.
[181] *See Kaur v Canada (Minister of Canada and Immigration),* 2016 CarswellNat 995 at para 2, [2016] WDFL 2809. The female appellant was one year older than the male applicant; *Dhillon v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 6985 at para 25, [2017] WDFL 513. The female appellant was 3 years older than the male applicant, which the member found modest and of no concern; *Sandhu v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 6898 at para 26, [2016] WDFL 817.

the explanations provided by the appellant and applicant before them, when questioning them on the difference in age. Many of the parties simply testified that age was either not a concern for them, or would reference they were in love or it was a love marriage, and these explanations were simply accepted by the members.[182]

There are several examples where IAD members considered the subjective views of the parties testifying before them, and accepted their explanations regarding the age differences between them despite the prevailing cultural practices. In one decision, for example, the appellant was a 40-year-old female and the male applicant was 32-years-old. Despite noting the age difference and the uncommonness for a younger male to marry an older female, the IAD member accepted witness testimony that the age was not a factor as both spouses were deeply attracted to each other from the start.[183]

Another member, while noting that a 13-year age gap existed between the older female appellant and male applicant, drew attention to this disparity during the appeal, yet their testimonies regarding the age difference signified that it was not important to them and that their families accepted it. The member found that their testimonies did not impugn their credibility.[184] In another decision, despite being aware of a nine year age difference whereby the female was older, and noting that the age difference was outside cultural norms, the member accepted that the parties simply overlooked this and wished to proceed with their marriage.[185] One member had also accepted that the older appellant, after initially being married to a man of her age, wanted a younger man whom she could mould. In turn, the male applicant testified that he

[182] *See Munjal-Bal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 7247 at para 14, [2016] WDFL 653; *Sidhu v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 8588 at para 10, [2017] WDFL 1168; *Randhawa and Canada (Minister of Citizenship and Immigration),* 2018 CarswellNat 9227 at para 14.
[183] *Aujla, supra* note 177 at para 14.
[184] *Sidhu, supra* note 182 at para 10.
[185] *Bhatti and Canada (Minister of Citizenship and Immigration),* 2019 CarswellNat 2795 at para 7.

wanted to marry a more mature woman and did not feel bound by the cultural norms or taboo whereby the male should be older.[186] Similarly, another IAD member also accepted the explanation given in a decision where the female was older and accounted for this age difference by stating that age is simply not a primary concern in the arrangement of marriages in contemporary culture, compared to the old ways.[187]

In contrast to the more accepting approaches mentioned above, numerous other IAD members rejected sponsorship claims because of the age differences between spousal claimants. This is despite the fact that such claimants furnished similar explanations about how the age difference did not matter. The IAD members did not believe or feel that the deviations were satisfactorily addressed:

> "When questioned by the Minister's counsel pertaining to the age difference, the appellant states, '*Her family looked nice and she has relatives in my village'.* The appellant also stated that is normal in his culture for a man to marry a woman five years older. While it is possibly that there are some marriages fitting this scenario regarding the age difference, the appellant did not satisfactorily address the concerns raised on this issue with respect to Indian arranged marriages."[188]

[186] *Birdi and Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 5606 at para 13, [2017] WDFL 5610.
[187] *See Brar and Canada (Minister of Citizenship and Immigration),* 2019 CarswellNat 9286 at para 29; *Kaur v Canada (Minister of Citizenship and Immigration),* 2013 CarswellNat 9310 at para 20, [2015] WDFL 3758.
[188] *Dhaliwal, supra* note 177 at para 27.

> "He testified the age difference does not concern him, what matters is the love between the spouses. In this case however, the match was arranged by families and the couple was married two weeks after a first meeting between them that was brief. It seems unlikely love was the main consideration. I find the applicant's evidence does not adequately explain why his family departed from cultural beliefs."[189]

Additionally, while recognizing that it is the norm for males to be older than females in arranged marriages, members also tended to view wider age gaps between such spouses as suspicious. While it may be reasonable to view age gaps, both modest and wide ones, with suspicion in regards to compatibility between the couple, it may not always be an appropriate idea to always relate it to a cultural norm, when there is vast inconsistency in the assessment of these age differences. For example, in one decision, *Dhaliwal v Canada (Minister of Citizenship and Immigration)*, the 71-year-old male appellant sought to sponsor his 38-year-old female wife. Both parties were previously married and had children, and the major concern specifically noted by the visa officer and reiterated by the IAD member was the age difference.[190] However, the IAD member noted the Federal Court's direction in how there should be no fixed ideas of how a marital relationship should develop, and that while acknowledging that the age gap runs counter to what is considered normal by Punjabi tradition, the member relied on the testimony of the parties in the comfortability with the age gap.[191] The couple testified that their main purpose at this stage in their lives, was companionship rather than romance and they addressed the concerns

[189] *Dhaliwal and Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 8519 at para 13.
[190] *Dhaliwal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9586 at para 13, [2016] WDFL 2435.
[191] *Ibid.*

of how they currently deal with any physical challenges they face due to the appellant's age.[192] The Minister argued that the applicant, being of only 38 years of age, is more likely seeking the marriage to afford better opportunities for herself and her children in Canada rather than companionship with her much older husband. While the IAD member acknowledged that this may be true and that age will become more of an issue in the future, the strong evidence based on their testimony and addressing to the incompatibilities showed that immigration was not a primary purpose[193] and the appeal was allowed. This was not the only case as well, in which an older couple with a wide age gap who simply sought companionship was allowed as a credible explanation, despite arguments that the sponsored spouse had potential immigration motives.[194]

What is notable about the previous *Dhaliwal* decision is that the IAD member considered the testimony as strong evidence demonstrating that companionship was being sought. In addition, the testimony provided necessary details with respect to the physical challenges faced due to the appellant's age; it served as a positive inference in accepting the difference in their age in connection with compatibility and the genuineness of their marriages. However, the acceptance of such age disparities is not always the case.

In another decision, where there was a similar age gap alongside testimony explaining that the parties were seeking companionship, the member simply found that the large age gap conflicted with the likelihood of their compatibility. In this decision, *Dhaliwal v Canada (Minister of Citizenship and Immigration)*, the appellant was a 71-year-old man and the applicant was a 42-year-old female.[195] Similar to the previous case, both parties were previously married

[192] *Ibid.*
[193] *Ibid.*
[194] *See also Bains v Canada (Minister of Citizenship and Immigration),* 2013 CarswellNat 7659 at paras 28-29, [2015] WDFL 2497.
[195] *Dhaliwal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 8563 at para 5, [2016] WDFL 1524

and had children.[196] Both parties also similarly stated that they entered into the marriage for companionship, as they each wanted a partner.[197] However, while in the previous decision, the member acknowledged that the parties married for companionship and accepted that their age was not a concern to them, here the member considered the evidence that the marriage was arranged in a haste and that the applicant knew very little about the appellant. As such, despite the parties mentioning they got married in a haste due to seeking a life partner, the member dismissed the appeal.[198] In this decision, the member focused on the haste and fact that the parties knew very little about one another, whereas in the previous decision, the member acknowledged that the applicant, who was testifying over the phone, was heard to be shuffling papers when being questioned about the appellant, yet still proceeded to accept the testimony. One could therefore argue that the applicant may not have known much about the appellant at all given she had papers in front of her during her cross-examination, but the testimony in regards to seeking a companion was given enough credibility to allow the appeal. Consider the contrast to the IAD member who stated that because the applicant in the other *Dhaliwal* case did not know much about her husband, and did not have papers in front of her, despite also testifying she looked for companionship, her appeal was denied.

While it may be reasonable to assume that in the first *Dhaliwal* decision, the parties' testimony and evidence of addressing the incompatibilities show why that was accepted, it is in contrast to the second *Dhaliwal* decision. In the second decision, there were multiple red flags which were not addressed and subsequently led to the dismissal, despite that parties in both decisions referencing they entered into the marriage for companionship.

[196] *Ibid* at paras 9-10.
[197] *Ibid* at para 12 and 18.
[198] *Ibid* at para 33.

Consider the next decision, *Mahal and Canada (Minister of Citizenship and Immigration)*, where there were otherwise also many red flags during the testimony related to the genesis of the relationship, lack of similarities in marital history, and lack of acknowledgement of love and knowledge of one another between the parties.

In this decision, the parties had an 11-year-age gap between them with the appellant being a 67-year-old male at the time of marriage and the applicant being 56-years-old at the time.[199] The member found this age difference as a negative inference, despite being much lesser than the age differences in both *Dhaliwal* decisions. Furthermore, what did not help in the appeal was that the testimony of each party did not adequately address any of the aforementioned red flagged incompatibilities, nor that the couple discussed contingency plans if the appellant were to become ill or died, given the age difference.[200] The only explanation provided consistently in the testimony, was that the applicant was religiously devout. In fact, when asked why she decided to marry for the first time (it was her first marriage) to a divorced man with five children living in Canada, she stated that wanted to spend the rest of her life to further God's work. Yet the member pointed out that neither party could explain why marriage to the appellant would help her in this.[201] Despite the failure to provide an explanation, the member accepted the parties as credible enough. The member simply saw them as unworldly people, despite the otherwise prima facie incompatibilities and lack of satisfactory answers to questioning, to allow the appeal. The member simply concluded that immigration would not be a primary purpose for an individual such as the applicant.[202]

[199] *Mahal and Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 5332, [2017] WDFL 5439.
[200] *Ibid* at para 17.
[201] *Ibid* at para 18.
[202] *Ibid* at para 21.

While these three decisions demonstrate the consideration of the testimonies of the parties to explain the age differences in their particular cases, what explanations can be provided to justify the inconsistent assessments and considerations by each IAD member? What does this speak to in regards to what would be a just decision to dismiss an appeal based on inconsistencies, or a lack of evidence or addressing of red flagged items, and what would not be a just decision to accept an appeal when there is also red flagged item, but the evidence considered credible is simply someone stating they are religious?

Additionally, there were often cases with a wide age gap in which the member simply drew no inference or the member simply accepted the explanation from the parties that the age difference was not a concern.[203] In some instances, the explanations provided by appellants and applicants indicated that other marriages in their families also had similar wide age gaps. Such evidence was seemingly accepted as credible to explain deviations concerning norms relating to age disparities among spouses.[204]

Viewing these decisions and variations through the framework of chapter 3, IAD members simply had different opinions and approaches to assessing this cultural norm. Many, if not all, relied on the visa officers' concerns when noting cultural norms related to age differences in Punjabi marriages and how some of the marriages in the appeals before them go against this. Thus, by upholding this cultural norm, some IAD members continued to further reinforce this stereotype, similar to Eisenberg's argument, by commenting on what would appear as a "compatibility in age" in accordance to the cultural norm and traditional marriage. It is a norm

[203] *See Sangha v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 10203 at para 17, [2016] WDFL 3105; *Brar and Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 3718 at para 22, [2017] WDFL 4525.
[204] *See Singh v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 7987 at para 36, [2017] WDFL 1043; *Teji and Canada (Minister of Citizenship and Immigration) Re*, 2020 CarswellNat 6681 at para 27.

where the male should be older than the female, thus assuming it to be part of their individual cultural identity and thus requiring that parties explain why they deviated from this identity. Or finding that too wide of an age gap was contradictory to the age norm, and not believing that the couple could see past this age difference in order to simply have a companion.

Other IAD members viewed this norm through what can be said to be a critical legal pluralist lens. These IAD members found that the age difference, while going against cultural norms, did not matter as the parties simply stated they do not consider it a relevant concern for them. These explanations were accepted as a satisfactory answer to explain such deviations. Other members paid it no attention, even if it were considered to be out of the norm by standards.

As previously mentioned, studies may lead to supporting the claim that age is no longer as strong of a cultural norm as it once may have been. Women are pursuing higher education today in India, whereas this was not previously the case.[205] Hence, these educational advancements have led to them marrying later.[206] Therefore, it can likely be possible that they may marry men who are younger than them as men who are their age may already be married. In the alternative, perhaps such women will marry much older men who may have previously been married. Additionally, considering the skewed sex-ratios and importance of the caste system in marriages, some traditional arranged marriages may look past the age difference so long as the caste is the same. Individuals may also simply fall in love, despite an age difference that may be seen as outside societal norms. Therefore, considering this a cultural norm and as a point of compatibility to determine whether a marriage is genuine or not may no longer be valid.

[205] Larsen & Kaur, *supra* note 53.
[206] Prakash & Singh, *supra* note 56.

Trends are shifting, slowly but surely, and it may no longer be appropriate to consider this a "cultural norm" in light of this. It further does not seem just to relate age to cultural norms, given the inconsistency evidenced in the consideration of the norm itself.

4.3.2 Compatibility in Education

Education has also been deemed a cultural norm in determining the compatibility between spouses, and has thus been considered in assessing the genuineness of a marriage. Similarities or compatibilities in educational backgrounds are, similar to age, also seen as a positive inference for members.[207]

Many members acknowledged or took note that compatibility in education is seen as one of the considered cultural norms, when seeking matches for arranged marriages in India:

> "The appellant has a grade-twelve education from a Canadian high school; the applicant has a bachelor's degree from an Indian university. At the hearing, it was adduced that there is a post-secondary gap of approximately three years between the couple. I find the couple's testimony that the quality of education in Canada is greater than in India to be credible and there was no evidence before me to indicate that this was not the case. Accordingly, I find that while it is more typical to find an arranged marriage between similarly-educated partners, I do not consider that in this case the educational difference was a material issue for either the couple or their families."[208]

---

[207] *See Prasad v Canada (Minister of Citizenship and Immigration),* 2014 CarswellNat 6028 at para 17, [2015] WDFL 1537; *Dhaliwal, supra* note 190 at para 12; *Dhami v Canada (Minister of Citizenship and Immigration),* 2014 CarswellNat 8261 at para 7, [2015] WDFL 4461; *Sidhu v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 11566 W.D.F.L. 425 at para 8; *Bhangu v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 3546 W.D.F.L 4551 at para 13.

[208] *See Padda, supra* note 178at para 17; *Sandhu v Canada (Minister of Citizenship and Immigration),* 2012 CarswellNat 8285 at para 3; *Sidhu v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 10582 at

Similarly, despite it being a cultural norm that has been identified, many members found that incompatibility in education did not lead to a significant issue in the appeal before them.[209] Some, however, considered the educational incompatibility to be an issue that affected credibility, when no satisfactory explanation could be given:

> "When interviewed by the visa officer, the applicant was asked how a marriage could have been arranged with "a girl who is not compatible with you in education or marital status?" His response was: "My aunt said it was a good match." The visa officer then asked: "How was it a good match?" The applicant responded that: "It is a good match." At the hearing, which afforded both the appellant and the applicant a *de novo* forum in which to provide much-needed elucidation, no satisfactory explanations were offered for these two *prima facie* incompatibilities, *i.e.* education and marital status"[210]

In the above decision, the member noted that the applicant had completed 10 years of education, whereas the appellant had completed 17 years of education. The member determined that such a gap showed an incompatibility in education between the spouses. Consider, however, the following decision in which a similar gap was seen as "similar educational levels", whereas

---

para 19, [2017] WDFL 3373; *Mann v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 5861 at para 35, [2016] WDFL 6567.

[209] *See Sandhu v Canada (Minister of Citizenship and Immigration),* 2012 CarswellNat 8285 at para 25; *Padda, supra* note 178 at para 17.

[210] *Brar v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9835 at para 16, [2016] WDFL 2619.

the applicant held two university degrees while the appellant held only a cooking diploma after high-school.[211]

Similar to age with respect to the role of gender, within one decision, the IAD member noted the visa officer's opinion on educational cultural norms within marriages, in that the visa officer finds that in Punjabi culture, the man is expected to be more educated.[212] While within this decision, attention was not paid to the educational incompatibility, such justifications can be problematic given the understanding that women are becoming more educationally advanced.

In decisions where the female spouse was seen to be more educated than the male, opinions differed on the inferences to be drawn with respect to compatibility and the genuineness of the marriage. In some instance, no inference was drawn at all.[213] In some decisions where such a norm was questioned and deviations were noted, members differed in their acceptances of the testimonies. In one decision, the member accepted the testimonies that the educational difference whereby the man was less educated was not of an issue to the female or their families.[214] In one decision, where the female appellant had a master's degree and the male applicant only held a post high-school one-year diploma, the member accepted this and found credible the testimony regarding the cultural shift with women becoming more educated than men.[215]

However, not all members found it credible or compatible for the female spouse to be more educated, despite testimony that it is a non-factor. For example in one decision, the female appellant held two master's degrees and the male applicant had only held a grade 12 education.

---

[211] *Mehmi, supra* note 177 at para 16.
[212] *Khela v Canada (Minister of Citizenship and Immigration),* 2013 CarswellNat 8297, [2015] WDFL 3072 at para 10.
[213] *See Grewal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9831, [2016] WDFL 2633.
[214] *See Dhaliwal v Canada (Minister of Citizenship and Immigration),* 2012 CarswellNat 7946 at para 25; *Kaur and Canada (Minister of Citizenship and Immigration),* 2020 CarswellNat 5884 at para 67.
[215] *Brar, supra* note 210 at para 29.

Although the appellant argued that despite her two master's degrees, she was employed in a factory and deemed the educational disparity no value, the member saw otherwise. The member stated that post-secondary education denotes recognition, social standing and higher learning and as such is deemed a compatibility issue that could not have simply been overlooked in the arrangement of the marriage.[216] In contrast, in another decision, where the female was more educated than the male and similarly stated the difference in education makes less difference in Canada than in India, the member accepted this as a credible explanation.[217]

Similar to explanations related to age, parties that had explained that the education discrepancy was not an issue due to other members within their family marrying with similar educational discrepancies were found as credible. In one decision, the female appellant with a double master's degree also stated that they do not mind that their husband only has up to an eighth grade education, because her brother who is similarly less educated owns his own construction business. The member in this decision also was not concerned with the vast difference in education so as to deem the marriage as not genuine.[218]

Similar to age differences, members had varying views on education and the cultural importance it holds in marriages today. While the majority of members acknowledged and drew a positive inference when educational backgrounds were similar, accepting the legal pluralist view of the importance of this cultural norm, it became an issue for some decision-makers when the parties were seemingly incompatible regarding education. Members differed in accepting that in contemporary times, social advancements are taking place and it is becoming more normal for

[216] *Dhindsa v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 6032, [2016] WDFL 6697 at paras 46 & 53.
[217] *Saroya and Canada (Minister of Citizenship and Immigration),* 2020 CarswellNat 975 at para 8.
[218] *Dhillon v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9801, [2016] WDFL 2622 at para 11; *see also Saggu v Canada (Minister of Citizenship and Immigration),* 2016 CarswellNat 7595 at para 21, [2017] WDFL 801.

women to be more educated. Even more confusing, while members acknowledged that the male should usually be more educated, in some instances when that was the case, they still found there to be an incompatibility issue. A number of IAD members have understood the subjectivity of the parties as well as changing social circumstances, and in a critical legal pluralist manner, focused on their testimonies affirming that such education differences were not an issue. Some further accepted the testimonies of parties that women becoming more educated is becoming the norm, despite visa officer's initially pointing out the concern with the female being more educated.

Studies are showing that women are becoming more educated, as educational advancements, industrialization and modernization are opening up more doors for women in India to pursue higher education, which was not always the case. As such, differences in education may begin to become more prevalent. IAD members must be aware of these shifts, and be more consistent in what they deem to be a cultural norm, when there is inconsistencies in the application of the educational norm itself. While many draw positive inferences from similar educational backgrounds, other expect the man to be more educated but then some find it to be a potential incompatibility. Others differ in their opinion as to whether education is even an impediment to a marriage at all, and some accept the opposite belief that women are becoming more educated today.

4.3.3 Compatibility in Marital Histories

Previous marital histories were also raised as issues in a number of decisions in determining whether marriages were genuine. IAD members considered incompatibilities in previous marital histories as a primary concern in identifying the genuineness of a marriage.

Divorce has, for the most part, been a taboo in Indian marriages and culture. Spouses remain in marriages, even if they are unhappy, for fear of the societal and family judgements passed on them. Such was the case earlier in this thesis in the *T.S.* decision.[219] As such, members in various decisions have consistently recognized the uncommonness or deviation from cultural norms when one of the parties entering the marriage had a different or prior marital history. In one decision, the member observed,

> "The appellant testified that it is uncommon in her culture for divorced women to re-marry. When viewed through a cultural lens, I agree that it is not typical for a Punjabi male who had never been married to match himself with a bride who, in addition to having been previously married, has a school-age daughter from a common-law relationship…"[220]

Yet, once again, the consideration of marital histories and the contribution it had in relation the credibility of the parties differed amongst IAD members. Some members further understood and recognized that despite divorce being a taboo and culturally looked down upon, it does not mean that such marriages where one party was previously married do not happen. For instance, one IAD member observed:

> "He, however, is divorced, and she never married. That is a potential issue, and was mentioned as such by the visa officer. The Panel is aware that a divorcee may be less attractive a match than a never married man, for a never married woman such as the

[219] *T.S, supra* note 33 at para 13.
[220] *Prasad, supra* note 207 at para 19; *See also Sandhu, supra* note 181 at para 26; *Aujla, supra* note 177 at para 14.

applicant. However, he was not married long, and has no children from the relationship. The applicant stated that it did not deter her from agreeing to the match, especially since she knew the appellant's family from before, and even had some acquaintance previously with the appellant. The Panel chooses to accept this argument. While indeed a match of a divorcee and a never married woman is not ideal or typical, especially in Punjabi culture, it can happen, and does happen. Cultural norms as expressed by the visa officer may well be broadly true, but, having said that, there can of course be exceptions, and the Panel finds that such is the case here, especially in light of the fact that the couple seems otherwise compatible."[221]

Some IAD members also considered that the parties in the marriages did not find that the incompatibility or difference in marital histories were impediments on them wishing to enter into and enjoy their marriage.[222] Many members also took note of the testimonies given by the parties that the cultural stigma and view on divorce is changing. These members found these testimonies as credible and accepted them.[223] Other members, however, did not consider or think that overlooking such histories or not requiring sufficient knowledge of these previous marital histories were indicative of a genuine marriage, but were instead likely due to an immigration purpose:

[221] *Mehmi, supra* note 177 at para 17.
[222] *See Sran v Canada (Minister of Citizenship and Immigration),* 2007 CarswellNat 5714 at para 22 and 17, [2018] WDFL 3713.
[223] *See Singh v Canada (Minister of Citizenship and Immigration),* 2007 CarswellNat 5739 at para 20, [2008] WDFL 3712; *Verma and Canada (Minister of Citizenship and Immigration),* 2017 CarswellNat 5190, [2017] WDFL 5255 at para 22; *Birdi, supra* note 186 at para 13.

> "I find it unlikely on a balance of probabilities that a *bona fide* marriage was being sought by the applicant's family when they agreed to marry their only daughter to a divorced man who had a child from his first marriage. The panel heard testimony that other candidates had refused to be matched with the appellant because he had been married before and also had a child. When asked why he thought the applicant was willing to overlook this when others would not, he testified that she found him to be traditional, handsome, and honest. While I acknowledge that people choose to marry for a variety of reasons, I find it most likely that the applicant's desire to come to Canada overrode the appellant's due diligence in choosing a suitable life partner."[224]

Interestingly, one member seemed to disbelieve that an appellant and applicant could be "open-minded". Specifically, in regards to the appellant, having been previously divorced and the applicant not taking the divorce of the appellant seriously, whereas they had also otherwise mentioned that they follow other cultural norms within typical marriages:

> "In further evidence of how well rehearsed their testimony was, they both gave the applicant being "open-minded" as the reason why the appellant being divorced was not problematic for their compatibility. The applicant told the visa officer at his interview that he did not take the fact of the appellant being previously married and divorced seriously, which perhaps could be interpreted as meaning he had an open mind. They both attributed his open-mindedness to the fact that the applicant had lived in the UK for

[224] *Sahota v Canada (Minister of Citizenship and Immigration),* 2014 CarswellNat 6500 at para 18, [2015] WDFL 2314; *Sangha, supra* note 229 at para 20; *see also Grewal v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 9831 at paras 15-16, [2016] WDFL 2665.

two years where he learned that divorce is a common thing. This of course creates an interesting paradox. The applicant claims that he was opened minded in respect of the appellant being divorced, a significant culturally rooted incompatibility, by virtue of his having been exposed to different ideas abroad, but at the same time both of them claim to be slaves to normative cultural behavior in respect of meeting each other before becoming engaged. This is example of what the panel describes as the plasticity of culture which is used to both deflect and justify normative behavior and deviations from it as best suits the interests of the teller."[225]

Such a position deems that appellants and applicants cannot be selective about which norms of their culture they can or cannot subscribe to. This kind of understanding and thinking is contrary to Federal Court precedents, in that when finding that parties may be exposed to two cultures, it makes it more important that when approaching discussions about divorce and marriage norms, decision-makers do so with caution.[226]

Divorce is still a taboo in India today. Culturally, divorce is considered to bring shame and judgements onto those who go through with them. It is a sensitive topic, and is one that not many feel comfortable discussing. As previously mentioned, the Federal Court has also given direction on the importance of approaching this issue with caution in the immigration context, when dealing with people from India.[227]

However, while it may be a taboo, it does still happen. Members must acknowledge that divorces happen even in cultures in which it is seen to be a taboo. Instead, by continuously

[225] *Kaur v Canada (Minister of Citizenship and Immigration),* 2015 CarswellNat 8185 at para 26, [2016] WDFL 1414.
[226] *Gill, supra* note 84.
[227] *Ibid.*

reinforcing the notion that divorce is taboo and that remarriages cannot be genuine due to this, it might be seen as evidence of a closed mind. It further reinforces such stereotypes and taboos, and such an approach will continue to lead to a closed-minded approach, against the directions of the Federal Court.

4.4 Conclusion

In this chapter, I have presented and examined how IAD members' consider the cultural norms of age, education and marital histories in assessing compatibility between spouses in Punjabi spousal sponsorship applications. The focus on compatibility through these norms, is to determine whether or not the marriage is genuine or entered into for immigration purposes and caught under section 4(1) of the regulations.[228]

From an overall standpoint, I have identified how these decisions examined have displayed a very inconsistent assessment and consideration of these cultural norms, in relation to traditional Punjabi and Indian marital practices. In relation to the discussion in chapter 3, when viewing these members' decisions through a legal pluralistic lens, it is evident that they upheld these cultural norms rigidly. These members, when conducting the credibility assessments of the parties, listened to their explanations regarding their deviation from these norms, only to not find that the explained deviation did not satisfy their questioning.

Other members, viewing their decisions through a critical legal pluralist lens, accepted not only similar explanations, but even general and very simplistic explanations as to the deviation. Within this, they simply considered the subjectivity of the individuals in wishing to enter into marriage, despite the contradiction it posed to these cultural norms. While furthermore,

[228] *Immigration and Refugee Protection Regulations, supra* note 14.

some members simply paid no attention or made no reference to some of these norms in their consideration of compatibility.

I have further illustrated through this presentation, how an argument may be made that IAD members continue to reinforce stereotypes related to marital practices in Punjabi and Indian culture, through the consideration of these norms. Some members approached appellants' and applicants' cultural identities through the collective practices of their cultural group's identity based on these cultural norms and their relation to traditional Indian marital arrangements. In doing so, some IAD members have treated these practices as immutable, static, and non-negotiable through their rigid application of these norms, coinciding with Eisenberg's argument presented in chapter 3.[229] These stereotypes relied on members' seeking whether conformation was done to these cultural norms, as they relate to what constitutes to a "traditional" marriage with respect to the normative marital practices in Indian culture. However, such approaches go against the Federal Court's rulings with respect to examining applicants' subjective perspectives on marriages within their cultures.[230]

Furthermore, considering the sex-skewed ratios in India, and the fact that with educational advancements, women may be subject to further delays in marriages, it may in fact become more likely for marriages to include one or more divorcees as women may then marry older men who may have already been married. It makes for an interesting paradox, given that the continuation of these shifting trends may lead to a domino effect on one another. Women may continue to pursue higher education, leading to more variation in educational compatibilities. Pursuing educational opportunities may also lead to further delays in entering marriages and lead to challenges in the age gap norm. Such delays in marriages may also lead to

[229] Eisenberg, *supra* note 132.
[230] *Khan, supra* note 170.

more non-traditional approaches in regard to the divorce taboo as women may still marry older men who were previously married or are divorced.

Whether this paradox comes to fruition, is still to be seen. For now, the inconsistency in the consideration of each norm as demonstrated by individual IAD members raises concern regarding the integrity of the decision-making process when attempting to determine the genuineness of a marriage by using such norms as criteria. If there is such a vast inconsistency amongst members, is it safe to say that the current system is a just one? If anything, this demonstrates that some members are more understanding, while others are not. Thus, similar to Professor Rehaag's belief, in relation to adjudication in refugee decisions, perhaps future appellants and applicants in spousal sponsorship applications should similarly just hope for an open-minded adjudicator. Yet, as mentioned, what does this speak to the integrity of the decision-making process, when there may be doubts on impartiality being employed? This further supports the requirement of accountability, cultural competency training, awareness, and implementations to be enforced within the IAD through the use of guidelines to ensure more consistency in decision-making regarding spousal sponsorship appeals.

CHAPTER 5: REFLECTION AND RECOMMENDATIONS

This chapter provides a conclusion regarding the findings of this thesis and posits future recommendations. This is then followed with recommendations as we look ahead and seek to address the concerns outlined regarding the use of credibility assessments within the IAD, in order to achieve a stronger, just and fair appeal process. A process that applies to not only spousal sponsorship applications from Punjab, as this thesis has focused on, but perhaps extends to other cultures and avenues of immigration sponsorship applications.

5.1 Conclusion

In this thesis, I examined a sample of the IAD's spousal sponsorship immigration application appeal decisions, related to those appellants and applicants from a Punjabi background. Within these decisions, it was shown that IAD members take cultural norms, in relation to Indian and Punjabi marital practices and traditions, into consideration during credibility assessments of the parties in an appeal. The reasoning behind the consideration of these norms during such assessments, is to determine whether the marriage is indeed genuine, or was simply entered into for the purposes of obtaining immigration, under section 4(1) of the *Immigration and Refugee Protection Regulations*.[231]

In this thesis, I examined IAD decisions where the consideration of these cultural norms were included. Specifically, I analyzed decisions relating to cultural norms concerning age, education and marital histories. While there is an argument that consideration of such norms is generally legitimate, if not justified, in connection with identifying fraudulent marriages engaged in for immigration purposes, there seems to be a lack of consistency amongst IAD members'

[231] *Immigration Refugee Protection Act Regulations, supra* note 14.

decisions. Through an examination of these decisions, I have highlighted these inconsistencies in different IAD members' considerations of these cultural norms as they assessed the credibility of the parties and the genuineness of the marriages.

Assessing Punjabi applicants and appellants' through traditionally repeated normative practices falls in line with Eisenberg's argument presented earlier in chapter 3, in that such an approach reinforces stereotypes about a group or who counts as a member of a group in the course of legally validating particular collective practices as core and immutable features of a group's identity.[232] Instead, as Eisenberg further argues, adjudicators must be held accountable and take into account an individual's own choices and beliefs, as not doing so would lead to an unjust practice.

While it may indeed be just to consider these norms in order to determine validity of these marriages, it is not just to apply them as rigid legal orders and to perceive any departures as violations which render marriages as invalid and not genuine. Such an approach further reinforces cultural stereotypes, which in turn can make it more difficult for the parties to convince some IAD decision-makers that their marriages are genuine despite their non-conformity with these norms.

This approach, which elevates cultural norms concerning marriages to the de facto status of legal norms, could be explained when viewed through a social-scientific legal pluralistic lens, as outlined in chapter 3. Through this form of legal pluralism, one may recognize these socio-cultural norms and traditions related to marriages in India as non-state legal orders. However, such an approach gives the image that these cultural forms of law can be objectified and reified[233], and therefore conformity with these norms is expected. Furthermore, any departure

[232] Eisenberg, *supra note* 132.
[233] Kleinhans & Macdonald, *supra* note 157.

from these cultural norms regarding marriage is not permitted and may lead to the conclusion that the marriage is not genuine for immigration purposes.

Coinciding alongside this flawed approach, lies serious concerns with respect to the inconsistency employed by IAD members when considering these cultural norms. Many members heavily scrutinized the simple explanations related to the claimants' deviations from such cultural norms, and found that they did not sufficiently address the decision-makers' concerns and were deemed not credible. Other members however accepted simple, and sometimes similar, explanations given by appellants and applicants to answer questions related to departure of the same norms in different decisions. Others noted the deviations, but drew no adverse inferences from them at all.

The hypothesis this thesis sought to demonstrate, was that the use of credibility assessments conducted by the IAD in spousal sponsorship applications, may be flawed due to the conclusions some members reach in not finding parties credible. As the decisions in chapter 4 show, the inconsistencies in conclusions given by IAD members with respect to the credibility of parties in relation to cultural norms were evident. This is not to say that the credibility assessments themselves should not be conducted, as they are crucial to any evidentiary consideration in a legal context. Credibility assessments are done in order to reach factual findings.[234] Testimonies are given by the parties appearing in IAD appeals, and these testimonies play a crucial role in the determination of their appeal. Credibility findings are often based on a variety of factors, and are indeed complex and muddled. Inconsistent testimony in relation to one factor may lead to negative inferences when considering other factors. However, such inferences are not drawn consistently amongst IAD members. Some members draw no inferences, as

[234] Rehaag, *supra* note 12 at 40.

mentioned, and others seemingly draw many. Thus, the inconsistencies in the reasoning that some IAD members employ in finding parties not credible during these assessments, is the problematic flaw.

Even if it will likely continue to be found that it is not unjust to consider cultural norms and ask questions related to them, the IRB as an institution must still be held accountable for these inconsistencies and be more aware of the subjectivity that individuals hold in following or rejecting such cultural norms.

5.2 Recommendations

The inconsistencies and unjust applications of the norms can perhaps be addressed through cultural competency training and awareness, or as Pia Zambelli suggests within the RPD and RAD, different types of hiring decisions. Zambelli suggests that decision-makers should cultivate certain skill sets that would be optimal in such a line of work and that the requirement of such a specific skill set is certainly feasible, given other Canadian administrative tribunals have set selection criteria as well.[235]

Following Eisenberg's argument in chapter 3, IAD members must also be subject to appropriate forms of accountability and transparency. This may begin by first educating IRB and IAD members to the fluid and ever-changing trends that are occurring in marital practices in India. Such information is necessary for decision-makers to be informed by forcing them to recognize and become aware that marriage customs are changing and there may be further departures from these norms. Some IAD members must further become more adept at

[235] Pia Zambelli, "Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative", (2017) 29:1 Intl J Refugee L at 25-26.

recognizing that the cultural norms, which they consider with respect to marriages, should be approached with greater nuance rather than as applications of rigid legal codes.

The IRB and the IAD must also implement a policy and conduct ethical awareness and training regarding diversity within other cultures. This may be where the legal theory of critical legal pluralism can help. Critical legal pluralism corresponds with the need of such ethical awareness and cultural competency. It treats legal subjects as "law inventing" and not merely law abiding. This is important in connection with intentional departures from established cultural norms. Such departures may not just be challenges to established norms governing marriages, but may contribute to the creation of new cultural norms and practices. Critical legal pluralism can help to combat the rigid perspectives some IAD members appear to hold regarding these cultural norms. Adopting a critical legal pluralist lens, more IAD members might recognize that individuals possess a constructive capacity and ability to shape cultural norms and practices. Such an approach recognizes the subjectivity of individuals, and is consistent with Federal Court precedents – namely that IAD members must examine applicants' and appellants' subjective perspectives on their culture, in relation to traditions and norms concerning marriage.

Furthermore, perhaps increasing diversity within the IAD may aid in combating these inconsistencies. Drawing from Colaiacovo's study discussed in chapter 2, adjudicators who had prior experiences working refugees and immigrations had a higher likelihood of granting leaves and accepting claims.[236] Such prior training and experiences may have allowed the adjudicators in the decisions examined in chapter 4 to better understand and deal with claimants in a more open-mind manner as they may have been more culturally aware and competent with the diversity of the individuals that appeared before them in appeals. This is also supported by her

[236] Coliacovo, *supra* note 111.

finding that refugee division board members educated outside of Canada and the United States were also much more likely to grant or accept claims, mentioning that this could be due to the intercultural interactions these adjudicators have had outside of North America.[237] Such cultural literacy and awareness among adjudicators may lead to better communication and understanding during IAD appeal hearings. Calls for increasing diversity does not necessarily mean that more Punjabi or Indian IAD members should be employed. However, perhaps members from a similar background to those who appear before them in appeals may potentially better understand the cultural implications and diverse practices within the culture themselves.

Lastly, in recognizing the importance of accountability and better training within the IRB, there is an important role for Chairperson guidelines in connection with assessing factual circumstances within immigration matters. As previously mentioned, Chairperson and jurisprudential guidelines have been created to guide Board members in proceedings related to refugee claims, but none have been created in relation to immigration appeals.

The lack of such guidelines within the context of immigration adjudication clearly demonstrates a large gap. The decisions examined in this thesis supports the need for such guidelines, given the number of inconsistencies presented earlier regarding assessments of parties' departures from cultural norms. The IRB should take this into account, and set out guidelines in an effort to address these inconsistencies and better guide IAD members. Establishing guidelines on IAD decision-making with references to judicial cases within spousal sponsorships for all claimants, may better serve to address this problem and further combat the issue of perceived biases and inconsistencies in such decisions and cases.

[237] Coliacovo, *supra* note 113.

The Federal Court had recently found that the use of jurisprudential guidelines, in the refugee context, does not in fact fetter with the discretion given to IRB members in making decisions.[238] In the administrative context, the use of tools such as guidelines to influence the manner in which decisions are reached, was found to be entirely appropriate.[239] Such guidelines can include identifying factors, sources of information and even particular information that may be helpful to consider in decisions today, so long as decision-makers are also still free to reach their own conclusions based on the facts and merits of each individual case.[240]

In the context of the decisions discussed in this thesis, such a guideline may prove to be immensely useful to ensure more consistency in Punjabi spousal sponsorship appeals. The IAD should not only implement a guideline on the cultural norms and traditions surrounding marriage practices within Punjab and India as a whole, it should further incorporate the trends which show the ever-changing deviation from such norms in today's generation. Emphasizing the studies and surveys as mentioned in the beginning of this thesis would be a great starting point to bring awareness to the change in marital practices occurring in Punjab and India today.

Current jurisprudential guidelines which serve the refugee divisions include information on the country, identifying factors, and relevant or emerging issues to the nature of the appeal in question.[241] Perhaps a number of decisions which deal with certain cultural norms related to marriage practices should be reviewed and perhaps implemented as well. Although the use of such guidelines are not binding on any IRB members, including members of the IAD, the

[238] *Canadian Association of Refugee Lawyers v Canada,* 2020 FCA 196 at para 21.
[239] *Ibid.*
[240] *Ibid.*
[241] Immigration and Refugee Board of Canada, "Policy on the Use of Jurisprudential Guides", (accessed Jan 26, 2020) online: <https://irb.gc.ca/en/legal-policy/policies/Pages/PolJurisguide.aspx>

implementation of them may begin the battle to ensure more consistency in decisions where there is a discrepancy in the assessments and analysis of such cultural norms.

5.3 Concluding Remarks: Looking ahead

The presentation and examination of the decisions within this thesis were limited to a certain cultural subgroup of appellants and applicants and were thus limited in its scope. However, the findings within this thesis can lead to further inquiries and studies. Other cultural subgroups may in fact face similar inconsistencies and issues regarding adjudications and the assessment of their own cultural norms in IAD decisions. Further studies may include the examination and inquiry into these subgroups, to determine patterns and further push the narrative that cultural competency and awareness training may be necessary within the IRB and IAD in relation to more cultures. With respect to the perceived biases of IAD members, perhaps a field study may be conducted in which members of the IAD that have decided on such decisions within a subgroup, be it Punjabi or otherwise, can be interviewed on their thought processes in the consideration of such norms. Whichever the case may be, change must be implemented. It is imperative that integrity and impartiality continue to be strived and accounted for.

BIBLIOGRAPHY

LEGISLATION

Canadian Multiculturalism Act, RSC 1985, c 24 (4th Supp).

The Constitution of India, c.1950.

Immigration Protection and Refugee Act, SC 2001, c 27.

REGULATIONS

Immigration and Refugee Protection Regulations, SOR/2002-227.

GOVERNMENT DOCUMENTS

Immigration and Refugee Board of Canada, "Background",
online: <https://irb-cisr.gc.ca/en/transparency/atip/Pages/infosource.aspx#s1>

Immigration and Refugee Board of Canada, "About the Board",
online: <https://irb-cisr.gc.ca/en/board/Pages/index.aspx>

Immigration and Refugee Board of Canada, "Members",
online: <https://irb-cisr.gc.ca/en/members/Pages/index.aspx>

Immigration and Refugee Board of Canada, "Immigration Appeals Statistics",
online: <https://irb-cisr.gc.ca/en/statistics/immigration-appeals/Pages/index.aspx>

Immigration and Refugee Board of Canada, "The Immigration and Refugee Board of Canada celebrates 30 years",
online: <https://irb-cisr.gc.ca/en/stay-connected/Pages/30-years-irb.aspx>

Immigration and Refugee Board of Canada, "Act, rules and regulations",
online: <https://irb.gc.ca/en/legal-policy/act-rules-regulations/pages/index.aspx>

Immigration and Refugee Board of Canada, "Code of Conduct for Members of the Immigration and Refugee Board of Canada", online: <https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>

Immigration and Refugee Board of Canada, "Chairperson's guidelines",
online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/chairperson-guideline.aspx>

Immigration and Refugee Board of Canada, "Jurisprudential guidelines",
online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/jurisprudential-guides.aspx>

Immigration and Refugee Board of Canada, "Policy on the Use of Jurisprudential Guides", online:
<https://irb.gc.ca/en/legal-policy/policies/Pages/PolJurisguide.aspx>

JURISPRUDENCE

SCC Decisions

R v S. (R.D.), [1997] 3 SCR.

Federal Court Decisions

Bains v Canada (Minister of Employment and Immigration), [1993] 63 FTR 312.

Bhatia v Canada (Minister of Citizenship and Immigration), 2002 FCT 2010.

Canadian Association of Refugee Lawyers v Canada, 2020 FCA 196.

Gill v Canada (Minister of Citizenship and Immigration), 2010 FC 122.

Granata v Minister of Citizenship and Immigration, 2013 FC 1203.

Khan v Canada (Minister of Citizenship and Immigration), 2006 FC 1490.

Khera v Canada (*Minister of Citizenship and Immigration),* 2007 FC 632

Nadasapillai v Canada (Citizenship and Immigration), 2015 FC 72.

IAD Decisions

Aujla v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 8911 W.D.F.L 1716.

Bains v Canada (Minister of Citizenship and Immigration), 2013 CarswellNat 7659.

Bhatti and Canada (Minister of Citizenship and Immigration), 2019 CarswellNat 2795.

Bedi and Canada (Minister of Citizenship and Immigration), 2018 CarswellNat 9151.

Bhangu v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 3546 W.D.F.L 4551.

Birdi and Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 5606 W.D.F.L 5610.

Brar v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 9835 W.D.F.L. 2619.

Brar and Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 3718 W.D.F.L 4525.

Brar and Canada (Minister of Citizenship and Immigration), 2019 CarswellNat 9286.

Chauhani v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 6421 W.D.F.L 171.

Chhokar and Canada (Minister of Citizenship and Immigration), 2019 CarswellNat 9784.

Dhaliwal v Canada (Minister of Citizenship and Immigration), 2012 CarswellNat 7946.

Dhaliwal v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 8563.

Dhaliwal v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 9310 W.D.F.L 2294.

Dhaliwal v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 9586.

Dhami v Canada (Minister of Citizenship and Immigration), 2014 CarswellNat 8261 W.D.F.L 4461.

Dhaliwal and Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 8519.

Dhillon v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 9801 W.D.F.L. 2622.

Dhillon v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 6985 W.D.F.L 513.

Dhindsa v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 6032 W.D.F.L 6697.

Grewal v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 9831 W.D.F.L. 2633.

Grewal v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 9185 W.D.F.L.

Kaur v Canada (Minister of Citizenship and Immigration), 2013 CarswellNat 9310 W.D.F.L 3758.

Kaur v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 8185 W.D.F.L. 1414.

Kaur v Canada (Minister of Canada and Immigration), 2016 CarswellNat 995.

Kaur and Canada (Minister of Citizenship and Immigration), 2020 CarswellNat 5884.

Khela v Canada (Minister of Citizenship and Immigration), 2013 CarswellNat 8297 W.D.F.L

Mahal and Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 5332.

Mann v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 5861 W.D.F.L. 6567.

Mehmi v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 8835 W.D.F.L 2035.

Munjal-Bal v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 7247 W.D.F.L 653.

Padda v Canada (Minister of Citizenship and Immigration), 2014 CarswellNat 7682.

Prasad v Canada (Minister of Citizenship and Immigration), 2014 CarswellNat 6028 W.D.F.L 1537.

Randhawa and Canada (Minister of Citizenship and Immigration), 2018 CarswellNat 9227.

Saggu v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 7595.

Sahota v Canada (Minister of Citizenship and Immigration), 2014 CarswellNat 6500.

Sandhu v Canada (Minister of Citizenship and Immigration), 2012 CarswellNat 8285.

Sandhu v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 6898.

Sangha v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 10203 W.D.F.L 3105.

Saroya and Canada (Minister of Citizenship and Immigration), 2020 CarswellNat 975.

Sidhu v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 10582 W.D.F.L. 3373.

Sidhu v Canada (Minister of Citizenship and Immigration), 2015 CarswellNat 11566 W.D.F.L. 425.

Sidhu v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 3343 W.D.F.L 4425.

Sidhu v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 8588 W.D.F.L 1168.

Singh v Canada (Minister of Citizenship and Immigration), 2007 CarswellNat 5739 W.D.F.L. 3712.

Singh v Canada (Minister of Citizenship and Immigration), 2016 CarswellNat 7987 W.D.F.L 1043.

Sran v Canada (Minister of Citizenship and Immigration), 2007 CarswellNat 5714 W.D.F.L. 3713.

Teji and Canada (Minister of Citizenship and Immigration) Re 2020 CarswellNat 6681.

TS v Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 4200 W.D.F.L 4833.

Verma and Canada (Minister of Citizenship and Immigration), 2017 CarswellNat 5190 W.D.F.L. 5272.

SECONDARY MATERIALS: BOOKS

Coleen Flood & Lorne Sossin, *Administrative Law In Context,* 3rd ed (Canada: Emond Montgomery Publications Limited, 2018).

Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials,* 7th ed (Canada: Emond Montgomery Publications Limited, 2015).

Jennifer L. Schultz, *Mediation and Popular Culture* (New York: Routledge, 2020).

Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).

Myron W. Lustig & Jolene Koester, *Intercultural Competence,* 7th ed (New York: Pearson, 2013).

Sadhguru, *Bha-ra-ta: The Rhythm of a Nation* (India: Isha Foundation, 2015).

SECONDARY MATERIALS: ARTICLES

Anderson Jeremiah, "Caste and Christianity in India", in Kenneth R Ross et al, eds, *Christiantity in South and Central Asia,* (Edinburgh: Edinburgh University Press, 2019).

Avigail Eisenberg, "Rights in the Age of Identity Politics" (2013) 50:3 Osgoode Hall LJ 609.

Catherine Dauvergne, "International Human Rights in Canadian Immigration Law – The Case of the Immigration and Refugee Board of Canada" (2012) 19:1 Ind J Global Leg Studies 305.

Cécile Rousseau et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board" (2002) 15:43 J of Refugee Studies 43.

Debra Chopp, "Addressing Cultural Bias in the Legal Profession", (2017) 41:3 *NYU Review of L. and Soc. Change* 367.

Eddy Ng & Isabel Metz, "Multiculturalism as a Strategy for National Competitiveness: The Case for Canada and Australia" (2015) 128:2 *Journal of Business Ethics.*

Fernando G. Mata, "The Multiculturalism Act and Refugee Integration in Canada", (1994) 13:9 *Refuge*: *Canada's Journal on Refugees*.

Hilary Cameron, "The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-Making" (2019) 42:1 Dalhousie LJ.

Innessa Coliacovo, "Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)", (2013) 1:4 *Journal on Migration and Human Security*.

Jennifer Bowman & David Dollahite, "'Why Would Such a Person Dream About Heaven?' Family, Faith, and Happiness in Arranged Marriages in India" (2013) 44:2 Journal of Comparative Family Studies.

Keera Allendorf & Roshan Pandian, "The Decline of Arranged Marriage? Marital Change and Continuity in India", (2016) 42:3 *Population and Development Review*.

Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS.

Mattias Larsen & Ravinder Kaur, "Signs of Change? Sex Ratio Imbalance and Shifting Social Practices in Northern India" (2013) 48:35 *Economic and Political Weekly.*

Minakshi Vishwakarma et al, "Variation in Marriage Squeeze by Region, Religion, and Caste in India" (2019) 50:4 *Journal of Comparative Family Studies.*

Paramjit S. Judge, "Caste Hierarchy, Dominance, and Change in Punjab" (2015) 64:1 *Sociological Bulletin*.

Patrick K. Wood & Liette Gilbert, "Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice" (2005) 29:3 *International Journal of Urban and Regional Research.*

Pia Zambelli, "Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative", (2017) 29:1 Intl J Refugee L at 25-26.

Rajagopal Ryali, "Matrimonials: A Variation of Arranged Marriages", (1998) 2:1 *International Journal of Hindu Studies.*

Ravi Prakash & Abhishek Singh, "Who marries whom? Changing Mate Selection Preferences in Urban India and Emerging Implications on Social Institutions", (2012) 33:2 *Population Research and Policy Review.*

Rebecca Hamlin, "International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia" (2012) 37:4 *Law & Social Inquiry.*

Robert Russo, "Security, Securitization and Human Capital: The New Wave of Canadian Immigration Laws" (2008) 2:8 *International Journal of Social, Behavioral, Educational Business and Industrial Engineering*.

Roderick. A. Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism", (2011) 26:2 *Canadian Journal of Law and Society.*

Sally Engle Merry, "Legal Pluralism" (1988) 22:5 *Law & Society Review*.

Sean Rehaag, "'I Simply Do Not Believe…': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38:1 Windsor Review of Legal and Social Issues.

Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1.

Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39:2 Ottawa L Rev.

Srinivas Goli et al, “Exploring the Myth of Mixed Marriages in India” (2013) 44:2 *Journal of Comparative Family Studies*.

Vic Satzewich, “Visa Officers as Gatekeepers of a State’s Borders: The Social Determinants of Discretion in Spousal Sponsorship Cases in Canada” (2013) 40:9 Journal of Ethnic and Migration Studies.

SECONDARY MATERIALS: OTHER

Amar Khoday, “‘Honour Killings’ hide racist motives”, *The Toronto Star* (8 March 2005).

“Government launches campaign to warn Canadians of immigration fraud” CTV Montreal (24 March 2013), online*: CTV NEWS* <https:montreal.ctvnews.ca/government-launches-campaign-to-warn-canadians-of-immigration-fraud-1.1209471>

David McKie, “Marriages of convenience problems persists”, *CBC* (8 Nov 2010), online: *CBC* <https://www.cbc/ca/news/politics/marriages-of-convenience-problems-persist-1.876101>

India Human Development Survey, “About”, online: <https://ihds.umd.edu/about>

York University’s Osgoode Hall, “Sean Rehaag” (accessed March 31, 2020), online: <https://www.osgoode.yorku.ca/faculty-and-staff/rehaag-sean/>

“95 pc marriages within caste: Report” (12 May 2016), online: Tribune India <https://www.tribuneindia.com/news/archive/nation/95-pc-marriages-within-caste-report-235469>