



POST WORKSHOP REPORT



Gendered Dissent Workshop Report

Event: Workshop on Gendered Dissent, Democracy and the Law
Date: May 12-13, 2014
Location: Osgoode Hall Law School, York University, Toronto
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Workshop Conveners

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- Mary Eberts, *Law office of Mary Eberts, Dissent Democracy & the Law Research Network*

Workshop Participants

- Shelagh Day, *Canadian Feminist Alliance for International Action*
- Pamela Cross, *National Association of Women and the Law*
- Julie Shugarman, *National Association of Women and the Law*
- Mary Lou Fassel, *Barbra Schlifer Clinic*
- Dayna Nadine Scott, *Associate Professor Osgoode Hall Law School, Director, National Network on Environments and Women's Health*
- Kathryn Chan, *Assistant Professor, Faculty of Law, University of Victoria*
- Veronica (Nikki) Strong-Boag, *Professor, Institute for Gender Race, Sexuality and Social Justice, University of British Columbia*
- Jennifer Raso, *PhD Candidate, Faculty of Law, University of Toronto*
- Lauren Ravon, *Senior Policy Advisor on Women's Rights and Global Issues, Oxfam Canada*
- Amar Bhatia, *Assistant Professor, Osgoode Hall Law School*
- Niki Ashton, *Member of Parliament for Churchill, NDP Official Opposition Critic for Status of Women Canada*
- Darrah Teitel, *Legislative Assistant, Office of Niki Ashton, Member of Parliament for Churchill*
- Pearl Eliadis, *McGill Centre for Human Rights and Legal Pluralism, Human rights lawyer*
- Kim Stanton, *Women's Legal Education and Action Fund*
- Tracy Heffernan, *Advocacy Centre for Tenants Ontario*
- Fay Faraday, *McMurtry Fellow, Osgoode Hall Law School, Faraday Law*
- Jillian Rogin, *LL.M. Candidate, Osgoode Hall Law School*

- Hayden Mcguire, *LL.M. Candidate, Osgoode Hall Law School*
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Workshop Overview

This two-day Workshop featured presentations by fourteen panelists and speakers who together constituted a diverse group of legal scholars from universities across Canada, and advocates and leaders of civil society organizations. Their objective was to report on and theorize the challenges faced by advocates and civil society organizations working on issues of gender equality in Canada. In particular, participants focused on those challenges that stem from governmental use of legal and extralegal measures that undermine the capacity of individuals, civil society organizations, and institutions to participate in public debate on key policy issues at the local, provincial or federal level.

Documenting and Constructing the Problem:

Dissent, Civil Society & the Law in Canada

Several international bodies have identified a global trend among governments to increase restrictions on dissent and control public dialogue about government policy and action. These observations resonate with concerns that there is an increased constriction of space for civil society organizations in Canada. A combination of legal and policy measures have functioned to reduce the legal, financial and political capacity of civil society organizations in Canada, particularly those whose work and public positions differ from those of the federal government.

The Workshop was inspired in part by the organizers' participation in the Voices-Voix Documentation Project, which has identified a number of specific methods employed by the current federal government to restrict dissent.¹ These methods include: the threat or revocation of charitable status, defunding, harassment/privacy violation, withholding information, interference with independent institutions, surveillance, and vilification/smearing. In some cases, rhetorical vilification has carried implicit or even explicit overtones of criminalization.

¹ The Voices-Voix civil society coalition was formed in 2010 in response to concerns about the restriction of political space for civil society organizations. The Documentation Project aims to research and record specific cases: <http://voices-voix.ca/en/facts>. Since September 2013, the Dissent, Democracy & the Law Editorial Board has undertaken to conduct peer-reviewed research that advances the digital publication of the Documentation Project. A description of the Board and its members can be found here: <http://voices-voix.ca/en/editorial-board-2013-2014>. Numerous media reports have relied on the Documentation Project research to discuss the treatment of dissent in Canada. See for example, see Linda Diebel's November 2013, "Meanness is a way of life in Ottawa" in the Toronto Star: http://www.thestar.com/news/canada/2013/11/20/meanness_is_a_way_of_life_in_ottawa.html.

Gendered Dissent in Canada

While these trends in the relationship between the State and dissent in Canada can be described in broad terms, there are specific issues and groups who exist in a particularly and even increasingly adverse relationship with the Canadian State. Groups working on gender issues are among these. Research undertaken to date indicates that women and gendered-focused civil society organizations attempting to critically discuss government policy decisions have been the target of legal and extralegal measures that undermine their capacity to participate in public debate and dissent on important policy issues. In particular, it appears that these practices have impacted those working on gender and socio-economic equality.

While it is generally agreed that the freedom to critique and oppose government decisions and positions is an essential element of ensuring healthy democratic institutions and practices, including the protection of fundamental human rights, there is a deficit of empirical research that documents the multiple ways in which law is practically and symbolically involved in constructing that relationship. This Workshop attempted to make some preliminary efforts to respond to this deficit.

In this context, the Workshop focused on the particular gender-based features of the emerging relationship between civil society, dissent and the state. A number of presenters helped to develop an empirical picture of the problem by documenting and describing specific case studies and the impacts of particular state measures on public advocacy efforts and/or civil society organizations working on gender issues. Participants asserted that the concept of 'dissent' must expand the traditional view of civil and political rights to encompass a positive state obligation to support and facilitate participation in public life and policy development. The conversation therefore included concern for protection from state actions, as well as the enforcement of state obligations to protect, facilitate, and promote equality rights, including active support for the participation of women and other marginalized peoples in public life, freedom of expression and access to justice.

Three broad themes emerged in the Workshop: (1) ideological funding and defunding, including through the Canadian model of charities regulation; (2) the control of the production of public information and knowledge; and, (3) adverse state litigation tactics and the role of litigation in feminist and social justice advocacy work.

(1) Ideological Funding, Defunding & Silencing

In the first panel "Funding Dissent: Advocacy & Service Provision Case Studies", academics and civil society leaders from prominent organizations discussed how the federal government's targeted defunding of certain groups has significantly weakened feminist law reform and advocacy work. The perspectives represented on this panel were those of Shelagh Day from the Canadian Feminist Alliance for International Action (FAFIA), Pamela Cross and Julie Shugarman, both from the National Association of Women and the Law (NAWL), and Mary Lou Fassel from the Barbra Schliker Clinic, with introductory comments from Dayna Scott reflecting on the experience of the National Network on Environments

and Women's Health (NNEWH). These were complemented by presentations in the subsequent panel by Lauren Ravon of Oxfam Canada and Kathryn Chan from the University of Victoria.

The first panel drew attention to the historical context and complexity of the relationship between feminist activism and the Canadian state by acknowledging both the benefits that have flowed from formal state support and the challenges associated with the institutionalization of feminist advocacy and research. Benefits include not only specific changes to law and policy, but also the ability to 'build a movement' through the establishment of national feminist organizations coordinated across the country and across sectors with the capacity to do research and advise government on law reform. At the same time, participants acknowledged the tension between the importance of federal funding to national research and advocacy, and the way that this funding relationship simultaneously makes feminist organizations like NAWL, NNEWH, and FAFIA, as well as international development organizations such as Oxfam, vulnerable to ideologically inspired changes to funding terms. Nonetheless, participants expressed a strong belief that federal funding is necessary to support national and systemic work and that this should be a central demand for feminist organizations. In fact, as Shelagh argued, the Canadian state's existing international obligations to support women's political participation should be enforced.

Some participants placed the current vulnerability and diminished capacity of national feminist organizations as part of a broader historical trend linked to the rise of neoliberal strategies of governance since the mid-1980s. For example, some of the presentations raised critical questions about the institutionalization of social movements through state-supported program delivery, and whether organizations can properly be considered part of civil society if their primary purpose has become the implementation of state programs. Mary Lou's presentation on the Schlifer Clinic provided an example of how service organizations are attempting to fill some of the gaps left by the decline of national feminist organizations. However, she noted that they do not have the capacity to do much of the key work that was formerly done by the national organizations, particularly building broad-based coalitions, developing analytical frameworks to frame service provision, feminist advocacy and law reform work. Linked to the trend to fund only service work, the panelists and the discussion participants also identified the shift towards short-term issue specific funding as another obstacle to effectively working on systemic equality issues, not only for NGOs, but also increasingly for academics.

The case study presentations in the first and second panel all pointed to the limitations of the charity model for feminist research and advocacy work. These include the inability to directly advocate for legal change and the shift of human resources from research and advocacy to fundraising and grant writing, which in some cases has rendered organizations unable to fulfill their own mandate (NAWL). Lauren linked these issues to the increasing and problematic divide in the international development sector between organizations that are becoming strategically less critical of federal policy, and those still willing to take 'risky' stances on issues such as reproductive rights. Her presentation reviewed some recent funding trends and policy positions in Canada's international development arena, including the exclusion of women's rights as a thematic strand of Canada's aid programs and the shift

from a discourse of women as rights-holders to women as mothers, victims or entrepreneurs. Lauren argued that one of the most significant consequences of this shift for dissent is that federal international development bodies have progressively excluded and defunded organizations that continue to support women's sexual and reproductive rights. Such organizations may simultaneously be denied public funding and be subjected to ideologically based threats to their charitable status. Lauren gave the example of CRA's ongoing review of Oxfam's charitable objectives. In the course of this review, CRA has characterized Oxfam's commitment to addressing the causes of poverty as 'political' rather than 'charitable' work, contrasting this to work aimed at addressing the symptoms of poverty.

Following from these case studies, Kathryn Chan of the University of Victoria provided critical insights into the relationship between charities and the state. Her research examines the legal and institutional conditions under which charities lose their independence from the state and become "co-opted", defined as primarily functioning to further government policy or being subject to government influence. Her presentation pointed to possible avenues for reform in Canada by contrasting the regulatory regime in England and Wales to the Canadian model. In particular she noted that the England and Wales charities regulator, the Charity Commission, is arms length from the central government and not subject to the control of the Crown. Another important difference is that in England and Wales the courts have a long tradition of oversight of administrative power, and there is a robust body of policy and social critique and debate about the role of charities in the UK. In contrast, she noted that Canada has no statutory definition of charity and the regulatory environment is controlled directly by the Minister. Participants in the discussion agreed that the charities and not-for-profits in Canada need to develop a legal strategy to combat attacks on charities in Canada. This would involve getting the issue before the court rather than under the narrow focus of the CRA, and pushing for new concepts and principles to define what is charitable.

In addition to the question of defunding, the Workshop participants attempted to identify some of the women's issues that *have* received an increase in support from the federal government. It was commonly believed that state support for organizations whose work and public positions resonate with the state's current policy goals has remained stable or increased. The Workshop participants were interested in the degree to which these emerging funding arrangements and attendant promotional tactics generate the perception of public "agreement" or "support" for specific policy decisions and/or problematic constructions of gender, nationhood and race. Unfortunately Dana Olwan of Syracuse University was unable to attend the workshop, however she was able to share her paper on the Canadian state's support for community work on the issue of "honor crimes". Lee Maracle was also unable to join the Workshop and her perspective and presentation on state practices and Indigenous women's activism and dissent were missed. We look forward to Dana and Lee's future participation and input and hope that we can identify other scholars and advocates who could contribute to these aspects of the discussion.

(2) The control of the production of information and knowledge

The role of information and the terms of access to information and knowledge production constitute the second important area of state action that participants identified as impacting gender-related public advocacy efforts and the work of civil society organizations. Jennifer Raso of the University of Toronto presented two case studies on the mandatory long form census and the National Council on Welfare to demonstrate how federal government budget cuts have diminished the role of state institutions in collecting information and ensuring its accessibility and use by the public. Jennifer connected this trend to larger ideological shifts in the way we understand the value of information and its role in governance. She also highlighted the gendered impacts of these budget cuts and their consequences for democratic dissent. The disappearance of detailed and nuanced information about Canadian society's social, economic and cultural make up enables the production and legitimation of political rhetoric that purports to speak on behalf of the "average Joe", and rejects the legitimacy of difference and dissent. Further, Jennifer noted that groups and individuals who rely on the public production and dissemination of information face particular challenges when that information and those functions are either privatized or eliminated entirely. Participants made connections between Jennifer's research and federal policy changes to dismantle knowledge production capacity in areas outside of general population statistics, such as in Environment Canada and the Department of Justice.

Veronica Strong-Boag of the University of British Columbia discussed the politics of knowledge and information production in terms of state actions that specifically aim to generate "public ignorance." She provided a brief overview of the importance of evidence and education in the women's rights movement, connecting this theme back to suffragists and going forward through to 20th Century feminism. She then analyzed the extent to which present state practices are changing the terrain of the struggle over knowledge production. Veronica presented a case study of the Canadian Museum for Human Rights, arguing that the federal government censored certain evidence-based contributions to the Museum's website on the topic of violence against women and particularly Indigenous women. She also argues that these acts are consistent with the government's anti-women ideology.

Jennifer and Veronica's presentations reminded us that the control of information and dissent may have indirect, gendered consequences, or may occur in the form of the direct circumscription or repression of the production of feminist knowledge and historical accounts. Participants drew attention to the critical role that both data and history play in combatting gendered (and other) stereotypes and oppressions. As discussant Mary Eberts noted, knowledge and information production is essential to the production of an the evidentiary record that enables equality seeking groups to litigate and enforce Charter rights.

The topic of silencing of dissent and suppressing access to information was also taken up by guest presenter Niki Ashton, NDP Member of Parliament for Churchill and Official

Opposition Critic for the Status of Women. Niki shared her observation that MPs who express and support dissent on gender equality and reproductive rights experience targeting and silencing, not only by the government, but also increasingly by non-state organizations who support the government's policy agenda. She reported a consistent pattern within the Status of Women Committee of silencing opposition MPs and women's organizations, particularly Indigenous women's organizations speaking about missing and murdered Aboriginal women. In her view, the federal government's failure to call a national inquiry on this issue demonstrates the governing party's resistance to acknowledging systemic racism and sexism and exposing the colonial approach of state relations with Indigenous people in Canada. Niki also pointed out that details of these tactics are not often publically available since the Status of Women Committee is among the most secretive, with the most time in-camera after the National Defence Committee.

(3) Litigation tactics: possibilities and limitations

Workshop participants were interested in the potential that Charter litigation may hold for addressing some of the trends in relation to the state's treatment of gendered dissent. To this end, human rights lawyer Mary Eberts presented her preliminary review of constitutional jurisprudence in search of principles that might support a challenge to some of the government measures described in the Workshop. She argued that feminist advocates and legal scholars must undertake to seriously scrutinize the Supreme Court of Canada's conception of democracy. She pointed to several examples in the Charter jurisprudence of a narrow and deficient conception of democracy, articulated as dialogue and mutual respect, which leaves the government with wide policy discretion and limits the role of the courts. Further, Mary argued that this conception leaves little role for the enforcement of Canada's international human rights commitments, which is critical to achieving equality and social justice goals. Mary concluded that litigation's potential as an avenue for addressing the problematic of gendered dissent will depend on advocates' ability to articulate the state's fundamental role and obligations to civil society and dissent, and to rebuild the Court's idea of democracy and representative government.

Turning to the procedural and practical side of litigation, several Workshop participants reported their observations about state litigation tactics in gender equality seeking cases. Kim Stanton, the legal director for the Women's Legal Education and Action Fund (LEAF), reported that LEAF faces many of the challenges described throughout the Workshop as its state-funding has been cancelled. In this context, LEAF's work is increasingly limited to reactive advocacy, responding to state action, rather than proactive law reform and research work. Drawing on LEAF's experience, Kim argued that the strategic utility of litigation as an equality-seeking tool may require review in light of resource shortages among women's organizations and increasingly aggressive government litigation tactics, including vigorous opposition to LEAF's applications to intervene in equality-related cases. In addition, she noted a number of other state tactics that appear to be solely directed toward undermining interveners and draining their already limited resources.

However, Kim's analysis of these trends was constrained by her inability to access the data required to provide a detailed empirical picture of the problem, namely, information

regarding litigation trends in the Department of Justice. On this basis, she linked her presentation to another Workshop theme, as described above, the adverse consequences of state control of information for gendered dissent. Kim expressed an ongoing interest in obtaining the data necessary to undertake a historical comparison of state litigation tactics in gender and equality rights seeking cases, in order to determine if anecdotal observations of an increase in adverse tactics are supported by empirical review.

Human rights and constitutional lawyer Fay Faraday, and Tracy Heffernan, counsel for the Advocacy Centre for Tenants Ontario, described the case study of the recent right to housing challenge in *Tanudjaja v. AG (Canada)* as an example of government attempts to pre-empt equality seeking Charter challenges by bringing preliminary motions to strike. They argued that not only does this litigation tactic jeopardize the possibility of a full hearing in a particular case, it also contributes to a political discourse which treats all *Charter* litigation as suspect. In the *Tanudjaja* case, the governments involved (Canada and Ontario) brought a successful motion to strike arguing that there was no reasonable legal claim despite the overwhelming evidentiary record put forward by the Applicants. While Ontario and Canada reviewed the entire evidentiary record, by launching a motion to strike they ensured that the courts could not. Fay and Tracy argued that the decision to strike prevents the development of the law and stunts the evolution of the constitution. It raises the question of whether a motion to strike is ever a justified procedural tool in a constitutional case. It also raises a fundamental question regarding access to justice for marginalized communities.

In response to this panel, participants agreed that there is a need to strategize ways to challenge dishonourable government litigation tactics, both inside and outside of the courts. Advocates must find ways to hold government litigation decisions to a standard that is consistent with the honour of the Crown, the public interest role of Crown litigators, and the ethical dimensions of constitutional litigation. Workshop participants were also concerned with the question of law's utility for addressing the various problematics identified throughout the Workshop. Many noted the inherent limitations of litigation as a tool for social justice. However, Fay and Tracey emphasized that litigation is most effective when it is situated within a broad community-based advocacy campaign. They reminded us that just because the courts disagree does not mean our concept of equality is wrong. Rather, litigation can be part of broader efforts to contribute to public discourse and to social movements. Many participants asserted that we do not have the luxury of pessimism and the response to unsuccessful litigation must be to take the issues to the public and change the terms of the debate.

Moving Forward: Theorizing and Enacting Responses

Human rights lawyer Pearl Eliadis provided a brief summary linking the Workshop presentations to the Voices-Voix Documentation Project. Pearl saw three important areas of work going forward: 1) reclaiming civil liberties; 2) confronting litigation tactics; and, 3) developing a report on dissent in Canada.

Throughout the Workshop participants sought to articulate how the focus on gender and dissent may bring specific nuance and insight into the broader effort to understand and respond to recent trends in the relationship between civil society and the state. At the same time, workshop participants critically interrogated the limitations of the gender focus, particularly with respect to how one draws the boundaries between 'gender' issues and other civil society issues. In the final discussion there was clear interest in continuing to pursue elements of a dissent-focused project with a specifically gendered lens. At the same time, there were concerns about how to prioritize responses and there was a call for solidarity and movement building across groups and issues, particularly in the lead up to the 2015 federal election. Throughout the Workshop there was strong agreement on the need for grassroots women's advocacy and political action, including the need for solidarity and movement building between domestic women's groups and international development sectors.

The participants also acknowledged the need for the conversation to be expanded beyond the relatively privileged and educated group in the room. Ongoing work on these issues must include strategies that aim to ensure much wider inclusion and participation.