Political Science Undergraduate Review

VOLUME 4, ISSUE NO.1
2018 -2019

UNIVERSITY OF ALBERTA POLITICAL SCIENCE UNDERGRADUATE ASSOCIATION

VOLUME 4

LETTER FROM THE EDITOR

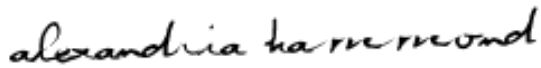
In its fourth year of publication, a time of reflection was in store for the Political Science Undergraduate Review (PSUR). As the promotion of undergraduate research continues in the Political Science department, how can the PSUR be better utilized as an opportunity for students to take their scholarly work beyond the classroom? Our conclusion was the PSUR can better act as an introduction to the peer-review process by creating a collaborative educational process between author and reviewer, while striving to curate the best content our department has to offer.

Multiple changes were implemented this year to ensure that the PSUR can be made more accessible for authors and peer-reviewers alike and to better promote scholarly publication. For the first time, the PSUR has defined and published reviewer guidelines making the peer-review process more transparent and trustworthy. While striving to make the peer-review process more accessible to students, this year the Editorial team worked closely with University of Alberta Libraries Sonya Betz, Head Library Publishing and Digital Production Services, to modernize the submission and review procedure of the PSUR. As a result of this work, the PSUR is now hosted on journal management and publishing system, Open Journal Systems, which enhances the reliability of the double-blind peer-review method and for the first time allow authors to engage with peer-reviewers directly to implement revisions. These changes have made the peer-review of the PSUR more of a collaborative learning process and we thank Sonya for making this possible.

The editorial team must be recognized for approaching this publication with enthusiasm and dedication. Heather Taskey, Sarah Clifford, Anusha Kav, Shahroze Khan, and Aryssa Hasham brought their knowledge and experience to create a PSUR edition which I believe maintains the highest level of academic integrity. The Political Science Undergraduate Association must also be thanked for their support on this initiative. To Micah Leondia, our PSUA President, I must thank you for your guidance and your continued advocacy in the department on behalf of the PSUR.

I hope that the PSUR continues to be a source of connection for political science students and remains a point of access for students who are willing to take the risk to share their work. If you find a favourite article, make sure you reach out to the author. It's important we tell our colleagues when they have done good work.

Enjoy the read.



- ALEXANDRIA HAMMOND, Managing Editor
Vice President Academic, Political Science Undergraduate Association 2018-2019

TABLE OF CONTENTS

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 1

Who Receives the Gift of Life? The Gendered Settler-Colonial Project and the Case of Delilah Saunders

By Meghan Cardy

An organ donation is a matter of life and death in the most literal sense, meaning the Trillium Gift of Life Organ Donation Network, the regulatory body for organ donations in Ontario, is aptly named. In December of 2017, Delilah Saunders, an Inuk activist for the rights of missing and murdered Indigenous women and girls, went into acute liver failure and was refused a spot on their waiting list. What was the reason the Trillium network cited in refusing Ms. Saunders? She had failed to meet the requirement of a prior sixth-month period of sobriety, a sixth month period wherein she had also been called to testify on the 2014 murder of her sister Loretta at the National Inquiry on Murdered and Missing Indigenous Women and Girls. The refusal gained national media attention and sparked furious debate, especially regarding the larger issue of the discriminatory experiences of Indigenous women in the Canadian health system. This paper argues that the policy that led to the decision to refuse Delilah Saunders a liver transplant, when analyzed through the intersecting lenses of gender and settler-colonialism, displays the continued commitment of Canada to the settler-colonial logic of elimination, especially regarding Indigenous women.

Introduction

An organ donation is a matter of life and death in the most literal sense, meaning the Trillium Gift of Life Organ Donation Network is aptly named. In December of 2017, Delilah Saunders, an Inuk activist for the rights of missing and murdered Indigenous women and girls, went into acute liver failure and was refused this gift, a spot on the Ontario organ donation waiting list because she had failed to meet the requirement of a prior sixth-month period of sobriety (Canadian Press 2017). Saunders had begun her advocacy in 2014, after the murder of her sister, Loretta Saunders. The refusal gained national media attention and sparked furious debate. Saunders considered legal action in order to change the policy, which had already received criticism, and drew attention to the larger issue of the discriminatory experiences of Indigenous women in the Canadian health system (Meloney 2017). This paper will argue that the 'impartial' policy that led to the decision of the Trillium Gift of Life Network to refuse Delilah Saunders a liver transplant, when analyzed through the intersecting lenses of gender and settler-colonialism, displays the continued commitment of Canada to the settler-colonial logic of elimination, especially regarding Indigenous women. I will examine how the bodies of Indigenous peoples, and

violence against those bodies, is inextricably linked to the process of settler colonization, and how the deep gendering of such a logic constructs the bodies of Indigenous women specifically as threatening to the nation. The specificities of this case, especially the links between the perceptions of Aboriginal women within the Canadian healthcare system, alcohol, indigeneity and the state, and Delilah Saunders' position as an Indigenous activist each serves to contextualize the refusal to place Ms. Saunders on the transplant waiting list. Considering the context reveals such an action to be much more than the application of a universal policy, and in fact, deeply connected with the historical and ongoing processes of settler colonialism. In researching as a settler and beneficiary of settler colonialism, I intend to emphasize the works of Indigenous scholars that center and legitimize the lived experience of Indigenous people as a source of knowledge. I undertook this effort in the recognition that processes and policies often deemed equal and rational, such as that which prevented the Trillium network from placing Delilah Saunders on the transplant waiting list, are in fact deeply informed by structures of oppression which I will never be able to fully represent.

Indigenous Women and the Logic of Elimination

While the formation of settler society is often discursively located in the past, it is important to locate contemporary individual experiences amidst the acknowledgement that settler colonialism is an ongoing operating logic that involves both the state and the individuals who comprise that state, and is not a discrete historical event. Patrick Wolfe's (2008) piece on how to appropriately link settler colonialism with the concept of genocide frames the settler-colonial "logic of elimination" as such a process, a theory that can help place the treatment of Ms. Saunders in it's larger context. Wolfe proposes that the appropriation of Indigenous land, which requires the elimination of Indigenous bodies to claim the land, is conceptualizable as a set of concrete events, but is also a logic reflected in the "different modalities, discourses, and institutional formations as it undergirds the historical development and complexification of settler society" (2008, 120-21). Wolfe demonstrates that the state's imperative to assimilate or annihilate Indigenous bodies is seen not only in the concrete steps towards elimination that the state took in history, but also in the way institutions are formed. Additionally, the rationale behind the actions of settlers past and present are implicated in this process as their interests become intertwined with those of the state (2008). The debate of settlers over Delilah Saunders' access to lifesaving medical treatment is therefore symptomatic of the settler concern about Indigenous bodies, even though such concern presents itself in the context of an individual's experience with an 'impartial policy'. Such 'impartial policies' were not created in a vacuum and are not arbitrated by completely unaffected persons, and Wolfe demonstrates that the logic of settler colonialism is contemporary and belongs to more than the state.

Important to understanding the challenge the case of Ms. Saunders' posed to the state and the nation is the especially contested position of Indigenous women within the logic of settler-colonialism. Audra Simpson notes that it is because Indigenous women embody the reproductive possibilities of Indigenous life, in both physical and political ways, their destruction is essential in maintaining the sovereignty of the settler-colonial state (2016). Indigenous women exist at the intersection of racialization and patriation, and their bodies are intimately connected to the settler-colonial imperative of Indigenous dispossession. Therefore, violence against them is widespread, goes un-noted, unprosecuted, and unquestioned (Simpson 2016). As stated by Simpson in reference to Chief Theresa Spence, but equally applicable to the case of Ms. Saunders that: "...were she to have died, her body would have been in fact, the

eliminatory logic of the state laid bare, and made all too real" (Simpson 2016, *Flesh and Sovereignty*). Delilah Saunders, as an Indigenous woman, came face to face with the eliminatory logic of the state and its settlers, not only in the murder of her sister Loretta, but in the state's own indifference to her life when it placed it in jeopardy. The logic of settler colonialism had put in place the conditions for her struggle and used the sobriety policy to continue the same 'destruction in absentia' process that contributed to the disregard for murdered and missing Indigenous women and girls. When we acknowledge this logic we must consider the ways in which the state formed the policy used against Ms. Saunders, its importance, and the role of settler-colonialism in shaping Ms. Saunders' previous experiences in order to fully understand how a debate about the life and death of an Inuk woman provided such a challenge to Canada.

Why Delilah? Consideration and Trauma

As the bodies of Indigenous women come to bear the violence of the state and its people in attempts to destroy Indigenous political orders and ways of life, the state healthcare system becomes another tool of settler-colonialism. In the healthcare system, decisions about who receives the resources to live a full life occur, and so the treatment (and non-treatment) of Indigenous women betray a lapse in the 'universality' that it is often attributed. Healthcare regulations crafted in resistance to Aboriginal entitlement continually discredit and marginalize Aboriginal women within the construction of the policies themselves (Fiske and Browne 2006). The institutional logic of the body that writes policies place certain subjects in greater degrees of surveillance, degrees that often coincide with racist stereotypes and assumptions (103). Fiske and Browne demonstrate that the language of policy and the resulting degrees of surveillance construct Aboriginal women as discredited medical subjects, creating a healthcare system in which "their expressed medical needs may be received with skepticism and disapproval even as they find themselves under greater scrutiny" (103). In the contemporary neoliberal context strategic surveillance-as-discretization technique becomes an expedient means of re-enforcing discourses of fiscal accountability that delegitimize citizen's moral claims on the state (106). The $110,000 the Canadian state spent fighting a legal battle against paying for braces for Josey Willier, a teen from Sucker Creek First Nation, displays another instance of the Canadian state distancing itself from its responsibility for the health of Indigenous women (Kassam 2017). The neoliberal Canadian state has a vested interest in refusing Indigenous women healthcare, in both limiting costs and in continuing to operate under the imperatives of gendered settler colonialism. Due to these interests within the system, the non-treatment of Delilah Saunders due to her previous history with alcohol abuse may not have been specifically because of the risks of alcohol abuse prior to transplantation, but due to the existence of such a policy at all and the prerogative of health practitioners to apply it in their own discretion.

The main concern of many who agreed with the decision of the Trillium Gift of Life Network to refuse Delilah Saunders was her history of alcohol abuse. Concerned parties frequently raised the issue of Saunders' recent alcohol abuse to invalidate her claim to an equal degree of medical treatment, as such sentiments convey the perception that her medical crises were entirely of her own creation. The complex history of indigeneity and alcohol in Canada is an inextricable piece of the debate, but actually serves to further indict the Canadian state rather than Ms. Saunders herself. The use of alcohol and its surrounding body of policies to control Indigenous lives has a well-documented history in Canada, despite racist stereotypes that link alcohol abuse with the personal failures of Indigenous peoples. In his work on the complex way alcohol policy facilitated both the assimilation and exclusion of Indigenous peoples from the

Canadian state, Robert A. Campbell traces the history of the Canadian government's control of access to alcohol for Indigenous peoples and the processes intimate connection with membership in the state (2008). Beginning even prior to Confederation, Indigenous people were completely barred from possessing or consuming alcohol, a policy that was an explicit part of the 'civilizing' process enforced by settlers from missionaries to the Canadian state, despite the prevalence of alcohol abuse in Indigenous communities and white settlements alike. After confederation, the consumption of alcohol was racialized even more significantly, as only First Nations people who gave up their status and became enfranchised were legally able to possess alcohol, and the *Indian Act* specified that Indigenous bodies had to be demonstrably sober before becoming eligible for enfranchisement (Campbell 2008, 107-109). These policies served to intimately connect Indigenous identity, membership in the Canadian state, and the consumption of alcohol. In order to be a full member of the nation and to be treated with a similar level of concern and care as settlers, Indigenous bodies were, and continually are held to different standards, especially in the context of alcohol policy. A substantive definition of citizenship that includes entitlement to government services like healthcare makes clear the lack of consideration as a 'proper' citizen Delilah Saunders is given. In using her relationship with alcohol as a reason to exclude her from the benefits of being a member of the state, the Trillium network re-invoked a set of beliefs and strategies that echo the government's historic approach to Indigenous bodies and alcohol, a continuation of settler-colonialism.

Also important to consider in the case of Delilah Saunders is her role as an activist and how her case displays both the personal cost of being an outspoken Indigenous woman, and what role this might have played in her failure to meet the sobriety requirements for organ donation. Ms. Saunders herself connected the emotionally charged and draining process of testifying about the murder of her sister at the National Inquiry into Murder and Missing Women and Girls to her relapse into alcohol abuse. Saunders had begun drinking shortly after her sister's death, but she had been sober for seven months prior to her testimony (Canadian Press 2017). There is an understood connection between the ongoing experience of trauma and alcohol abuse, a relationship that was not considered in refusing Ms. Saunders' spot on the donation waiting list. In her work on Indigenous women activists in Canada and their role in moving the ongoing abuses of colonialism into the public sphere in Canadian discourses, Dian Million notes that the very structure of tribunals engages with trauma (2008, 268). Million proposes that because tribunals depend upon the participants to connect the past with the present, and in a way "return to the sight of the crime," they force victims to publicize their trauma (268). Indigenous women feel the impact of not only the incredible trauma of experiencing violence, but also the secondary trauma of having to account their experiences in activism to push for their recognition and action towards a resolution. These acts of incredible resistance move the abuses of settler colonialism out of the weak consideration of the private sphere and into the public, destroying 'objective' colonial histories (Million 2008). Delilah Saunders took upon herself the mantle of publicizing her family's trauma and making public the negligence of the colonial state in her sister Loretta's death, but was not able to have her own alcohol abuse connected to public histories of trauma. A failure to acknowledge the complex associations between alcohol abuse and trauma pushes the issues of Indigenous women back into the private sphere and allows for further negligence of the colonial state regarding the ongoing role they play in the destruction of Indigenous women's lives.

Making Visible: Trauma-Informed Care

When the trauma faced by Indigenous women at the hands of the state becomes publicly recognized, it is apparent that there is a need to re-examine decision-making in healthcare The healthcare system must ensure more women like Delilah Saunders do not continue to slip through the cracks caused by the inability of current policies to properly acknowledge the ongoing complexity of the Indigenous experience in Canada. Interviews with Aboriginal people who had accessed the healthcare system in British Columbia reveal that current policies, and medical professionals themselves, often render Indigenous people's histories invisible while highlighting their Indigeneity in a problematic way, as an issue that must be "dealt with" (Hole et al. 2015, 1670). Interestingly, many of the healthcare practitioners interviews in these studies placed an emphasis on the need for "equality" in healthcare, in that they aimed to treat Aboriginal patients the same as white patients (1670). This is the issue faced by Delilah Saunders, in that it was expected that the policy that kept her from the possibility of receiving a new liver would impact all patients the same way despite their position within the structure of colonialism. Aboriginal people within the previously mentioned study called for nonracist healthcare and policies cognisant of social and historical factors that influence the need for healthcare and the cultural desires of Indigenous patients (1671). Moreover, policies in healthcare have to contend not only with the differing needs of Indigenous peoples but also with Indigenous women specifically as subjects with frequent experiences of trauma. A 2016 ethnographic study on increasing Indigenous healthcare equity prioritised trauma and violence informed care as one of their ten strategies towards improving services, noting that "without a broader understanding of the intertwining nature of trauma, pain, and substance use, negative judgments conveyed to patients, particularly those who experience problematic substance use, can have harmful consequences" (Browne et al. 2016, 12). Indigenous equity in healthcare necessitates the recognition that trauma is an experience that informs medical need, which could have drastically altered the interaction between Delilah Saunders and the Trillium Gift of Life network.

Conclusion

Without rethinking both the concept of 'impartiality' in healthcare and the recognition that universal policies can perpetuate violence, the eliminatory project of settler-colonialism continues to enact violence against Indigenous women. In her illness, Delilah Saunders became subject to the same potential destruction stemming from disregard that she testified against in advocating for Missing and Murdered Indigenous Women and Girls such as her sister. Delilah Saunders' claim to healthcare forced settlers and the settler state alike to contend with complex histories of alcohol and Indigenous recognition by the state, the ongoing regulation and problematization of the bodies of Indigenous women and the power and vulnerability of an outspoken Indigenous woman fighting to bring the violence of settler-colonialism to public consciousness. In the course of researching this work as a settler complicated my understanding of the suitability and the extent of our current steps towards 'reconciliation' under the Canadian state. Ms. Saunders' case displays that the project of ending gendered settler-colonial violence must indeed occur more than in word. The processes of decolonization must include more than apologies that acknowledge the historicized narrative of annihilation, and address the policies and institutional logic that perpetuates settler violence against Indigenous bodies, and especially women, today.

References

Browne, Annette J., Colleen Varcoe, Josée Lavoie, Victoria Smye, Sabrina T. Wong, Murry Krause, David Tu, Olive Godwin, Koushambhi Khan, and Alycia Fridkin. 2016. "Enhancing Health Care Equity with Indigenous Populations: Evidence-Based Strategies from an Ethnographic Study." *BMC Health Services Research* 16: 1-17. doi:10.1186/s12913-016-1707-9.

Campbell, Robert A. 2008. "Making Sober Citizens: The Legacy of Indigenous Alcohol Regulation in Canada, 1777-1985." *Journal of Canadian Studies* 42 (1): 105-126.

Canadian Press. 2017. "Delilah Saunders' Potential Liver Donors Stalled by Ontario Rule." *Huffington Post*, December 18. http://www.huffingtonpost.ca/2017/12/18/delilah-saunders-potential-liver-donors-stalled-by-ontario-rule_a_23310673/

Fiske, Jo-Anne and Annette Browne. 2006. "Aboriginal Citizen, Discredited Medical Subject: Paradoxical Constructions of Aboriginal Women's Subjectivity in Canadian Health Care Policies." *Policy Sciences* 39 (1): 91-111. doi:10.1007/s11077-006-9013-8.

Hole, Rachelle D., Mike Evans, Lawrence D. Berg, Joan L. Bottorff, Carlene Dingwall, Carmella Alexis, Jessie Nyberg, and Michelle L. Smith. 2015. "Visibility and Voice: Aboriginal People Experience Culturally Safe and Unsafe Health Care." *Qualitative Health Research* 25 (12): 1662-1674. doi:10.1177/1049732314566325.

Kassam, Ashifa. 2017. "Canada has Spent $110,000 to Avoid Paying $6,000 for Indigenous Teen's Orthodontics." *The Guardian*, September 30. https://www.theguardian.com/world/2017/sep/30/canada-first-nations-orthodontics-teenager

Meloney, Nic. 2017. "Delilah Saunders 'Grateful and Outraged' by Struggle to Get Liver Transplant." *CBC News*, December 20. http://www.cbc.ca/news/indigenous/delilah-saunders-liver-transplant-wait-list-alcohol-1.4456672

Million, Dian. 2008. "Felt Theory." *American Quarterly* 60 (2): 267-272. http://www.jstor.org.login.ezproxy.library.ualberta.ca/stable/40068534.

Simpson, Audra. 2016. "The State is a Man: Theresa Spence, Loretta Saunders and the Gender of Settler Sovereignty." *Theory and Event* 19 (4): 14.

Wolfe, Patrick. 2008. "Structure and Event: Settler Colonialism, Time, and the Question of Genocide." Chap. 4, In *Empire, Colony, Genocide : Conquest, Occupation, and Subaltern Resistance in World History*, edited by A. Dirk Moses, 102-132. New York: Berghahn Books. http://www.jstor.org/stable/j.ctt9qd5qb.

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 2

The Case of Omar Khadr and the Two-Tiered Canadian Citizenship Model

By Keysel Alberto Aranzamendez Besa

This paper focuses on the case of Omar Khadr, a Toronto-born Muslim-Canadian citizen who was captured by the American Armed Forces in a bombed-out compound in Afghanistan in 2002. Khadr spent a decade of his life detained, often in solitary confinement, in Guantanamo Bay, which had been controversial for allegations of torture against its detainees (cite). In 2012, Khadr pled guilty before a military tribunal for throwing a grenade that fatally wounded an American soldier – a guilty plea he later recanted. As for the Liberal government's $10-million compensation and apology to Khadr, Canadians remain divided. Through using the case of Omar Khadr, I will argue that one's status as a Canadian citizen is not an absolute guarantee to shield people from abuse, dispossession, stigmatization, prejudice, and racialization. Additionally, I suggest that Canada subscribes to a double standard when it comes to protecting its citizens, as seen in its complicity in Khadr's case, as well as its deliberate stonewalling of his repatriation. Most importantly, I intend to demonstrate that racialization and prejudice are the main reasons why Khadr was deprived of the protections and rights, which should have been guaranteed to him, given his Canadian citizenship.

Introduction

What makes a Canadian citizen an "ideal Canadian"? Are some Canadians "more Canadian" than others and thus, more deserving of the rights that citizenship entails Many of those who closely followed how Omar Khadr's case unfolded had these questions in mind. Khadr is a Toronto-born Canadian citizen who was captured by American Armed Forces in a bombed-out compound in Afghanistan back in 2002, a year after one of the deadliest terrorist attacks on American soil (Cote and Henriquez 2010; Gibson and Covacs 2010). Khadr's case suggests that Canadian citizens are categorized into two groups. Some political commentators call this system "two-tiered citizenship" (Khan 2008; Pagtakhan 2016). The first-tier of Canadian citizens are full citizens, meaning they are guaranteed full access to the rights and privileges that come with their "formal citizenship" (Sedef 2005, 41). On the other hand, the second-tier of Canadian citizens is composed of those who are merely regarded as "technically Canadians." Second-tier Canadians, unlike first-tier citizens, cannot rely on their formal citizenship to gain full access to rights and privileges that normally come with Canadian citizenship. In fact, they face exclusion, dispossession, and alienation from the Canadian political

community. In this paper, I will argue that the Canadian model of citizenship is two-tiered and that a person's race and religion are the determining factors as to which category they will fall under. This argument is supported through an analysis of three major occurrences in Khadr's case: the government's complicity in the violation of his rights, the Supreme Court's failure to address all the breaches of his citizenship rights, and the government's refusal to repatriate him to Canada.

Canada's Complicity in the Violation of Khadr's Rights

Canada's complicity in the violation of Khadr's Charter rights supports the notion that he belongs in the second-tier of citizens, which means he does not qualify for the full protection of rights that are enjoyed by first-tier citizens. Arguably, the reason for this is his race and religion. The Supreme Court of Canada's held that the Canadian state had indeed violated Khadr's Charter rights while he was abroad:

> Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the Charter, contrary to the principles of fundamental justice. (Canada vs Khadr 2010)

This decision pertains to the impropriety of the interrogation conducted by Canadian government officials while Khadr was 16 – without any access to legal counsel and despite knowing he had been subjected to torture (Canada vs. Khadr 2010; Canada vs. Khadr 2009). Additionally, this decision confirms that it is unlawful of the Canadian Intelligence officials to share the fruits of their interrogation with US government officials. Canada's violation of Khadr's citizenship rights attests to the notion that Khadr is a second-tier citizen, as his formal citizenship was insufficient in shielding him from racialization and denial of access to rights and privileges normally given to full citizens.

According to Wendy Chan and Dorothy Chunn (2014), two sociologists who wrote extensively about the racialization of crime in Canada, Canada's complicity in the violation of Khadr's Charter rights may be a direct result of the September 11 attacks, where the terrorists responsible were identified as Muslim men. Chan and Chunn contend that the xenophobia, bias, and suspicions toward people of Muslim and Arab origin intensified, regardless of whether these Muslims are Canadian citizens or not. This view is echoed by Yasmeen Abu-Laban (2014), who believes that since 9/11, "what Muslims [and Arabs] are up to at home and abroad became a national security concern" (408). Thus, it can be said that the two-tiered citizenship in Canada is racially marked, as even though people of Muslim and Arab origin may be Canadian citizens, their citizenship is not a blanket-guarantee that they will be protected from the unfair and sometimes baseless suspicions by the state which first-tier citizens rarely, if never, experience.

Valentina Capurri (2016), an expert in the geography of citizenship, captured this idea of racialization as a major factor for classifying Khadr as a second-tier citizen: "Omar Khadr is among those individuals who the state has decided do not belong... assumed guilty by reason of their race or ethnicity, and are left with the task of proving their innocence in order to be recognized as citizens" (156-57). Indeed, the moment Canada became involved in the breach of Khadr's citizenship rights, the virtue of his

formal citizenship or "being a Canadian," per se, had been reduced and undervalued. If Canadian citizenship is an all-inclusive concept, then Omar should have been included in the term "everyone" in the Charter's section 7 (Macklin 2012): "[e]veryone_has the right to life, liberty, and security of the person, and the right not to be deprived thereof, except in accordance with fundamental justice. Unfortunately, as seen in Khadr's case, Canada failed to protect any of these rights, which for Audrey Macklin (2012), a law professor who had been active in Khadr's case, is Canada's way of "[renouncing] its relationship with Khadr as its citizen" (233). Even worse, Canada partook in the violation of his rights. Indeed, the Canadian government's contribution to the Khadr's plight in Guantanamo is an illustration of the notion that he is a second-tier citizen, which means his fundamental rights as a Canadian is less likely to be dignified compared to those who fall under the first tier. Additionally, his categorization as a second-tier Canadian is believed to have racial overtones.

Those who disagree with the notion that there is a two-tier citizenship system and that this is racially marked might argue that Khadr's case is not the first time Canada violated the Charter rights of its citizen(s). They might even supplement this objection by saying that the rights of some white, non-Muslim Canadians have also been violated by the government in the past. Therefore, it is misleading to assume that there is a two-tier citizenship system and that "playing the race card" is wrong (Hoppe 2009). As a response to this possible objection, we must remember that the breach to Khadr's Charter rights is extraordinary. Unlike other cases, assuming there are more, whereby Canada also violated the Charter rights of citizens including white and/or non-Muslim Canadian(s), the present case shows a government that deliberately colluded, participated, and "effectively collaborated with U.S. military authorities" in the mistreatment of its own citizen (Glavin 2017), which in the words of Canada's top court: "offends the most basic Canadian standards" (*Canada vs Khadr* 2010). Put another way, the Canadian government has willfully aggravated Khadr's appalling condition abroad it sent officials to interrogate him and when they shared evidence with US officials to ensure his conviction. Aside from that, we have reason to believe that there is a spectre of racialization here, since Muslim Canadians, as many scholars have argued, had been subject to intense negative suspicions, securitization, prejudice, dispossession, and xenophobia in the post-9/11 era (Chann and Chun 2014; Abu-Laban (2014); Aitken 2008; Jiwani 2012).

The Supreme Court: Also Participatory in the Breaches of Khadr's Rights?

The Supreme Court of Canada is arguably complicit too in the continuous violation of Khadr's rights for two reasons: first, the court failed to explicitly address other Charter rights that had been breached in Khadr's case; and second, the Court stopped short at ordering the government to repatriate Khadr.

Although the Supreme Court, in its 2010 decision in *Canada vs Khadr*, ruled in favour of Khadr's team by ruling that his Charter rights had indeed been violated, the Court has also contributed to the ongoing violation of his rights when it failed to tackle other Charter rights that had been breached in his case. As we know, the Court has decidedly ruled that his rights under the Charter's section 7 had been violated (*Canada vs Khadr* 2010). However, his right not to be arbitrarily detained, to have a trial by an impartial and independent tribunal, be tried within a reasonable time – which are all Charter rights too – were left unaddressed by the Court. By not paying enough attention to the other Charter rights that had

been breached, the Court ignored the ongoing torture and violation of Khadr's rights, which raises doubts as to the Court's allegiance to the rule of law and to the Canadian constitution (Woo 2012).

According to Grace Woo (2012), a member of the Lawyers Rights Watch Canada, the idea that our Supreme Court failed to address Khadr being detained for at least 5 years without any charges, in a place designed to operate "beyond the purview of the rule of law" (Pugliese 2011, 165) and be kept by captors who use horrific torture ways other than sleep deprivation, suggests that the Court deliberately "ignored the gravity of the situation" (317). Additionally, Woo (2012) explains that such failure of the court may be attributable to the perception many had about Muslims Canadians and Middle Eastern people as "desert nomads engaged in terrorist activities" (321) in the post-9/11 era. This reinforces the argument that there is a two-tier citizenship system in which Khadr had been systematically sequestered to the second-tier of citizens due to his race and religion. And this time, the Court had contributed to the continuing deprivation of his citizenship rights.

In addition to its failure to address other rights breached in Khadr's case, the Court was also participatory in the ongoing violation of his citizenship rights abroad when it reversed the order of the Federal Court and the Federal Court of Appeals in 2009 to repatriate Khadr (Chung 2010). Gail Davidson (2012), a retired lawyer and academic whose interest is in the study of international human rights, criticized the 2010 Supreme Court reversal of the Federal Court's repatriation ruling as "[laying] the foundation for more inaction" (258). Davidson's view is justified by the fact that Canada remained inactive about Khadr's repatriation after the 2010 ruling. A 2012 poll indicates that an overwhelming 60% of Canadians remained vehemently opposed to his return (Akin 2012). This is important because even though the Supreme Court, technically speaking, has the power and jurisdiction to order the federal government to repatriate Khadr (Makin 2010; Macklin 2012; Canada vs Khadr 2010), they chose not to. Most importantly, this is crucial because it has often been thought that the Supreme Court is the impartial last line of defense when citizenship rights have been violated. Sadly, as law professor, David Schneider (2010), points out, there is a double-standard here, which is consistent with the notion that the Canadian model of citizenship is two-tiered and is racially marked, since "...in other cases...the Court has ordered Canada to seek assurances" from other countries when the rights of its citizen(s) is/are threatened. The salient point is that the Supreme Court decision in 2010 gives thrust to the argument that the Canadian model of citizenship is two-tiered, whereby Khadr is situated in the second-tier of citizens because of the negative outlook associated with his race and religion. Therefore, he cannot fully rely on his country to defend, uphold, and dignify the rights he would ordinarily have if he was a first-tier citizen.

The Canadian Government's Deliberate Attempt to Block Khadr's Repatriation

The Canadian government's efforts to obstruct Khadr's repatriation suggests that citizenship in two-tiered, in which Khadr is categorized as a second-class citizen. When the Federal Court ordered his repatriation because they believe Canada had offended Khadr's fundamental rights under the Charter, and when the Federal Court of Appeal upheld that order, the implacable Harper government unyieldingly fought those orders all the way to the Supreme Court of Canada. Undoubtedly, the government did not hesitate to spend millions of dollars to impede Khadr's impending repatriation (Shepard 2017).

Some might argue that the reason the Canadian government could not bring Khadr back is that it would disrespect the United States' jurisdiction over their own affairs to do so. This is a fair objection to raise since the United States has no legal obligation to approve repatriation requests from the Canadian government or the Canadian Supreme Court. Therefore, others might understand why the Canadian government just wanted to leave the Khadr matter in the hands of the US government. However, the Canadian government, both the Liberals and Conservatives, never even bothered to ask the United States to hand over Khadr back to Canada. (Shepard 2017). In fact, the United States had to be the one to work for Khadr's return to Canada: they were the one who took the initiated talks with the Canadian government to take Khadr back to Canada after his plea bargain in 2010 (Dunn 2012). Even Ezra Levant (2011), one of Khadr's staunchest critics, affirms this: "getting rid of Omar Khadr, a Guantanamo celebrity inmate, remained a [US] political priority" (188). All these facts are crucial for us to fully visualize and understand that it was the Canadian government that tried to drag its foot on the issue of Khadr's repatriation.

Augustine Park (2014), a sociology professor who wrote extensively on the discourses of racialization, suggests that there are racial undertones in blocking Khadr's repatriation: "...the Muslim other is equated with the inescapably cultural, where culture becomes a code for discourses of terrorism, extremism, fanaticism, and bloody-mindedness, along with patriarchy, oppression, and an irrational, unprovoked hatred of all things..." (48). Further, Park (2014) argues that the government's refusal to bring Khadr is "animated by cultural racism" and has underpinnings related to the theory of a "clash of civilizations," wherein "Western and Islamic civilizations in particular are destined for conflict" (48). Khadr, being a brown-skinned Muslim-Canadian, is thus positioned in the second tier of citizens and "...rendered undeserving of the rights of 'real' Canadians, including the guarantees of state protection abroad" (45).

In the same vein, Robert Diab (2012), a criminal law expert, and Alnoor Gova (2012), a PhD candidate whose expertise is in the study of Canadian citizenship, argue that since Khadr's case has "unfolded in a religio-political context" the government felt that the parameters of rights that entail his Canadian citizenship could be "ignored and exploited" (364). Hence, it is difficult to ignore the possibility that the Canadian government's refusal to bring Khadr back in Canada is due to negative perceptions they have about people of Muslim origins. Attorney Dennis Edney, one of Khadr's lawyers, perfectly captured this notion of a two-tiered citizenship system based on race and religion, when he states that the Canadian government tries to pick-and-choose "which Canadians it should help and represent. And Omar Khadr, being a person of colour, doesn't fit into that list" (The Hamilton Spectator 2009). The overarching point is that Khadr's citizenship is not as valuable, respected, and worth dignifying as other Canadians,' who belong to what we call the "first tier." He was treated as an "undeserving victim, unbefitting of state intervention and societal sympathy" (Jiwani 2012, 13). Although he is a Canadian citizen, the government's effort to block his return to Canada sends a strong message that there is a two-tier citizenship system, in which Khadr falls under the second tier.

Conclusion

It is difficult to answer the question I initially posed: What makes a Canadian citizen an ideal citizen? However, we can at least see by examining the way Canada treated Khadr that he personifies what constitutes the unideal citizen. Khadr's case suggests that formal citizenship is neither an automatic, nor a reliable guarantee of equal access to privileges, rights, and fair treatment before the law. In this paper, I examined three important occurrences in the saga of Khadr's legal battles: the government's involvement in the breach of his Charter rights, the Supreme Court's 2010 decision, and the government's determination to block and prevent Khadr's repatriation. It has been suggested that these three important occurrences in Khadr's case have all likely been affected by his racialized appearance and his identification as a Muslim. This raises an important question: Does Khadr's case involve the proper and equal application of justice? Or does it show how the Canadian state treats its citizens who are considered "different"? The case of Omar Khadr should serve as a warning to those who come to Canada hoping that this country can and will always uphold their right to equality, justice, and freedom. If the Canadian state can do what it did to Khadr, there is no doubt it can do it to other Canadian citizens too. Some of us might be privileged to belong in the first-tier of Canadian citizens for now, but who knows when the factors that determine which tier a person falls under will shift. Should we try to revise or change the current two-tiered model of Canadian citizenship to accommodate the increasing social and cultural pluralism in Canada? These questions are up to Canadians to answer.

References

Abu-Laban, Yasmeen. 2014. "Diversity in Canadian Politics". In 6th ed., 395-410. University of Toronto Press.

Aitken, Rob. 2008. "Notes on The Canadian Exception: Security Certificates in Critical Context". *Citizenship Studies* 12 (4): 382-395.

Akin, David. 2012. "Canada Doesn't Want Khadr Back: Poll". *Lucknow Sentinel*. http://www.lucknowsentinel.com/2012/08/22/canada-doesnt-want-khadr-back-poll.

Asiz, Omer. 2017. "Omar Khadr And the Shame of Canadian Media". *New Canadian Media*. http://newcanadianmedia.ca/item/41916-omar-khadr-and-the-shame-of-the-canadian-media.

Aziz, Omer. 2017. "Omar Khadr And the Shame of The Canadian Press". *The Walrus*. https://thewalrus.ca/omar-khadr-and-the-shame-of-the-canadian-press/.

Biswas, Shampa, and Zahi Anbra Zalloua. 2012. *Torture*. Seattle, Wash.: University of Washington Press.

Canada (Prime Minister) v. Omar Khadr. 2010. The Supreme Court of Canada.

Capurri, Valentina. 2016. "Omar Khadr, Hannah Arendt, and the Racialization of Rights' Discourse." *Studies in Social Justice* 10, no. 1: 147-166. *SocINDEX with Full Text*, EBSCO*host*

Chan, Wendy, and Dorothy Chunn. 2014. *Racialization, Crime, And Criminal Justice in Canada*. Toronto: University of Toronto Press.

Chung, Emily. 2010. "Khadr Repatriation Overturned by Top Court". *CBC News*. http://www.cbc.ca/news/canada/khadr-repatriation-overturned-by-top-court-1.893059.

"Clinton Emails Show Depth of Discontent with Harper Among Foreign Affairs Staff". 2015. *CBC News*. http://www.cbc.ca/news/politics/clinton-email-canada-foreign-affairs-1.3344920.

Cote, Luc, and Patricio Henriquez. 2010. *You Don't Like the Truth: 4 Days Inside Guantanamo*. DVD.

Cotler, Irwin. 2008. "Bring Omar Khadr Home It May Not Be Popular but it's the Right Thing to Do | Irwin Cotler". *Irwincotler.Liberal.Ca*. https://irwincotler.liberal.ca/blog/bring-omar-khadr-home-it-may-not-be-popular-but-its-the-right-thing-to-do/.

"Detainee Treatment After Transfers to Countries of Citizenship And/Or Residency". 2017. *Library.Law.Utoronto.Ca*. Accessed November 25. http://library.law.utoronto.ca/khadr-case-resources-page.

Diab, Robert, and Alnoor Gova. 2012. "Reading Khadr: Making Sense of Canada's Reluctance To Do The Right Thing". In *Omar Khadr, Oh Canada*, 357-368. Mcgill-Queen's University Press.

Downing, David. 2008. *The War on Terror*. North Mankato, MN: Arcturus.

Dunn, Mark. 2012. "Feds in No Hurry to Bring Khadr Home". *Lucknow Sentinel*. http://www.lucknowsentinel.com/2012/07/16/feds-in-no-hurry-to-bring-khadr-home.

Gibson, Nigel, and Lou Kovacs. 2010. *News in Review*. DVD. Toronto: CBC Learning.

Glavin, Terry. 2017. "The Shady Business of Paying Omar Khadr - Macleans.Ca". *Macleans.Ca*. http://www.macleans.ca/opinion/the-shady-business-of-paying-omar-khadr/.

Haerens, Margaret. 2011. *Canada*. Detroit: Greenhaven Press.

Hausendorf, H, and Alfons Bora. 2006. *Analysing Citizenship Talk*. Amsterdam: John Benjamins.

Hoppe, Fred. 2009. "Columnist Wrong to Play the Race Card". *The Hamilton Spectator*, 2009. http://login.ezproxy.library.ualberta.ca/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=rch&AN=Q4K353082796609&site=eds-live&scope=site.

Inc., Postmedia. 2017. "What Some People Are Saying About the Omar Khadr Settlement and Apology". *National Post*. Accessed November 22. http://nationalpost.com/pmn/news-pmn/canada-news-pmn/what-some-people-are-saying-about-the-omar-khadr-settlement-and-apology.

"Khadr Should Be Tried on American Soil: Dion". 2007. *CBC News*. http://www.cbc.ca/beta/news/canada/khadr-should-be-tried-on-american-soil-dion-1.679315.

Khan, Sheema. 2008. "Do We Have Two-Tier Citizenship in Canada?". *The Globe and Mail*. https://www.theglobeandmail.com/opinion/do-we-have-two-tier-citizenship-in-canada/article25581081/.

Khan, Sheema. 2015. "Khadr's Release Is Bittersweet for Canada's Muslims". *The Globe and Mail*. https://www.theglobeandmail.com/opinion/khadrs-release-is-bittersweet-for-canadas-muslims/article24458706/.

Levant, Ezra. 2011. *The Enemy Within*. Toronto: CNIB.

Macklin, Audrey. 2012. "Rule of Law, Force of Law, And the Rule of Force". In *Omar Khadr, Oh Canada*, 222-242. McGill Queen's University Press.

Makin, Kirk. 2010. "Supreme Court Won't Force Khadr Repatriation". *The Globe and Mail*. https://www.theglobeandmail.com/news/politics/supreme-court-wont-force-khadr-repatriation/article4303500/.

"Martin Verdict Coming Tuesday, Mexican Judge Says". 2008. *CBC News*. http://www.cbc.ca/news/world/martin-verdict-coming-tuesday-mexican-judge-says-1.728665.

Neve, Alex. 2017. "Neve: Here's What Canada Is Making Amends for the Omar Khadr Case". *Ottawa Citizen*. http://ottawacitizen.com/opinion/columnists/neve-heres-what-canada-is-making-amends-for-in-the-omar-khadr-case.

Pagtakhan, Reis. 2016. "Canadian Citizenship Should Have 2 Tiers, Reis Pagtakhan Says". *CBC News*. http://www.cbc.ca/news/canada/manitoba/canadian-citizenship-reis-pagtakhan-opinion-1.3537885.

Park, Augustine S. J. 2014. "Constituting Omar Khadr: Cultural Racism, Childhood, and Citizenship." *International Political Sociology* 8, no. 1: 43-62. *Political Science Complete*, EBSCO*host*

Pugliese, Joseph. 2011. "Specters of The Muselmann: Guantanamo Bay Penalogial Theme Park and The Torture Of Omar Khadr". In *Torture: Power, Democracy, And the Human Body*, 158-165. University of Washington Press.

Schneiderman, David. 2010. "Khadr And Prerogative Power". https://www.law.utoronto.ca/blog/faculty/khadr-and-prerogative-power.

Sedef, Arat-Koc. 2005. "The Disciplinary Boundaries of Canadian Identity After September 11: Civilizational Identity, Multiculturalism, And the Challenge of Anti-Imperialist Feminism." *Social Justice* no. 4 (102): 32. *JSTOR Journals*, EBSCO*host*

Shephard, Michelle. 2017. "15 Years and Nearly $5 Million In Legal Costs Later, Ottawa Apologizes To Omar Khadr | Toronto Star". *Thestar.Com*. https://www.thestar.com/news/canada/2017/07/07/lawyer-for-us-soldiers-widow-calls-for-urgent-hearing-on-freezing-khadrs-105-million-settlement.html.

"The Case Of The Child Soldier". 2015. *Youtube*. https://www.youtube.com/watch?v=aoaU6D9tJrs.

The Hamilton Spectator. 2009. "Tories Deny Racism in Appeal of Khadr Ruling", 2009. http://login.ezproxy.library.ualberta.ca/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=rch&AN=Q4K06863097010 9&site=eds-live&scope=site.

"Toews' Request Delays Khadr's Transfer to Canada". 2017. *CBC News*. Accessed November 21. http://www.cbc.ca/news/canada/toews-request-delays-khadr-s-transfer-to-canada-1.1235312.

Wherry, Aaron. 2017. "Why Will Omar Khadr Receive $10.5M? Because The Supreme Court Ruled His Rights Were Violated". *CBC News*. http://www.cbc.ca/news/politics/omar-khadr-settlement-analysis-aaron-wherry-1.4189472.

Williamson, Janice. 2014. *Omar Khadr, Oh Canada*. Montréal: McGill-Queen's University Press.

Wilson, Richard. 2012. "War Stories: A Reflection on Defending An Alleged Enemy Combatant". In *Omar Khadr, Oh Canada*, 189-210. McGill-Queen's University Press.

Woo, Grace. 2012. "The Supreme Court and The Rights of the Child". In *Omar Khadr, Oh Canada*, 318-327. McGill-Queen's University Press.

Yasmin, Jiwani. 2011. "Trapped in the Carceral Net: Race, Gender, and the "War on Terror"." *Global Media Journal: Canadian Edition, Vol 4, Iss 2, Pp 13-31 (2011)* no. 2: 13. *Directory of Open Access Journals*, EBSCO*host* (accessed November 29, 2017).

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 3

Indigenous Child Welfare in Canada

By Christian Zukowski

This paper is primarily a case study of the Canadian Human Rights Tribunal case Caring Society v Canada and seeks to accomplish three things. First, to create a theoretical foundation built upon historic instances of discriminatory /assimilationist policies based upon theoretical understandings of social reproduction, biopolitics, and neoliberalism. Second, to situate Caring Society within said theoretical framework for the purpose of determining the context in which it occurs and the role of the case's context in producing discriminatory/assimilationist policy. Third is the application of both the theoretical framework as well as Caring Society to determine how the Canadian state engages in nation building through processes of othering and framing Indigenous peoples as a foreign threat to the security of the Canadian identity. In doing so, I not only argue that Indigenous child welfare is the perpetuation of residential schools, but that it systematically breaks down Indigenous children and Indigenous communities in response to their perceived threat through processes of othering and nation-building.

Introduction

Cindy Blackstock's paper, entitled "Residential schools: Did They Really Close or Just Morph Into Child Welfare?" (Blackstock 2007, 71), serves well as a theoretic and analytic point to begin this paper. Though my primary focus deals with *Caring Society v Canada* and how the case impacts our understanding of Indigenous peoples as citizens (and tensions therein), I will also discuss the historic, economic and social factors the permeate and foreground this case.

As Blackstock poses in her article, despite the last residential school having closed in 1996, does the settler colonial practice of nation-building continue through the Canadian state's exertion of control over the processes of social reproduction, othering, and the construction of foreignness in relation to its Indigenous peoples? In exploring this question, I will critically discuss the Canadian state's control over social reproduction through policy, legislation, and discourse, and how there has been a continuing tension between Indigenous traditions and the capitalist settler (and therefore gendered and racialized) construct of the family and citizenship. Building on this framework, I will discuss the more recent forces of neoliberal policy, and how it complements and motivates the state's control over social reproduction. The recent implementation of neoliberal policies by the state will be explored through the practices of

devolution of responsibility in the Indigenous child welfare system, as well as the biopolitical and fiscal tensions created in conflicts over land claims and Indigenous peoples' *sui generis* status in Canadian constitutional law. Having built a framework on the basis of social reproduction and neoliberalism, I will return to *Caring Society v Canada* and apply said framework. I then conclude with discussions regarding the processes of othering, security, and foreignness in Canadian nation-building and how this defines citizenship and the Canadian political community. In doing so, I argue that Indigenous child welfare systems are a perpetuation of the residential school system in that they, in practice, achieve the same thing: the exertion of control over the economic, familial, and social makeup of the Canadian national identity. Further, I argue that this is due to the perception of Indigenous people and their values as a threat to that very same identity, as well as the gendered and racialized construction of citizenship discussed above. However, I contend that the context in which this occurs has become increasingly complex in the light of the developing neoliberal state of politics of the Canadian government since the late 20th century and will attempt to tease this out in this paper.

Social Reproduction

In her writing, Bezanson identifies social reproduction as the "fleshy, messy, and indeterminate stuff of everyday life" (Bezanson 2018, 153). She elaborates that it permeates the macro, meso, and micro levels at which we analyze politics and power. While I fully agree with Bezanson's broad definition of social reproduction, it would be outside the scope of this essay to attempt a full analysis of what she defines. The relevance of Bezanson's framework to this paper is how the state controls social reproduction in *Caring Society* and Indigenous child welfare. Accordingly, I wish to focus on the parts of social reproduction that the Canadian state, in relation to the Indigenous peoples that reside within the confines of its settler colonial borders, seeks to exert power over in order to define the Canadian identity. In doing this, I will focus on the macro themes of social reproduction like settler colonialism and federalism; institutions and policies contained in the meso level, such as Policy Directive 5.1; and the micro level "transmission of culture, norms, socialization (including to racism) as well as love, support, and material/physical care" (Bezanson 2018, 153). While Bezanson also identifies neoliberalism as a macro level ideology through which we can analyze social reproduction, in light of its more contemporary relevance to my analysis, I will discuss it in a later section of this essay.

The Micro Level: Legal and Social Understandings of Indigenous Fathering

In beginning an analysis of social reproduction at the micro level, family must be considered as the focal point of social reproduction, through socialization and parenting. Within this paper, I will broadly define socialization as the process by which individuals transmit ideology, culture, and parenting practices. This will express the historical impact of settler colonial policies of assimilation, as well as how Indigeneity may be at conflict with the normative white settler identity.

Jessica Ball, a clinical psychologist with a background in public health and childhood development wrote: "Fathering in the Shadows." Ball examines "systemic barriers to positive fathers' involvement, including socioeconomic exclusion due to failures of the educational system, ongoing colonization through Canada's Indian Act, and mother-centrism in parenting programs and child welfare practices" (Ball 2009, 29). Specifically, in relation to my discussion of social reproduction, Ball relates

the fact that "that most Indigenous men and women in Canada are either survivors of residential schools or have suffered ″secondary trauma″ (2009, 32), with the experiences of fathers who felt that the "lack of exposure to positive fatherhood in their childhoods" is "best accounted for many of the challenges they faced when they became fathers" (2009, 34). The experience of modern Indigenous fathers would clearly impact socialization through the institution of the family. Such an impact is not merely in terms of "good" fatherhood, but *Indigenous* fatherhood. Some fathers express concerns regarding the recovery of "Indigenous forms of family life and men's roles as teachers, guides, providers, and guardians of the spiritual life of the family" (Ball 2009, 39). Modern Indigenous fathers are concerned about reviving their traditional role as transmitters of Indigenous culture, and therefore the transmission of indigeneity in the family.

We can also observe control over the type of social reproduction discussed above continued in the settler colonial formations of custody and legal paternity. Ball touches briefly on the fact that in the Canadian system of jurisprudence, the legal paternity of Indigenous fathers relies on the father's signature being on the witnessed birth record (2009, 43). Ball identifies several factors that exist as barriers to Indigenous fathers being able to sign their child's birth record, and further discusses research that indicates a father's name being present on a birth record is correlated to his involvement with a child and even child mortality (2009, 43). The barriers of Indigenous fathers being unable to sign their child's birth certificate demonstrates that settler colonial legal constructs (and barriers Indigenous fathers face in conforming to them) not only affect the transmission of culture, but the individual life.

In terms of custody, Friedland, the author of "Tragic Choices," discusses the tension between the loss of Indigenous communities and the loss of individuals in custody decisions regarding Indigenous children. While her paper speaks to the much broader issue of speaking about difficult factors regarding Indigenous custody decisions, her analysis of the case *D.(H.) v. H.(M.)* is relevant to my discussion surrounding social reproduction. There must be a degree of caution in giving weight to Friedland's writing, because while she may seem to support her arguments by the evidence that she provides, by her own admission this particular work is "following an intuition through legal theorists and case law, rather than a thorough or empirical analysis of the present situation" (Friedland 2009, 255). Friedland contrasts two parts of the judge's reasoning in deciding not to award custody to the biological grandfather of a child of Indigenous heritage: "his not [being comfortable] with "traditional spiritual practices"" and his "approach to parenting which is too 'hands off'" (Friedland 2009, 231). Friedland argues that the judge "is ignoring what is possibly an embedded cultural practice of child rearing, common to many Aboriginal communities" (Friedland 2009, 231). In doing this, Friedland posits that the "grandfather seems to be judged for not being "Aboriginal" enough on the one hand, and (perhaps) for being too traditional on the other" (Friedland 2009, 232).

Neoliberalism: A Meso and Macro Understanding of Social Reproduction through Legislation and Policy

In Bezanson's analysis, she takes a more economic and neoliberal understanding of social reproduction than the micro level analysis constructed above. However, in understanding the transmission of economic and ideological values contained within this section, the micro-level familial form of social reproduction that I have discussed deepens our understanding of social reproduction.

In discussing Grammond and the implications of Ball's work, we begin to see the importance of federal legislation and policy in relation to this case. Grammond, now a Justice of the Federal Court, wrote "Federal Legislation" while a Professor of Civil Law, and published this article in the Journal of Law and Social Policy. Grammond explicitly contends that "the child welfare system is perpetuating the harms of residential schools through different means" (2018, 132). In exploring traditional Canadian "Indian" policy, he examines the historic use of federal jurisdiction over Indigenous affairs "based on paternalistic assumptions and was aimed at assimilation" (Grammond 2018, 139). In contrast, MacDonald points to the fact that "the shift to 'autonomous' child welfare includes all the hallmarks of a privatization project including: re-regulation, re-privatization, co-optation, de-politicization and individualization" (2007, 22). Such a privatization project represents a growing shift in federal policy, oft-identified in academic writing, that shows a neoliberal tendency to increase the devolution of control over services without providing adequate resources to manage such control.

In the context of *Caring Society v Canada* and the case's broader implications for Indigenous child welfare, a shift towards neoliberal policies can be seen in the financial incentivization of removing children from their communities. Bezanson explains that the Tribunal found that "AANDC/INAC's funding structure incentivizes removing children and placing them into care rather than focusing on prevention and support" (2018, 159), a practice "built upon historical state practices of child removal and extended generational damage" (Bezanson 2018, 160). Grammond supports this in connecting it to an Ontario Superior Court of Justice ruling regarding the Sixty's Scoop that "held that the federal government was negligent when it failed to ensure the protection of the cultural identity of Indigenous children placed in foster care or adopted" (2018, 133). Further, throughout his paper Grammond explores the legal theory of "double aspect," in which both the federal and provincial governments may legislate in terms of Indigenous issues, but "[Parliament has] jurisdiction to legislate on Indigenous child and family services if it chooses to do so" (2018, 138).

Connecting this to my discussions of explicitly *social* (micro level) reproduction, one can see that neoliberal policies both permeate and motivate the Canadian state's exertion of control over social reproduction, in two distinct ways. The first that I discussed is in terms of child welfare funding, and the creation of a funding scheme that incentivizes the removing of Indigenous children from their communities. The second, is the lack of federal legislation regulating Indigenous child welfare, when Parliament has the constitutional grounds to do so. The significance of this is that it demonstrates that government policy continues to engage in assimilation and the destruction of traditional paths of Indigenous cultural transmission. Despite having clear authority to introduce legislation that would resolve or mediate the issue, the federal government has not done so. We must be cognizant that this also takes place within a broad settler colonial structure, and the federal exercise of legislative power over "Indians, and land reserved for the Indians" through the *Constitution Act, 1867* is itself an act of colonization. Within such a context, neoliberalism has further confounded the way in which we look at this issue in that it supports settler colonial practices and disincentivizes federal intervention.

Pasternak's "The Fiscal Body of Sovereignty" can lend further assistance in analyzing the relationship between the Canadian state's neoliberal policies in relation to Indigenous issues. Though she examines land claims, band management, and financial conflicts, Pasternak's analysis and connecting of these issues to those of surplus populations in capitalist societies and biopolitics is particularly

relevant. One can draw a direct analogy between band management and child welfare, as the federal government fails to provide adequate funding to Indigenous programs for them to achieve their intended goals. Pasternak also notes, through Marx and Li, that "surplus populations are not always created as a strategy of capitalism, but can be 'a sign of their limited relevance to capital at any scale'" (2015, 15). When discussing the context of government funding for any service, the creation of surplus populations suggests that the provision of capital to a surplus population would be allocated based on its relevance to capital.

Further biopolitical implications can be considered in "The Fiscal Body of Sovereignty" in a settler colonial context, in that Indigenous peoples are not considered nation-to-nation partners, but rather as "neo-liberal Canadian subjects who must embrace market citizenship in order to secure necessary funds to eat and have shelter" (Pasternak 2015, 15). In the case of Indigenous bodies on reserves, they are fiscally discriminated against to the point that they are no longer seen as humans with extra-fiscal value, but as subjects to be integrated into the market. As Pasternak notes, this can become a matter of literal life and death. The claim of market integration can be connected with Indigenous fathering, in which fiscal limitations to Indigenous fathers signing the birth record, itself a settler colonial legal construct, is correlate to infant mortality.

Applying the Theoretical Framework: *Caring Society v Canada*

Having built a theoretical foundation on which to examine the case at hand, I will now apply that foundation to the circumstances of *Caring Society* and then return to a theoretical discussion to explore the relevance of my findings. While the claim that the Canadian state perpetuates residential schools has a certain shock factor considering the gross abuses that occurred, the contemporary perpetuation of the schools is more nuanced. Further, the real importance lies in how we can use this assertion to define Indigenous-settler relations as well as how the settler state defines itself by othering and framing Indigeneity as foreign.

According to Bezanson, "[f]ederalism, neoliberal governance, and social reproduction are thus central to [*Caring Society*]" (2018, 172). As I have established, a system exists in which neoliberal motivations create and motivate the structural continuation of residential schools. Two primary instances of this occur. The first is an expression of a broader neoliberal trend seen in government policy by which responsibility is given to First Nations without a lack of adequate or permanent funding, superfluous and harmful reporting expectations, and/or interference from the Canadian state based on the created perception of incompetence or even criminal behaviour in Indigenous leadership. Such funding and policy schemes, in the case of Indigenous child welfare, are expressed in Policy Directive 5.1 ("First Nations Child and Family Services"), as well as findings that "[o]n-reserve child welfare system receives up to 38% less funding than elsewhere" (Fontaine 2016). The second instance is a more specific expression of neoliberalism that deals specifically with jurisdiction and policy direction within Indigenous child welfare. The federal government's refusal to legislate despite clear jurisdiction to do so under the legal doctrine of double aspect, as well as the Tribunal's finding that funding programs create an environment where removing children from their communities is incentivized, account for this expression of neoliberalism.

In applying Joyce Green's definition of colonization (that includes a restriction of cultural self-determination) to *Caring Society v Canada*, it becomes clear that the Canadian state's policies *are* colonial and assimilationist. The existence of restrictions on cultural self-determination is obvious in considering the first section of the theoretical framework that I have laid out, dealing with control over social reproduction. Whether or not these policies are intentional becomes irrelevant at a certain point because, as Friedland writes, Indigenous child welfare is not merely an issue of community and cultural survival, but the survival and wellbeing of individual children (2009, 225-226).

Processes of Othering, Foreignness, and Building the Canadian National Identity

As Bezanson points out, the concept of social reproduction is "large and messy" (2018, 153) and becomes yet more complicated when applied to the history and nuance of Indigenous-Settler relations. However, at the risk of flattening the complex analysis of the issue I have developed above, I will attempt to summarize it in order to create a starting point from which I can discuss othering, foreignness, and the Canadian identity.

As in *Caring Society*, by exerting control over social reproduction, the Canadian state's intentions and motivations are threefold. First, to break down traditional methods of cultural and social transmissions in the family, seen historically in residential schools and contemporarily through the settler colonial institutions of custody, legal paternity, and the fiscal incentivization of removing Indigenous children from their communities. Second, to frame Indigenous issues (both child welfare and land claims) in terms of fiscal responsibility, essentially removing questions of sociocultural and biological life from consideration and furthering the state's neoliberal policies. Third, and drawing from the previous two, the incorporation of Indigenous surplus populations into the economic, social, and cultural folds of the settler colonial society.

In examining how the Canadian state racializes, others, and names Indigeneity and the people within that category as foreign, I will draw upon the works of Gaucher in "Monogamous Canadian Citizenship," and Abu-Laban and Dhamoon in "Dangerous (Internal) Foreigners." I seek to combine the frameworks provided in both papers, with the goal of seeing how the Canadian state engages in nation-building through the process of othering, and as a result, how it forms our perception of citizenship and political community in relation to Indigenous peoples.

Starting with Abu-Laban and Dhamoon, they provide an invaluable framework to explain how the Canadian state creates perceptions of foreignness around *internal* groups. They argue that "[f]oreignness ... is ... subject to variation according to the specific ways in which discourses of a nation, security, and racialization interact" (Dhamoon and Abu-Laban 2009, 166). Dhamoon and Abu-Laban gives specific focus to the aspect of security, which "serve[s] as specific alibis for, a) specific forms of nation-building and, b) constructions of the omnipresent danger posed by radicalized Others" (Dhamoon and Abu-Laban 2009, 166). In the case of *Caring Society* and Indigenous child welfare, the settler colonial and neoliberal motivations for control over social reproduction comes into play. This is specifically through discourses of a need for fiscal responsibility, the danger of financial mismanagement, and protecting the settler colonial concept of the family. These provide "security threats" that allow for the construction of Indigenous peoples as internal dangerous foreigners. While Abu-Laban and

Dhamoon focus on physical security, this analysis is supported by Gaucher in her analysis of the Canadian government's characterization of polygamy as a "foreign threat" and "barbaric cultural practice," despite its occurrence within Canadian borders (2016).

Conclusion: Social Reproduction, Neoliberalism, and Indigenous Peoples as Citizens

Within such a framework, we can observe that the Canadian state perceives and enforces the perception that indigeneity, and those who adhere to it, are foreign and threatening to the settler conception of the Canadian identity. These processes of othering and the framing of Indigenous people as foreign is evident in my use of neoliberalism and social reproduction in order to ground *Caring Society* in the historic and colonial context in which it was created. This has profound implications in how we see Indigenous peoples as Canadian citizens, particularly as those with a *sui generis* relationship to the Canadian state. Despite that relationship and the state's fiduciary responsibility to Indigenous peoples, the state continues to shun constructive policy making and discourse in favour of assimilationist policies that seek to exert control over social, familial, and economic forms of social reproduction, in part by reinforcing a perception that indigeneity is foreign to (settler) Canadian values, to the point that Indigenous lives may be deemed surplus and risk death. While neoliberalism may have changed the medium and means by which the state achieves this, as I have shown, neoliberal policies in the Canadian government motivate and complement assimilationist practices.

In tandem, such neoliberal and assimilationist policies severely impact the ability of Indigenous peoples to substantively belong and participate in Canadian society and political community, for unless they renounce their Indigeneity, they will continue to be the subject of such policies. Further, if we apply T.H. Marshall's definition of social citizenship to *Caring Society*, it is obvious that the state others the concept of Indigenous citizenship in the building of a settler Canadian identity. Though issues of jurisdiction are not wholly within the scope of this essay, Pasternak's conceptualization of Indigenous bodies as jurisdictional subjects in "Jurisdiction and Settler Colonialism" may apply here (2014), in that Indigenous bodies are also seen to be jurisdictional objects in what I have detailed in this paper. Further analysis of the connection between social reproduction, jurisdiction, and Indigenous citizenship may add more depth to my analysis, particularly regarding the *sui generis* relationship in practice.

References

Ball, Jessica. 2009. "Fathering in the Shadows: Indigenous Fathers and Canada's Colonial Legacies." *The ANNALS of the American Academy of Political and Social Science* 624 (1): 29-48. http://dx.doi.org/10.1177/0002716209334181

Blackstock, Cindy. 2007. "Residential Schools: Did They Really Close or Just Morph Into Child Welfare?" *Indigenous Law Journal* 6 (1): 71-78.

Bezanson, Kate. 2018. "*Caring Society v Canada*: Neoliberalism, Social Reproduction, and Indigenous Child Welfare" *Journal of Law and Social Policy* 28: 152-73.

Dhamoon, R., and Yasmeen Abu-Laban. 2009. "Dangerous (Internal) Foreigners and Nation-Building: The Case of Canada." International Political Science Review 30 (2): 163-83. https://doi.org/10.1177/0192512109102435

Friedland, Hadley. 2009. "Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children." *Canadian Journal of Family Law* 25 (2): 223-56. http://dx.doi.org/10.1080/14755610.2015.1090468

Fontaine, Tim. (2016). "Canada discriminates against children on reserves, tribunal rules." cbc.ca, 26 January 26. http://www.cbc.ca/news/indigenous/canada-discriminates-against-children-onreserves-tribunal-rules-1.3419480

Gaucher, Megan. 2016. " Monogamous Canadian Citizenship, Constructing Foreignness and the Limits of Harm Discourse." *Canadian Journal of Political Science* 49 (3): 519-38. http://dx.doi.org/10.1017/S0008423916000810

Grammond, Sébastien. 2018. "Federal Legislation on Indigenous Child Welfare in Canada." *Journal of Law and Social Policy* 28: 132-51.

MacDonald, Fiona. "(Re)conceiving Citizenship: the Welfare-Multiculturalism Dynamic." American Political Science Association, Conference Papers, 2007 Annual Meeting.

Pasternak, Shiri. 2014. " Jurisdiction and Settler Colonialism: Where Do Laws Meet?" *Canadian Journal of Law and Society* 29 (2): 145-61. http://dx.doi.org/10.1080/2201473X.2015.1090525

Pasternak, Shiri. 2015. "The fiscal body of sovereignty: to 'make live' in Indian country." *Settler Colonial Studies* 6 (4): 317-38. http://dx.doi.org/10.1017/cls.2014.5

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 4

Settler Colonialism and the Contemporary Sterilizations of Indigenous Women

By Ravia Kaur Dhaliwal

Within the context of settler colonialism, this paper investigates the contemporary coerced sterilizations of Indigenous Women in Canada. By going through the history of coercive sterilizations in Canada, and then delving into the efforts in light of these supposedly historical coerced sterilizations, of culturally safe care in hospitals in Canada. This paper goes on to investigate the case of M.L.R.P., who was coercively sterilized in 2008. Lastly, this paper relates to Audre Lorde's work on the "master's tools" to the activism put forth around the case of indigenous women's coercive sterilizations highlighting again, the settler colonial contexts of these cases.

Introduction

Indigenous peoples in Canada have been strategically and systematically targeted for assimilation, or as Palmater explains, "extermination" from Canadian society through settler colonial policies (Palmater 2014, 28). The control of Indigenous women's bodies has been pivotal for this purpose, through the imposition of Western medical practices on Indigenous women since the founding of Canada, although this has been carried out "under the pretense of humanitarian concern by the federal government", it has given the state a way to "maintain its colonial grip and undermine the health and integrity of Indigenous peoples" (Stote 2015, 5). The practice of coercive sterilization of Indigenous women, when situated in the settler-colonial context, has historically been "rationalized as a means of protecting society and Indigenous women from the burdens of additional births" (5).

I will be making the connections from these presumably historical coercive sterilization practices to those happening contemporarily (5). As of December 2018, over one hundred[1] Indigenous women have come forward with experiences of being coercively sterilized in the province of Saskatchewan, Canada, with the most recent case occurring in 2017 (Kirkup 2018b). Alisa Lombard represents these Indigenous women in leading a class-action suit against the involved physicians, the Saskatchewan Health Authority, the province of Saskatchewan, and the Government of Canada (Moran et al. 2018).

[1] When I first started researching this paper in November 2018, the number of women who have come forward with coerced sterilizations has gone from 40 women to 100. This is important to note in the contexts of the medical trauma and shame many women experience from coerced sterilizations.

Lombard has taken this case to the United Nations Committee Against Torture to highlight how Canada is violating international human rights laws it has agreed to uphold, specifically that coerced sterilizations are considered a violation of human rights law (Arsenault 2018). Despite the apologies issued in 1999 addressing the Government of Alberta's eugenics practices, the practice of coerced sterilization, although violating medical ethical laws, is not an illegal practice in Canada. Therefore, in a way, the lack of legislation aids in the persistence of coerced sterilizations in Canada (CBC News 1999; Samson 2018). Settler-colonialism and its transcendence onto Indigenous peoples lives today can be specifically outlined in the case of Indigenous women's coerced sterilizations. In following the beginnings of the court case headed by Alisa Lombard, we will be looking closely to a woman she is representing, who has been named "M.L.R.P". M.L.R.P.'s specific experience is important for us to investigate as it gives us one of the lived experience of being an Indigenous woman in Canada, and how certain policies and actions, which are settler-colonial and assimilative in nature, have affected her.

The seriousness of the coercive tubal ligations of women was emphasized when the "External Review: Tubal Ligation in the Saskatchewan Health Region: The Lived Experience of Aboriginal Women", was published in the summer of 2017 (Boyer and Bartlett 2017**).** After this were a noticeable number of media reports which came out, that signified that many Indigenous women were being coerced into having tubal ligations in Saskatchewan (Lombard 2017). This review looked into the healthcare system, interviewed Indigenous women from Saskatoon and surrounding areas who reported their forced sterilization experiences to the review (Boyer and Bartlett 2017**).** The review found, by hearing the women who came forward with allegations of their coerced sterilization, their stories showed the "pervasive systematic racism" in the health care system, which is underpinned with deep roots of settler-colonialism as Canada as a state. After this review was published, there was an apology issued by the Saskatoon Health Region, but since those apologies, a year later, there has been no change in policy by the Saskatoon Health Region **(**Globe and Mail, 2010**).** This paper will be focusing on the experiences of one of the sixty women who has come forward through Alisa Lombard's case, for the sake of their privacy, named "M.L.R.P" " (Lombard 2017). The experiences of M.L.R.P., an Anishinaabe, Status Indian woman, outline specifically the ways in which settler colonialism, as a structure that is upheld through the Canadian healthcare system, and highlights the importance of culturally safe care in hospitals.

Brief History of Coerced Sterilizations

The legal coercive sterilization of Indigenous women gives us a glimpse into the violence that Canada, a settler-colonial state, inflicts upon on Indigenous peoples lives. This violence is a part of the larger colonial project that colonizes Indigenous lands and shows at the most basic level of colonization, the control of Indigenous bodies (Wilson 2015, 4). The case of forcible sterilizations, and controlling Indigenous women's bodies, specifically their abilities to reproduce, is embedded in Canadian history; as Indigenous women are seen as "unfit" mothers this idea has played a large part in coerced sterilization of Indigenous women (Stote 2015, 26). The idea that Indigenous women are unfit mothers were also reciprocated through Residential Schools and the Sixties Scoop, where the taking of children from their parents was paternalistically justified as being for the Indigenous child's benefit (Stote 2012, 30). Although the case we are looking at is in situated in the province of Saskatchewan, it is important to note the rampant government-led eugenic practices in British Columbia and Alberta which were based in

racist, ableist and colonial ideologies, which disproportionately affected Indigenous mean and women (26). Negative eugenics[2] was the practice used by these provinces to "alter" societies by controlling which people, namely women, were able to reproduce (Stote 2015, 26). These racist practices highlighted the state's focus on creating a settler-colonial society, where white mothers were the ideal mothers, and "other" mothers, in this specific case, Indigenous mothers, were "unfit" because their bodies were the "wrong" race and they reproduced the kind of children the settler-colonial policies and practices were trying to "eliminate" (Stote 2015, 27; Palmater, 2014). Specifically under this western ideology of creating a perfect state the provinces of British Columbia and Alberta introduced their own Sexual Sterilization Acts, where both provinces encouraged and legalized the sterilization of peoples whom the provinces saw as "unfit" (Pegoraro 2015, 167). Specifically, the Sexual Sterilization Act of BC allowed a Residential School's principal, as they were students legal guardian, to permit the sterilization of any native person under his charge (162). In Alberta, the Eugenics Board which was created and run through the institution I study at, the University of Alberta, passed the sterilization of over 2,800 Albertans many without their knowledge or consent (163). While Indigenous populations in Alberta at the time took up 2-3% of the population, but Indigenous people were the "most prominent victims of the Board's attention" (163).

Medical Practices, Culturally Safe Care

Sharma et al. (2016)'s work is premised on the understanding the disparities of maternal health in Canada for Indigenous people and non-indigenous populations. Sharma et al. (2016) find that "inconsistent and non-comprehensive policies" cause impediments to maternal health and healthcare access (341). Interestingly, Hole et al. (2015)'s analysis of Indigenous peoples and culturally safe and unsafe care, contextualize the culturally unsafe care in the bureaucratic biomedical systems and which are *physically* placed in buildings that were the houses of colonist institutions (1668). Hole et al. (2015) find that the interpersonal experiences of marginalization are prevalent in the cases, especially M.L.R.P's Alisa Lombard is coming forward within the lawsuit against Canada. Patients experiences in Hole et al.'s study, show that Indigenous patients are not listened to, and even if they are, they are not believed, in some cases patients were even "ignored" and "left in hallways" (1670). If after going through this process, Indigenous peoples treatments would "lack information about their diagnosis and treatment", which creates stress in the patient (1670). The 60 women, and the many more who have not come forward, whom Alisa Lombard is fighting for, experienced all of the above methods of "unsafe care", which all resulted in the "medical authority" given to physicians and medical professions over the control of a patient′s body. The coercion of these women happened in the context of the power relations between the western-contextualized power of a doctor, and the sometimes small ways to overlook or diminish the autonomy, and decision making authority of an Indigenous patient. Hole et al. (2015) describe doctors, who are in positions of power "looks, movements, tone, comments" that can, in some cases make Indigenous peoples feel "powerless", and that sometimes the medical professionals "don't even know" that they are doing so (1671). This has to be understood in the contexts of the imbalance of powers in the doctor-patient relationship, where doctors and other medical professionals have a considerable amount of power over the patient′s body in deciding how it gets treated. The coercive sterilization of Indigenous women that Lombard is fighting for, is coercive because the consent the

[2] Negative eugenics is a eugenic practice, which involves discouraging, by sterilization or other means of persons thought of have undesirable traits.

women gave to their tubal ligations was not informed, ongoing consent. Hole et al. (2015) find that the that when physicians and medical care staff and institutions like hospitals are given training in how to work with culturally safe practices there is a big difference made in the comfortability of the patient, and it is more likely that the patient is able to understand what procedures are being performed on them (1673). If there were culturally safe care practices, such as an Indigenous person on staff, as Hole et al. suggest and prove in their study, the aspects that lead up to a coerced sterilization, such as misunderstandings, asking for consent during labour would go down. This is not to excuse that the doctors do indeed violate several medical ethical laws themselves through their practices of coerced sterilizations, but perhaps a way to remedy a part of the issue if possible.

Contemporary Cases Sterilizations

As Alisa Lombard articulates, the "primary injury" with the doctors unethical coerced sterilizations is "sterility", and sterility can mean different things to each individual (Moran et al. 2018). In M.L.R.P.'s experience, her sterility meant "patience, pain, suffering and misery", and for other women it sterility means "decades of repressed feelings of inadequacy, deceit and fear of authority" (Lombard, 11). This deceit and fear of medical authority has also led these women to not seek medical care, because of their fear of mistreatment, which makes them "vulnerable to life-threatening risks of preventable and treatable illnesses" (Lombard 11). Besides the physical symptoms victims of forced sterilization face, such as tissue scarring, the coercive and deceitful nature of coerced sterilizations often results in victims developing symptoms of and being diagnosed with depression and anxiety (Moran et al. 2018). As Lombard notes, "many are no longer with us because of these ailments and those circumstances" (Moran et al. 2018). Pam, who did not disclose her last name for safety reasons, said her daughter died by suicide 10 months after her tubal ligation in 2009 (Kirkup 2018a). In Pam's daughter′s case, she explains it was as if her daughter was "bullied to death", in that her daughter was made to believe that having the procedure would result in getting her children back from foster care (Kirkup 2018a). Many women have told Cora Morgan, a family advocate with the Assembly of Manitoba Chiefs, about their experiences with social workers making Indigenous women believe they would get their children back if they abort their baby, or receive tubal ligations (Kirkup 2018a).

A central idea to Indigenous feminism is the concept of body sovereignty. Body sovereignty is the ability to make decisions about how to define and identify one′s body. This concept of body sovereignty, in the colonial context, is tied to the control of *production*, where the movements of "sovereignty over [indigenous] lands is inseparable from sovereignty over [indigenous] bodies (Wilson 2015, 4). The violation of body sovereignty of Indigenous women is a thread in the blanket of colonialism that has suffocated, namely, oppressed Indigenous peoples as a part of a larger settler colonial context. It was not only the physical act of doctors performing tubal ligations on women that caused this, but a larger structural racist, deceitful ideas displayed by social workers, and other government-family-relations knowledge producers, such as gynecologists and support workers who severely affected women's positions before they received their tubal ligations (Kirkup 2018a). Now that I have given a general overview of the historical contexts and contemporary happenings of coercive sterilization and the control of Indigenous women's bodies in the larger settler colonial experiences can be highlighted in the specific case of M.L.R.P. There have been apologies issued by the Alberta Government on this issue (CBC News 1999), but the futility of these apologies, without any action on the part of the government shows the

cyclical nature of the settler-colonial state. Cyclical, in that enforcing the *premise* of settler-colonial policies which have the goal to "eliminate" Indigenous peoples on the land, have a tendency to occur even without the legislation of the state (Palmater 2014). Although in the cases Lombard is defending the sterilizations occurred where there was no formal legislation that encouraged it, the racist ideals of Indigenous women as being "unfit" mothers still occurs, this is especially shown in the case of M.L.R.P.

The Case of M.L.R.P.'s Coerced Sterilization

M.L.R.P., and several other Indigenous women did not take action on these matters until they went to the media with their experiences in 2015 (Lombard, 11). It is important to look at the details of M.L.R.P.'s coerced sterilization, and the way she was misled in the context of the settler-colonial society, which includes the Saskatoon Health Region as one of the settler-colonial institutions. t is also important to note that these women, once they started to come together and gained more media attention, were able to propel other Indigenous women to come forward about their own experiences with coerced sterilizations so that they could create some sort of legislative change and be compensated for the harm done to them. First, we will delve into M.L.R.P.'s specific experiences.

As an Anishinaabe Status Indian woman, M.L.R.P. describes the ability for women to bear children and rear their children as sacred, and that it has been, continuously for Anishinaabe women since before European contact (Lombard 9). As Lombard notes, "procreation goes into the very existence and continuity of all civilizations" (9). The coercive sterilization takes away these abilities for women, and in turn takes away their ability to maintain the "continuity" of their peoples, cultures, traditions and so on, which therefore highlights the settler-colonial nature of coerced tubal ligations (9).

When M.L.R.P. became pregnant with her second child, whose due date was October 5, 2008, and her pregnancy is described as physically and emotionally challenging (9). During her pregnancy she was subject to "bleeding, lower back pain, pelvic cramping, headaches, fatigue, dizziness, pre-eclampsia and gestational diabetes, trauma-induced depression, anxieties and emotional difficulties" (9). This long lists of pain that M.L.R.P. was in, points to the condition of her pregnancy being difficult, but also highlights the effects of her trauma-induced depression, anxiety and emotional difficulties. M.L.R.P. is a Sixties Scoop survivor who suffered physiological symptoms and subsequent difficulties in her pregnancy were in part caused because of the trauma she had experienced because of Sixties Scoop[3], and the maltreatment she received after being displaced from her family. This experience of M.L.R.P. shows the way the settler colonial system affects Indigenous women's, (and others) *bodies* as the sites of where colonial violence is inflicted at the most basic level. From being taken away as a child from her home, then having her ability to have children taken away is just one example of the experiences of being an Anishinaabe woman in Canada. During her pregnancy she visited the emergency department at Royal University Hospital approximately six times where she was attended to by various physicians, there were no conversations about birth control options including the several types of tubal ligation procedures (9). Almost one month before her delivery date on September 12, 2008, M.L.R.P., was admitted into the Royal University Hospital after she went into labour (9). During her labour, M.R.L.P. experienced "placental abruption", a painful and stressful condition that creates a high level of risk for mother and

[3] The "Sixties Scoop apology" and process of compensation for the trauma caused by the government in Saskatchewan is still being researched and mitigated.

baby (9). Because of this condition the doctor determined a caesarian section was needed, which M.L.R.P. agreed to immediately, believing the doctor knew what was best for her, and her baby (9). The nursing reports characterize M.L.R.P. as "unstable, belligerent to staff, unpredictable, demanding, and an emotional wreck" (9). Lombard highlights that M.L.R.P.'s emotional state was affected by the stress of labour, the placental abruption, and her "history of trauma at the hands of people in authority" (9). While M.L.R.P. was in the excruciating "throes of active labour" M.L.R.P. recalls a medical professional approaching her about having a tubal ligation, and remembers the professional said that "she [M.L.R.P.] wouldn't want to be in this kind [painful pregnancy and pre-partum] of position again" (10) At the same time M.L.R.P. was waiting in labour induced pain, for the administering of her epidural, a "powerful mind-altering medication", Dr. Kristine Mytopher approached M.L.R.P. to discuss the tubal ligation procedure for the first time(10). This "10 minute" discussion lead M.L.R.P. to sign the tubal ligation form only because Dr. Mytopher made her believe that the procedure was reversible, even though it was not deemed medically necessary (10). When a person is in incredible amounts of pain and stress, as M.L.R.P. was, and is misled by the doctor to believe that a certain procedure is reversible, even though it is not medically necessary, is a vehement violation of consent laws, as the doctor did not disclose all the information (Stote 2015, 43). It is important to note here, that the sterilization of M.L.R.P. and other women should not be "misconstrued" to frame these women solely as victims, but as women who have "absolutely resisted, adapted and survived" in the face of all these coercive policies (Stote 2015, 43). In this case, M.L.R.P. and other women who have experienced coerced sterilization, are activists who have told their stories to bring awareness, with the goal to some extent, end this violence against Indigenous women's bodies.

The sterilization of M.L.R.P. represents a human rights violation and an ethical violation by the physicians around the consent of a patient. The case that Lombard is representing is asking for the changing of the legislation around sterilization, the compensation of those affected, and an apology. Lombard recognizes that an apology is important, but not enough, as apologies have been given by the state-institutions around sterilizations, but no change has been made until now (CBC News 1990, Moran et al. 2018). Perhaps it's because these apologies that are issued by the state are issued by just that, the settler colonial state, that is in danger of uprooting its legitimacy as an institution and governing body; if the Supreme Court of Canada ever addresses that the country is built on taking, and deception of Indigenous lands and peoples. What is important to note is that Indigenous peoples have always resisted against the state on several levels, and using the "master's tools" is the most effective in making legislative change, but as a result of the power relations where the Canadian state has physically and legislatively dominated Indigenous peoples (Audre Lorde, 1979). In light of these coercive sterilizations, it is surprising, to say the least, to see that there have been instances where doctors in Canada were "denying" tubal ligations to women under the age of 30, who have no medical conditions warranting a tubal ligation but are wanting to receive tubal ligations as they chose not to have children (Kirkey 2017). In the case of Indigenous women's sterilizations, there was also no health reason to perform tubal ligations, but they were unethically performed by physicians anyways. In both cases of denying or unethically performing tubal ligations, medical professionals are making decisions about women's abilities to reproduce. As Kirkey (2017) does not give insight into which doctors denied tubal ligations, the question I ask is which women were the ones denied the ability to reproduce through coercive sterilizations, and which ones were, in a way encouraged by denying them tubal ligations? Were Indigenous women sterilized, or where they predominantly white? The opposing argument, as is

underpinned with colonist ideals, is that what we discussed, the Indigenous women are "unfit" mothers who do not have the right type of children and by having children are an added expense on the "public purse" (Friske and Browne 2006, 106). These ideologies of Indigenous peoples as unfit to raise the right type of children, stem from the same colonial ideologies and thoughts that justified policies like Residential Schools. The fact that Residential Schools, the Sixties Scoop[4], and their position as being a present-day "evolution" into the Child and Family Services (CFS), and these cases of non-consensual, coerced tubal ligations of women like M.L.R.P. are created under the same ideologies of what the predominantly white settler-colonial state should look like (Barghout 2014). In fact, M.L.R.P. is a "sixties scoop survivor", and as Lombard describes, M.L.R.P. has experienced considerable trauma in her lifetime (Lombard 9).

The Settler Colonial State: Superficial Apologies and '*The Master's Tools*'

"For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change" (Lorde, 1979).

Suzack (2015) defines, how Indigenous feminism can be seen as restoring indigenous women's collective status as it had been eroded by the colonial and patriarchal system (262). What the Lombard case is doing by fighting for 7 million dollars in reparations for the "physical, psychological, spiritual and emotional," is using the international courts and tactics of "shaming" of Canada, and using the Canadian Charter of Rights and Freedoms to highlight these injustices (Lombard 13). Using the tactics of shaming has worked for Indigenous women fighting for their rights internationally, and is a symbol of Indigenous feminism, and Indigenous women's activism. One specific case being the one of the activism against the explicit gender discrimination in Section 12[5]of the Indian Act that was propelled by Sandra Lovelace, who took her case to the United Nations Human Rights Committee in 1981, where she argued that discriminatory measures in the Indian Act violated international law (Boyer 2009, 82). The Government of Canada sees itself as a "leader in the area of human rights" and is signed on to many treaties that confirm the human rights of its citizens, to uphold these treaties Canada submits reports of its human rights records for UN monitoring bodies to include (81). To sustain this self-reputation of being a leader in human rights, Canada created a parliamentary subcommittee on Indian women and the Indian Act was formed in August of 1982 which ultimately propelled, alongside with many other Indigenous women's activists, Canada to amend the Indian Act through Bill C-31 (84). Although Bill C-31 eliminated most gender discrimination the new, amended sections of the Indian Act still caused perfunctory discrimination against women (Nelson 2018). And now thirty-six years later, Bill S-3, which is designed to bring the Indian Act in line with the Canadian Charter of Rights and Freedoms (Nelson 2018). Sandra Lovelace, now a Senator is calling to amend Bill S-3 for not amending its gender-based discriminatory policies[6] (Nelson 2018). This example shows the pitfalls, but necessities of activists, especially women's

[4] The Sixties Scoop refers to the Canadian practice of taking children of Indigenous peoples and placing them in foster homes or adoption with non-Indigenous homes (Lombard 2017).

[5] Section 12 of the Indian Act caused Status Indian women to lose their Indian status and subsequently their treaty and land rights, if they married a non-status Indian person, even if a woman was to divorce from her non-status husband, her status would be diminished.

[6] This discrimination in the Indian act, even after the amendment of the Indian Act through Bill C-31, women's descendents still lost status because of the "cousins rule" (Boyer 2009).

rights activists, such as Lovelace and Lombard, resort to using the "master's tools" (Lorde, 1979). So to draw a comparison between Lovelace's case and Lombard's case, we see how Lombard is taking a similar route in going to the international bodies, such as the UN, in order to "shame" Canada into changing its discriminatory practices (Nelson 2018). Although Lovelace is still fighting for the gender discrimination amendment in Bill S-3, those who have lost status would be able to be reinstated by the state, even if the state was in compliance with Lovelace's proposal to amend Bill S-3. In the case of Lombard, the compensation required from the state for the women who were forcibly sterilized is ethically sticker, because of its entanglement with medical trauma. This is not to say that women who lost their Indian Status do not feel adverse effects, but that the medical procedures associated with a coerced sterilization cannot be "reinstated" the way Indian Status can be. In the end, these women's sterility is symbolic of a larger settler-colonial goal that has been continued through the coercive sterilizations. Although Lombard's case can fight for reparations for these women, and for subsequent legislation and apologies from various settler-colonial institutions, examples such as Lovelace's case are an example that shine light on the idea that "the master's tools will not dismantle the master's house", they may only allow Indigenous women like Lombard to beat the Government at their own game, in the courts, but these tools will never enable Indigenous women to bring about "genuine change" (Lorde 1979).

M.L.R.P. and the other women Alisa Lombard is defending are in practice using the "master's tools", by using the avenues made available by the "masters", the Canadian government and the United Nations (Lorde 1979). The United Nations "shaming tactics" are useful, but only to a certain extent, as seen in the case of Lovelace continuing the fight for ending gender discrimination in the Indian Act with proposing amendments to Bill S-3, as previously discussed, therefore; shaming tactics can only go so far. The reason these shaming tactics do not let Indigenous activists goals come to fruition, although their goals are often in line with what is expected through the Canadian Charter of Rights and Freedoms (Bill S-3), is because Canada is a settler-colonial state. If Canada were to address the underlying colonial issues that stimulate the rationale behind doctors and states to practice coerced sterilization to occur they would be dismantling the settler colonial premise that Canada is built upon (Dyck, 2018). The insufficiency of apologies, without compensation, is deeply problematic and does not change anything, but the question of how these women would be reinstated by their "masters" is interesting as well. To create complete change of this institution it would be useful to look at a complete overarching change of perhaps the medical system as well, where movements of Indigenous resurgence and reclamation and perhaps could look towards another approach, that is able to "dismantle" the house in a way that would bring about systemic change (Lorde 1979).

Conclusion

In seeing that the contemporary sterilizations of Indigenous women is not a new phenomenon, but is involved in the larger contexts of medical practices being a way for the settler-colonial state to control Indigenous women's bodies. In seeing that although states have apologized for their eugenics practices that took place in the form of sterilizations, created no legislation that would ban the unethical coercive sterilization of Indigenous women or any person. We see that although cultural care practices would be one way to ensure that cases like M.L.R.P. do not happen again, the changing of policies and instating culturally safe care may look a lot like the case of Indigenous women's activism, namely Lovelace's work around gender-based discrimination in the Indian Act. As a result of the settler-colonial

state's policies being so deeply embedded in institutions like hospitals, medical practices, and the Indian act, a different sort of activism that does not use the "master's tools" may be required to bring about substantive change that can eliminate this violence, like coerced sterilizations, more thoroughly.

References

Arsenault, Chris. 2018. "Dozens of Indigenous women forcibly sterilized in Canada, UN committee hears." Reuters. November 23, 2018 https://www.reuters.com/article/us-canada-healthcare-lawsuit-feature/dozens-of-indigenous-women-forcibly-sterilized-in-canada-u-n-committee-hears-idUSKCN1NS1W2

Boyer, Yvonne. 2009. "First Nations Women's Contributions to Culture and Community through Canadian Law." Restoring the Balance, edited by Gail Guthrie Valaskakis, Madeleine Dion Stout and Eric Guimond, 69-85. Winnipeg Manitoba, University of Manitoba Press.

Boyer, Yvonne., and Judith Bartlett. 2017. "External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women." Saskatoonhealthregion.com. https://www.saskatoonhealthregion.ca/DocumentsInternal/Tubal_Ligation_intheSaskatoonHealthRegion_the_Lived_Experience_of_Aboriginal_Women_BoyerandBartlett_July_22_2017.pdf

Barghout, Caroline. "CFS is 'new residential school system', says former CFS investigator." CBC News. October 6, 2014. https://www.cbc.ca/news/canada/manitoba/cfs-is-new-residential-school-system-says-former-cfs-investigator-1.2788730

CBC News. 1999. "Alberta apologizes for forced sterilization."CBC News November 9, 1999. https://www.cbc.ca/news/canada/alberta-apologizes-for-forced-sterilization-1.169579

Friske, Jo-Anne., Annette J. Browne. 2006. "Aboriginal citizen, discredited medical subject: Paradoxical constructions of Aboriginal women's subjectivity in Canadian healthcare policies." *Policy Sciences* 39 (1): 91-111. http://web.b.ebscohost.com.login.ezproxy.library.ualberta.ca/ehost/pdfviewer/pdfviewer?vid=1&sid=584132fe-f658-4ea9-9073-c44623e76744%40sessionmgr101

Globe and Mail., 2017. "Saskatoon Health Region apologizes for coerced tubal ligation on Indigenous women." The Globe and Mail, July 27, 2017. https://www.theglobeandmail.com/news/national/saskatoon-health-region-apologizes-for-coerced-tubal-ligations-on-indigenous-women/article35824599/

Hole, Rachelle D., Mike Evans, Lawrence D. Berg, Joan L. Bottorff, CArlene Dingwall, Carmella Alexis, Jessie Nyberg, and Michelle L. Smith. 2015. "Visibility and Voice: Aboriginal People Experience Culturally Safe and Unsafe Health Care." *Qualitative Health Research* 25 (12): 1662-1674. https://journals-sagepub-com.login.ezproxy.library.ualberta.ca/doi/pdf/10.1177/1049732314566325

Kirkey, Sharon. 2017. "Doctors denying 'tubals' to women under 30 opting out of motherhood." National Post, September 6, 2017. https://nationalpost.com/health/doctors-denying-tubals-to-women-under-30-opting-out-of-motherhood

Kirkup., Kristy. 2018a. "There has to be accountability": Indigenous women coerced into sterilization demand action." The Globe and Mail, November 21, 2018. https://www.theglobeandmail.com/canada/article-there-has-to-be-accountability-indigenous-women-coerced-into/

Kirkup, Kristy. 2018b. "UN committee tells Canada to do more on sterilizations of Indigenous women." The Chronicle Herald, December 7, 2018.https://www.thechronicleherald.ca/news/canada/un-committee-tells-canada-to-do-more-on-sterilizations-of-indigenous-women-266316/

Lombard, Alisa. 2017. "Notice to Defendants." Mauricelaw.com. https://www.mauricelaw.com/upload/Class-Action-Docs/Notice-to-Defendants-Q.B.-No-1485-of-2017.pdf

Lorde, Audre. 1979. "The Master's Tools Will Never Dismantle the Master's House." History is a Weapon. https://www.historyisaweapon.com/defcon1/lordedismantle.html

Moran, Padraig., Idella Sturino and Willow Smith. 2018. "Sterilizations happened as recently as 2017, Saskatchewan lawsuit alleges." CBC Radio, November 13, 2018. https://www.cbc.ca/radio/thecurrent/the-current-for-november-13-2018-1.4902679/indigenous-women-kept-from-seeing-their-newborn-babies-until-agreeing-to-sterilization-says-lawyer-1.4902693

Palmater, Pam. 2014. "Genocide, Indian Policy and Legislated Elimination of Indians in Canada" *Aboriginal Policy Studies* 3(3): 27-54. https://journals.library.ualberta.ca/aps/ index.php/aps/article/view/22225

Pegoraro, Leonardo. 2015. "Second-rate victims: the forced sterilization of Indigenous peoples in the USA and Canada", *Settler Colonial Studies*, 5 (2): 161-173, DOI:10.1080/2201473X.2014.955947

Suzack, Cheryl. 2015. "Indigenous Feminisms in Canada", *Nordic Journal of Feminist and Gender Research*, 23:4, 261-274, DOI: 10.1080/08038740.2015.1104595

Samson, Sam. 2018. "Class-action lawyer told of two sterilizations of Indigenous women in Manitoba." CBC News, November 14, 2018. https://www.cbc.ca/news/canada/manitoba/manitoba-indigenous-women-forced-sterilization-lawsuit-1.4904421

Sharma, Sangita., Fariba Khaldooz, Katherine Launier, Farouz Nader, Kyoung June Yi, Philip Baker, Tara-Leigh McHugh, and Helen Vallianatos. 2016. "Canadian Indigenous Women's Perspectives of Maternal Health and Health Care Services: A Systematic Review." *Diversity and Equality in Health Care* 13 (5): 334-348.http://diversityhealthcare.imedpub.com/canadian-indigenous-womens-perspectives-ofmaternal-health-and-health-care-services-asystematic-review.pdf

Stote, Karen., 2012. The Coercive Sterilization of Aboriginal Women in Canada, *American Indian Culture and Research Journal* 36 (3). 117-150. http://www.fqpn.qc.ca/main/wp-content/uploads/2016/06/AICRJ_STOTE-STERILIZATION.pdf

Stote, Karen., 2015. An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women. Halifax and Winnipeg: Fernwood Publishing.

Little, Peter D. 2003. Somalia: Economy without State. Bloomington: Indiana University Press.

Wilson, Alex. 2015. "Our Coming In Stories: Cree Identity, Body Sovereignty and Gender Self Determination", *Journal of Global Indigeneity*, 1(1): 1-4. http://ro.uow.edu.au/jgi/vol1/iss1/4

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 5

The Métis and the Courts: Interrogating Métis-Focused Supreme Court Decisions in Canada

By Thomas Feth

This paper is broadly concerned with the politics of the Canadian constitution, with its primary focus being the relationship between the Métis and the Supreme Court of Canada. The Métis are one of three Aboriginal groups in Canada that are officially recognized in the Constitution Act, 1982, along with the First Nations and the Inuit. The Act sparked a new era of Canadian jurisprudence and Indigenous activism through the courts. Despite the hopes of the Métis, major Supreme Court decisions vis-à-vis Métis issues since 1982 have been questionable, if not problematic. This paper discusses Métis identity, jurisdiction, equality rights, and the question of Métis title in relation to four Supreme Court decisions. The paper aims to provide an overview of the most pertinent issues and cases in Métis constitutional law while arguing that Métis-focused Supreme Court decisions have done little to improve the position and status of the Métis people in Canadian society, while some judgments have even undermined them.

Introduction

The Métis are a distinct cultural group in Canada and are officially recognized in the *Constitution Act, 1982* as one of the three distinct Aboriginal groups in Canada along with the First Nations and the Inuit. Métis people in Canada trace their origins to unions between European traders and Indigenous women in pre-Confederation Canada. A collection of these unions subsequently led to an ethnogenesis: the creation of a new people and nation. However, Métis people have long struggled for equal rights and recognition in Canada. After the establishment of Red River Colony in 1811 in present-day Manitoba, the region was populated over time by mixed-ethnicity peoples who came to be known as Métis. The federal government of Canada purchased the territory in 1869, but the Métis feared hostility and assimilationist policies. Subsequent tensions resulted in the Red River Resistance, led by Métis leader Louis Riel and his provisional government, against the Government of Canada. In 1870 the Métis and Canada reached an agreement that led to the creation of the province of Manitoba, just three years after Canada's founding. However, fifteen years later, new conflicts developed, especially over the division and distribution of land in the new province. Another Métis uprising, the North-West Rebellion led again by Riel, was sparked

with the goal of protecting Métis land, rights, and identity. Unfortunately for the Métis rebels, the rebellion was crushed, Riel was executed, and the Métis were set up to be marginalized for years to come.

Almost 100 years after the rebellion, the *Constitution Act, 1982* recognized the Métis as one of the three distinct Aboriginal groups of Canada. As a legal document, the *Act* sparked new hope for the Métis in Canada. Many disadvantaged groups looking to improve their status and position in Canadian society looked to the *Act* with hopes of making progress through the courts. However, since the *Constitution Act, 1982* was entrenched in Canadian law, Métis rights cases have typically lagged ten to fifteen years behind First Nations cases.[1] That is in part a consequence of the complicated nature of Métis rights and the struggle over what it means to be Métis in Canada. This paper explores this topic further by offering an answer to the following question: to what extent has the Supreme Court been a resource for improving the position and status of Métis people in Canadian society? In order to answer this question, I will discuss the implications of Métis-focused Supreme Court decisions, especially those in relation to Métis identity, jurisdiction, equality, and Aboriginal title. Through an exploration of these topics, I will ultimately argue that the Supreme Court has not been a satisfactory resource for the Métis people in Canadian society. Major Supreme Court decisions have done little to improve the position and status of the Métis people in Canada, and some judgments have even undermined them.

The Question of Métis Identity

Undoubtedly, a complication in the ability of the Supreme Court to formulate judgments on Métis constitutional questions has been the debate over who we consider the Métis to be in Canada. According to the 2016 Canadian Census, 587,545 Canadians identify as Métis,[2] but there is considerable controversy in Métis communities across the country over what it means to be Métis. Some make a problematic distinction between so-called "lowercase *m*" and "uppercase *M*" Métis people. The lowercase "métis" can be used more generally to refer to individuals who have mixed indigenous and other ancestries, while the uppercase "Métis" can be used to refer to individuals who are historically members of a distinct Métis community: such as the Métis Nation which was historically and geographically located near Red River.[3] The distinction could look like this: we could call the child of a Cree Woman and a European Man "métis," with the child identifying as half-Cree and half-European, rather than "Métis." However, these conceptions are not useful because they are artificial, do not include a meaningful definition of what it means to be Métis, and conflate the separate meanings of "Métis" and "mixed." The idea that Métis refers simply to mixed individuals is racialized logic.[4] Instead, many Métis

[1] Karen Drake and Adam Gaudry, "'The Lands…Belonged to Them, Once by the Indian Title, Twice for Having Defended Them…and Thrice for Having Built and Lived on Them': The Law and Politics of Métis Title," *Osgoode Hall Law Journal* 54, no. 1 (Fall 2016): 1.

[2] "Aboriginal peoples in Canada: Key results from the 2016 Census," Statistics Canada, released October 25, 2017, https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm.

[3] Larry Chartrand, "Métis Constitutional Law Issues," in *The Oxford Handbook of the Canadian Constitution*, ed. by Oliver, Peter C., Patrick Macklem, and Nathalie Des Rosiers, (New York, New York: Oxford University Press, 2017), 369.

[4] Chris Andersen, "The Supreme Court ruling on Métis: A roadmap to nowhere," *The Globe and Mail*, April 14, 2016, accessed December 7, 2018, https://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/.

advocate for a conception of "Métis" that is either a "singular exclusive Métis Nation definition" or a "more broader open-ended definition."[5] Proponents of the former often criticize the latter.

R. v. Powley, or the *Powley* ruling, is a decision by the Supreme Court from 2003 which defined Métis rights under section 35(1) of the *Constitution Act, 1982*. In *Powley*, the Supreme Court defined "Métis" as "a category representative of mixed-ancestry communities that have demonstrated a continuity to a particular historical Métis community that existed prior to "effective European control" over the relevant territory."[6] In section 35(1), the court argued, the term "Métis" "does not encompass all individuals with mixed Indigenous and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs and recognizable group identity."[7] The court additionally included three criteria for individuals who we can consider to be rights-bearing Métis: self-identification, ancestral connection, and community acceptance.[8] While there are strengths to this definition, Larry Chartrand argues that this definition and criteria set by the Supreme Court in *Powley* has the potential to divide Métis communities between those who do and do not qualify for rights under the court's criteria, which could effectively create "second class Métis."[9] For example, members in certain Métis communities can include those who may not be able to prove an ancestral connection to a historic Métis community. Chartrand outlines a scenario in which a status Indian woman, who could have lost her Indian status by marrying a non-status Indian before the introduction of Bill C-31 in 1985, could have joined a Métis association and passed on Métis identity to her children.[10] These children, however, would lack an ancestral connection to the Métis community and would therefore not qualify for Métis rights as outlined by the Supreme Court in *Powley*.

The conception of Métis identity outlined by the Supreme Court in *Powley* added new dynamics and complications to the debate concerning Métis identity in Canada. The extent to which this debate has had implications in other Supreme Court decisions is discussed below. Nevertheless, the status of many self-identifying Métis people in Canada was not improved by the *Powley* decision, nor was the question of Métis identity fully resolved.

Métis Identity and Jurisdiction

Thirteen years after the *Powley* ruling, the Supreme Court came to a decision concerning Métis identity and legislative jurisdiction that was questionable if not problematic for Métis people in Canada. Some have praised the *Powley* ruling for its criteria on Métis identity, but others have criticized it for its "judicially imposed"[11] conception of Métis identity by a "foreign institution,"[12] along with the ideas discussed above. Métis rights scholar Paul Chartrand argues that the Métis themselves should have the right to determine who is Métis—not the courts—but also acknowledges that an understanding of Métis

[5] Larry Chartrand, "Métis Constitutional Law Issues," 369.
[6] Ibid.
[7] *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, preamble. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2076/index.do.
[8] Ibid., para. 30.
[9] Larry Chartrand, "Métis Constitutional Law Issues," 370.
[10] Ibid.
[11] Ibid.
[12] Ibid.

identity under the law will ultimately involve the Crown and the courts.[13] The conundrum in part demonstrates why Métis constitutional questions are so complicated in Canada. However, *Powley* was not the last Supreme Court decision to shift the debate on Métis identity.

Daniels v. Canada is a Supreme Court decision from 2016 which generated commentary and debate in the Canadian legal community. *Daniels* further complicated the question of Métis identity, and the conception of Métis identity in the judgment itself is problematic. The case has led to controversy and even infighting within the Métis community. In the *Daniels* decision, the Supreme Court ruled that "Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*," meaning that Métis people in Canada fall under federal legislative jurisdiction (as section 91 concerns the constitutional division of powers). In the Supreme Court's conception of Métis identity in *Daniels*, the court wrote that "there is no consensus on who is considered to be Métis"[14] and that the term "can be used as a general term for anyone with mixed European and Aboriginal heritage."[15] However, in *Powley*, as discussed above, three criteria (self-identification, ancestral connection, and community acceptance) are used to determine Métis identity and therefore whether an individual had certain Aboriginal rights or not. Chris Andersen argues that with this new conception the court appears to have reversed or at least challenged its own conception of Métis identity set in *Powley* with *Daniels*.[16]

While the Supreme Court gave an explanation for the discontinuity, the issue remaining is that the *Daniels* conception of Métis identity is inherently problematic. The disconnect comes from the fact that *Powley* and *Daniels* are concerned with different sections of the Constitution and therefore have different purposes. Section 91(24) sets out jurisdictional obligations owed to Indians (which now includes all Indigenous peoples, including Métis) while section 35(1) created a framework for Aboriginal rights, land claims, and treaty negotiations. Both decisions still have repercussions for the Métis and their distinct identity. When the Supreme Court decided in *Daniels* that "Métis" could simply mean mixed heritage, it undermined the idea that the Métis are a culturally distinct people and community.[17] It also led to conflicts between Métis groups battling for bargaining power with and recognition by the federal government.[18] While *Daniels* may have provided a next step in the reconciliation process for many Indigenous peoples across Canada, it further complicated the concept of Métis identity and arguably the distinct status of the Métis people in Canada.

---

[13] Paul Chartrand, "Defining the 'Métis' of Canada: A Principled Approach to Crown-Aboriginal Relations," in *Métis-Crown Relations: Rights: Identity, Jurisdiction, and Governance*, edited by Frederica Wilson & Melanie Mallet, (Toronto: Irwin Law, 2008), 35-36.

[14] *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99, para. 17. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do.

[15] Ibid.

[16] Chris Andersen, "The Supreme Court ruling on Métis: A roadmap to nowhere," *The Globe and Mail*, April 14, 2016, accessed December 7, 2018, https://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/.

[17] Larry Chartrand, "Métis Constitutional Law Issues," 382-383.

[18] Karina Roman, "Métis infighting follows historic Daniels ruling by Supreme Court," *CBC News*, July 12, 2016, accessed December 7, 2018, https://www.cbc.ca/news/politics/metis-daniels-supreme-court-status-1.3675612.

Equality Rights and the Métis

In relation to Métis identity and equality rights under the *Charter*, the Supreme Court ruled in 2011 that the Government of Alberta could strip certain Métis individuals of their Métis settlement membership benefits: a decision that is deeply problematic for a number of Métis people. After the *Constitution Act, 1982* became law in Canada, the province of Alberta responded to the inclusion of the Métis in section 35(2) of the *Act* by establishing a Joint Métis-Government Committee to review the status of Métis-focused legislation in Alberta. This culminated in the *Métis Settlements Act* (*MSA*) which established an updated legal framework for eight Métis settlements in the province. The *MSA* includes a number of sections related to self-governance and membership requirements for the Métis settlements. In *Alberta v. Cunningham*, a group of complainants took issue with sections 75 and 90 of the *MSA* because "[t]he former prohibits status Indians (under the *Indian Act*) from obtaining Métis settlement membership [and] the latter calls for the termination of the Métis settlement membership of members who register as status Indians."[19] The complainants were lifelong members of the Peavine Métis Settlement in Alberta, and applied for Indian status under the *Indian Act* to receive particular health benefits, but as a consequence, they lost their Métis settlement status and benefits. In response to an appeal by the complainants, the Alberta Court of Appeal found that sections 75 and 90(1)(a) of the *MSA* did discriminate against status Indians and were thus unconstitutional per section 15 of the *Charter* (equality rights).

In 2011, the Supreme Court overturned the Alberta Court of Appeal's ruling that the section 15 *Charter* rights of the complainants were violated. The Supreme Court confirmed that the law (the *MSA*) was discriminatory but also that it was saved because that discrimination was justified under section 15(2) of the *Charter*.[20] The Supreme Court argued that one of the purposes of the *MSA* was to preserve the uniqueness of Métis identity and culture, and that excluding status Indians from membership in Métis settlements served that purpose.[21] Furthermore, the court confirmed that governments were allowed to implement programs that only benefit one group, with no obligation remaining to help another group with that same program (in accordance with section 15(2)). The provisions in the *MSA* were therefore justified through the goal of substantive equality.[22]

The Métis Nation cheered the decision by the Supreme Court in *Cunningham*,[23] as one of the goals of the *MSA* was the protection of the distinct Métis identity. While the position of the court and the Métis Nation is understandable, this paper takes issue with the ultimate ruling. Joseph Marcus argues that the decision "employs one injustice to rectify another" by denying the complainants access to benefits under both the *Indian Act* and the *MSA*. The group of Métis individuals in *Cunningham* are those who face

[19] Ankur Bhatt, "Cunningham v. Alberta: Aboriginal "Double Dipping"," *TheCourt.ca*, April 8, 2010, accessed December 7, 2018, http://www.thecourt.ca/cunningham-v-alberta-aboriginal-double-dipping/.
[20] *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, preamble. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7849/index.do.
[21] Ibid.
[22] Joseph Marcus, "Alberta v. Cunningham: The Substantive Power of Section 15(2)," *TheCourt.ca*, September 14, 2011, accessed December 7, 2018, http://www.thecourt.ca/alberta-v-cunningham-the-substantive-power-of-section-152/.
[23] "Métis Nation Applauds Supreme Court's Decision on Alberta Métis Settlements," Metis Nation, July 21, 2011, accessed December 7, 2018, http://www.metisnation.ca/index.php/news/metis-nation-applauds-supreme-courts-decision-on-alberta-metis-settlements.

legitimate disadvantages in their day to day lives—a reality which the court acknowledged—and took action to improve their circumstance by registering as status Indians. Ralph David Cunningham, one of the complainants, had one parent who was Métis and one parent who was status Indian.[24] Is Cunningham not entitled to both sets of rights as both a Métis and status Indian person?[25] Or is this a case of double-dipping as some others have argued? This paper defends the former, and ultimately disagrees with the decision of the Supreme Court. The individuals in question, identifying as both Métis and status Indians, were discriminated against when their membership status as Métis was revoked, especially when considering that these individuals registered as Indians in order to receive particular healthcare benefits. Registering as a status Indian should not eliminate one's Métis status nor question their Métis identity. It is reasonable to argue that one can be both Métis and status Indian—as the Alberta Court of Appeal had concluded. One aspect of one's identity should not undermine another. While the decision of the Supreme Court in *Cunningham* aims to protect Métis identity and principles of equality under the *Charter*, it takes benefits away from individuals who identify as both Métis and status Indian—a reality which harms the position of many self-identifying Métis people in Canada.

Métis Title?

On the issue of Aboriginal title, a recent Supreme Court decision implicitly and incorrectly suggested that the Red River Métis in Manitoba were historically not enough of a collective group to establish Métis title. In Canadian constitutional law, Aboriginal title refers to the inherent Aboriginal right of a group to particular land or territory based on the Aboriginal group's ancestral territories. The concept is tied to the idea that Indigenous peoples and their systems of law existed before contact with Europeans—especially before European control—and therefore those groups still have a right to their historical lands. Over time, many Aboriginal groups have tried and failed to establish Aboriginal title through the courts, but in 2014, the Supreme Court of Canada for the first time declared Aboriginal title. In 2014, *Tsilhqot'in Nation v. British Columbia* established Aboriginal title for the Tsilhqot′in First Nation. The result of the decision meant that, as the title-holder, the Tsilhqot′in had the power to approve or reject resource development projects on their lands.[26] Just one year prior to this decision, the Manitoba Métis Federation had attempted to claim Aboriginal title through the Supreme Court but was denied. In 1997, the Supreme Court outlined a test by which Aboriginal title could be claimed in its *Delgamuukw v. British Columbia* decision: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[27] The case of the Métis in Manitoba arguably passes this test, but the Supreme Court rejected their claim in the 2013 decision *Manitoba Métis Federation v. Canada*. The court rejected the claim based on the argument that "the Métis used and held land individually, rather than communally, and permitted alienation."[28] This reasoning is flawed because through this argumentation the court

[24] Ankur Bhatt, "Cunningham v. Alberta: Aboriginal "Double Dipping"."
[25] Joseph Marcus, "Alberta v. Cunningham: The Substantive Power of Section 15(2)."
[26] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, preamble. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.
[27] Ibid., paras. 25-26.
[28] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, para 56. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12888/index.do.

conflated collective rights with communal land holding, and communal land holding is not a requirement of Aboriginal title,[29] nor is the alienation of land lots.[30]

Historically, many Métis settled along the Red River in present-day Manitoba, establishing their homes and settlements while working as traders and/or farmers. Similar to the historical French Canadian seigneurial system, the Métis along Red River had narrow, individual land lots which were occupied with permanence as the Métis farmed and built enduring structures.[31] The Court argued, however, that because Métis individuals and not the Métis people collectively owned these plots of land along Red River, it meant that the Red River Métis did not have Aboriginal title to the land.[32] The decision of the Supreme Court is troubling because, as Drake and Gaudry argue, communal land holding is simply not a part of the test for Aboriginal title.[33] The logic of the court, Drake and Gaudry argue, stems from the idea that "jurisdiction can only be exercised in the form of communal land holding,"[34] but there were other avenues in which the Métis exercised their jurisdiction. The Red River Métis governed their communities with their own laws, and their communities collectively utilized the long-lot system for land holding along the River.[35] Furthermore, regarding land alienation, Drake and Gaudry also argue that Aboriginal nations were permitted to alienate individual lots so long as they retain their Aboriginal title—or jurisdiction—over the land,[36] which further bolsters the argument that inalienability should not have been fatal for the claim.

Regardless, the Supreme Court ruled against the claim of Métis title. The failure of the *Manitoba* decision is particularly troubling for Métis communities across Canada. The "intensity of occupation in the Red River valley" by the Red River Métis and the strength of their claim is arguably the strongest of any Métis community in Canada.[37] With this outcome, the prospect of granting Métis title to another Métis community seems significantly more difficult, and is therefore a big blow to many Métis across Canada.

Concluding Thoughts

This paper has argued that the Supreme Court has largely been an ineffective resource for the Métis people as they aspire to improve their position in Canadian society. The outcomes of the Supreme Court decisions discussed in this paper have not been enough to substantially improve the status of the Métis in Canada, and some rulings have made matters worse. With *Powley* and *Daniels*, the Supreme Court complicated the question of Métis identity and distinctiveness. In *Cunningham*, the Court upheld a discriminatory law, which stripped certain individuals in Alberta of their Métis membership status and

[29] Karen Drake and Adam Gaudry, "'The Lands…Belonged to Them, Once by the Indian Title, Twice for Having Defended Them…and Thrice for Having Built and Lived on Them': The Law and Politics of Métis Title," 4.
[30] Ibid., 45.
[31] Ibid., 40.
[32] Manitoba Metis Federation Inc. *v.* Canada (Attorney General), [2013] 1 S.C.R. 623, 2013 SCC 14, para. 56.
[33] Karen Drake and Adam Gaudry, "'The Lands…Belonged to Them, Once by the Indian Title, Twice for Having Defended Them…and Thrice for Having Built and Lived on Them': The Law and Politics of Métis Title," 43.
[34] Ibid., 46.
[35] Ibid.
[36] Ibid., 45.
[37] Ibid., 40.

benefits due to their choice to register as status Indians (thus, essentially a punishment for their mixed heritage). In *Manitoba*, the Court denied Aboriginal title to the Manitoba Métis whose ancestors historically inhabited the Red River region and were instrumental in the founding of that province, and the modern Metis Nation as a whole. When considering the dynamics of power in the Canadian state, it is unsurprising to discover that its institutions serve to protect the power of that state, rather than relinquish it to disadvantaged groups. This is especially evident in the plight of the Métis in Canada. If Canada is to meaningfully attempt reconciliation with its Aboriginal peoples, it must accept the argument that the highest arbiter of laws in the land has not done enough for its Aboriginal peoples: especially with regard to the Métis. Canada—and its courts—must do better.

References

Andersen, Chris. "The Supreme Court ruling on Métis: A roadmap to nowhere." *The Globe and Mail*, April 14, 2016. https://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/.

Bhatt, Ankur. "Cunningham v. Alberta: Aboriginal "Double Dipping"." *TheCourt.ca*. April 8, 2010. Accessed December 7, 2018. http://www.thecourt.ca/cunningham-v-alberta-aboriginal-double-dipping/.

Chartrand, Larry. "Métis Constitutional Law Issues." In *The Oxford Handbook of the Canadian Constitution*, edited by Oliver, Peter C., Patrick Macklem, and Nathalie Des Rosiers, 367-385. New York, New York: Oxford University Press, 2017.

Chartrand, Paul. "Defining the 'Métis' of Canada: A Principled Approach to Crown-Aboriginal Relations." In *Métis-Crown Relations: Rights: Identity, Jurisdiction, and Governance*, edited by Frederica Wilson & Melanie Mallet. 27-70. Toronto: Irwin Law, 2008.

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do.

Drake, Karen and Adam Gaudry. "'The Lands…Belonged to Them, Once by the Indian Title, Twice for Having Defended Them…and Thrice for Having Built and Lived on Them': The Law and Politics of Métis Title." *Osgoode Hall Law Journal* 54, no. 1 (Fall 2016): 1–52.

Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12888/index.do.

Marcus, Joseph. "Alberta v. Cunningham: The Substantive Power of Section 15(2)." *TheCourt.ca*. September 14, 2011. Accessed December 7, 2018. http://www.thecourt.ca/alberta-v-cunningham-the-substantive-power-of-section-152/.

Metis Nation. "Métis Nation Applauds Supreme Court's Decision on Alberta Métis Settlements." July 21, 2011. Accessed December 7, 2018. http://www.metisnation.ca/index.php/news/metis-nation-applauds-supreme-courts-decision-on-alberta-metis-settlements.

R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7849/index.do.

R. v. Powley, [2003] 2 S.C.R. 207, 2003 SCC 43. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2076/index.do.

Roman, Karina. "Métis infighting follows historic Daniels ruling by Supreme Court." *CBC News*. July 12, 2016. Accessed December 7, 2018. https://www.cbc.ca/news/politics/metis-daniels-supreme-court-status-1.3675612.

Statistics Canada. "Aboriginal peoples in Canada: Key results from the 2016 Census." Released October 25, 2017. https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 6

The Duty to Consult as the Authority to Recognize: A Continued Presumption of Crown Sovereignty

By Regan Brodziak

This essay performs an analysis of the duty to consult and accommodate principle, a legal mandate that requires the Canadian state to consult and accommodate Indigenous nations when taking action that might interfere with established Aboriginal or treaty rights. Though Tsilhqot'in Nation v. British did make progress in terms of providing Indigenous peoples with more authority in the consultative process, the power still ultimately remains with the Crown in dictating whether or not the interference on Aboriginal or treaty rights is justified. That is, the Indigenous nation is invited to participate in the process, but they are not granted the authority to truly determine what happens on their land. In light of this limitation, this essay claims that this principle still operates within the presumption of Crown sovereignty, and therefore ultimately fails to confer upon the Indigenous nation their rightful political independence. In order to truly reconcile the relationship between Indigenous nations and the Canadian state, this essay concludes that it is necessary to establish a relationship premised on the rightful treaty-federalist framework.

Introduction

In a 2004, 2005 trilogy of landmark decisions, the Supreme Court interpreted Section 35 of the Constitution in a way that would require the Crown to consult and accommodate Indigenous nations "when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights" (Indigenous and Northern Affairs Canada [INAC] 2011). In practice, this would mean that the Crown is legally obligated to consult with Indigenous peoples before taking resource or developmental action that concerns their traditional territory. While this can certainly be interpreted as a positive development in that it recognizes the government's unique obligations to Indigenous peoples, critics have argued that it is not much of a departure from previous, more explicit attempts to dispossess them from their traditional territory. Through an analysis of the Supreme Court case *Tsilhqot'in Nation v. British Columbia* and the politics of recognition, I will argue that the duty to consult and accommodate principle is insufficient in the context of Indigenous-Canada relations as it still operates within a colonial

framework that presumes Crown sovereignty. I have selected this particular case because, despite it being the most progressive development in terms of recognizing Indigenous self-determination, it still operates under the recognition framework that positions Indigenous peoples as existing under the authority of the Crown. Before making this case, however, it is first necessary to establish a more comprehensive understanding of how the politics of recognition actually operate to delegitimize Indigenous peoples as independent and self-governing nations.

According to Dene scholar, Glen Coulthard (2007), the language of Indigenous self-determination has recently shifted to that of recognition – recognition of their right to land, recognition of their right to economic autonomy, and recognition of their right to self-govern (2). This discursive shift has often been celebrated as a positive development, given that it no longer explicitly requires that Indigenous peoples be governed under the colonial state. According to Coulthard (2007), however, the politics of recognition promise "to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend" (3). Under the politics of recognition, he argues, Indigenous peoples only derive their political authority from the Crown, which still serves as the supreme and indisputable authority. This is because, in pursuit of recognition, "First Nations have to implicitly concede that the Crown's sovereign reign over all lands in Canada is just and legitimate" (Youdelis 2016, 7). In this sense, so long as the colonial state is positioned such that it has the authority to determine the legitimacy of Indigenous claims to nationhood, this colonial framework will continue to exist and prevent Indigenous peoples from truly reclaiming their political independence.

Now, in order to determine how the duty to consult principle is premised on the politics of recognition, it is important to understand the exact nature of these consultation requirements. Consider the most recent developments made to this practice by the legal dispute between the Tsilhqot'in Nation and the province of British Columbia. Problems first arose in 1983, when the province unilaterally approved a commercial logging license on alleged traditional territory (*Tsilhqot'in Nation v. British Columbia* 2014). In response, the Tsilhqot'in Nation launched a legal challenge on the grounds that they had not been properly consulted. The Supreme Court held the appeal, maintaining that the Tsilhqot'in did in fact have Aboriginal title over the area in dispute and therefore that the province had failed to satisfy its duty to consult. In fact, in this case, the Court determined that Aboriginal title "confers on the group that holds it the exclusive right to decide how the land is used" (*Tsilhqot'in* 2014). In theory, this would essentially mean that, in the absence of consent, the Crown is prohibited from using Aboriginal title land for their own development purposes. In this sense, this decision seems a radical departure from the earlier duty to consult practice, in which the "Crown [was] not under a duty to reach an agreement" (*Haida Nation v. British Columbia* 2004) before proceeding on established title land.

From this perspective, it would seem that this decision was made specifically with the interests of Indigenous peoples in mind. In fact, according to the federal government, the purpose of the broader duty to consult and accommodate practice is to "strengthen relationships and partnerships with Aboriginal peoples and...achieve reconciliation objectives" (INAC 2011). By providing Indigenous peoples with a legal mechanism that requires the government to consider their interests before proceeding with a land-based project, they reason, the duty to consult principle serves to protect their rights from unilateral exploitation. In other words, it provides them with an opportunity to participate in

a decision-making process from which they would otherwise be excluded. In fact, John Borrows (2015) provides a partial defense of the changes made in *Tsilhqot'in*, arguing that "it would be unwise to minimize the decision's potential" (705). Unfortunately, as he notes, there is perhaps more to this decision than is immediately evident. A more in-depth analysis of how the duty to consult principle operates even after *Tsilhqot'in* suggests that the government is not yet prepared to end its policy of dispossession.

Participation vs. Consent: Neither Free nor Informed

Despite the government's seeming commitment to ensuring that the consultative process is one of integrity and good faith, there is one component that is especially problematic in the context of Indigenous-Canada relations; despite the developments made in *Tsilhqot'in*, consultation still does not necessarily mean consent. In fact, even under the new regime that explicitly mandates consent, the Crown is still legally capable of overriding this requirement. Now, in order to proceed on Aboriginal title land without the consent of the Nation to whom the land belongs, "the Crown must justify its actions as fulfilling a 'compelling and substantial public purpose'" (Ariss, MacCallum, and Somani 2017, 21). This means that, as per this justified intervention clause, the Crown can override the doctrine of consent if they deem it necessary in pursuit of their own public objectives. In this sense, the doctrine of consent is qualified by the Crown's own interests.

Of course, on paper, the Crown is subject to strict legal requirements that govern whether or not their intervention is justified. More specifically, they are bound by the principle of proportionality, which maintains that the infringement is justified only if it is "necessary to achieve [the Crown's] objectives...only to the extent necessary; and [only if] there is minimal impairment of Aboriginal title" (Ariss, MacCallum, and Somani 2017, 21). Though it is still too early to see any tangible implications of this decision, some scholars argue that *Tsilhqot'in* "provides a legal test for the Crown – stringent but not unreachable – to override consent on Aboriginal title lands" (Ariss, MacCallum, Somani 2017, 22). Rosenberg and Woodward (2015) confirm this point, arguing that the *Tsilhqot'in* decision positions the Crown such that they have the authority "to move forward with settlement and industrial development on Aboriginal lands with relative impunity" (961).

In this sense, despite the introduction of the doctrine of consent, consultation still takes on the meaning of participation (Gilbert 2016, 239). The Crown need not reach an agreement to which the Indigenous nation consents, but rather must simply engage in a process of consultation to ensure the participation of the Indigenous peoples concerned. In fact, based on the standards established by *Tsilhqot'in*, if the proper consultation procedures were followed and if the Crown is capable of justifying its intrusion, even explicit dissent on the part of the Indigenous nation would not require that the government halt its construction. The access to participation in the consultation process therefore means that Indigenous peoples "have no right to determine their own destiny, but only a right to agree or not to a destiny imposed by the 'other people' forming the state in which they live" (Gilbert 2016, 240). In practice, then, given that Indigenous peoples still do not have the ultimate authority to determine what happens on their land, the *Tsilhqot'in* decision does not appear to be much of a departure from the previous guidelines that did not require consent. Their right to govern their land and protect their interests are still not absolute, but instead mediated by the Crown's own interests (Coulthard 2007, 124).

In this sense, the government is seemingly only willing to recognize the existence of such rights to the extent that it does not interfere with their own interests.

This absence of a mandatory consent requirement is puzzling given the state's supposed commitment to establishing a nation-to-nation relationship based on international legal standards. In fact, as of 2016, the Canadian government has fully committed itself to the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], vowing to adopt the principle of free and informed consent without qualification (Papillon and Rodon 2017, 217). This document explicitly mandates consent under the very circumstances present in duty to consult disputes (UNDRIP 2008, 12). Clearly, given that Canada's duty to consult principle does not require that the Crown obtain consent if it can justify its interference, the government has failed to uphold these standards. It is worth noting that this document is not legally binding and that its violation cannot implicate the Canadian government. Despite the absence of any legal implications, however, Damstra (2015) argues that "the precise legal significance of UNDRIP is not determinate of its normative value" (164). This does not necessarily mean that it should not be regarded as a moral imperative (Damstra 2015, 164).

It is also worth taking a step back to consider where this authority to 'consult' Indigenous peoples emerged in the first place. While the concept of consultation is often celebrated as creating an inclusive environment in which Indigenous peoples have the opportunity to voice their concerns, critics argue that it merely "produces mechanisms which deny First Nations' voice and political agency" (Youdelis 2016, 1377). In doing so, this process serves as a justification to further domesticate Indigenous peoples within the paternal Canadian framework, treating them as an entity that can be subsumed under the Canadian Crown (Gilbert 2016, 63). In the context of the duty to consult principle, this process of consultation positions the Crown as the sovereign with the political capacity to recognize Indigenous claims to independence. However, a more in-depth and critical analysis of Canada's history reveals that Canadian claims to sovereignty are largely inconsistent with international legal standards of state legitimacy.

The Continued Presumption of Crown Sovereignty

In *Tsilhqot'in*, the Supreme Court confirmed what had already previously been established, that the duty to consult and Indigenous peoples "is grounded in the principle of the honour of the Crown" (*Haida Nation* 2004). While some argue that this statement imposes on the Crown the onus to act in good faith during the consultation process, it is in fact based on a flawed premise. More specifically, it is "grounded in the doctrine that the Crown is always already honourable, with this honour then seeping into the crown's 'mystical body' – the Canadian state" (Valverde 2011, 957). This statement situates the Crown as the "benevolent patriarch" (Valverde 2011, 967) with the supposed legal authority to govern Indigenous peoples. However, given that Indigenous peoples have never formally surrendered their right to govern themselves or their land, Borrows (2015) argues "some kind of legal vacuum must be imagined in order to create the Crown's radical title" (703).

Despite the well-established fact that Indigenous peoples occupied and governed the land long before European contact, the duty to consult principle still implicitly operates according to the legal principle of *terra nullius*, which assumes that the land was empty upon colonization and that the state is

now free to use it as they see fit (Keith 2015, 61). These narratives of emptiness and incivility serve to justify Crown sovereignty, as the Crown cannot otherwise legitimately assume the right to govern (Keith 2015, 62). Of course, the government no longer overtly abides by this principle, given that these claims are "factually untrue and lack legal cohesion" (Borrows 2002, 117). In fact, in *Tsilhqot'in*, the Supreme court formally determined that "the doctrine of *terra nullius*...never applied in Canada" (*Tsilhqot'in Nation* 2014). However, this does not necessarily mean that government policies have abandoned the presumption that the land was empty upon arrival. In fact, according to Borrows (2015), "Canadian law still has *terra nullius* written all over it" (702).

To understand how the principle of *terra nullius* continues to inform government policy, it is perhaps useful to imagine how a process like that of the duty to consult would operate according to the rightful presumption that Indigenous peoples have the authority to determine what is permitted on their land. If the state had truly abandoned the doctrine of discovery, there would be no 'justified intrusion'. In fact, there would be no intrusion at all. Questions of land development would be approached from the understanding that the nation that occupies the territory has the authority to determine what projects can and cannot proceed. The existing process of consultation would be replaced by a process that positions Indigenous peoples as the sovereign on their own territory. The 'public interest' of the general Canadian population would not serve as a justification to proceed, as the rightfully sovereign nations would act as the final arbiter in such decisions. In the absence of consent, the Canadian state would have no legal authority to intervene. In this sense, it would be under the unqualified authority of the nation to whom the territory belongs to determine what qualifies as an appropriate use of their land.

Of course, this is not the case. Instead, under the duty to consult process, Indigenous peoples are situated as the claimant who, in the face of concerns that a particular project interferes with their Aboriginal rights, are requesting that their land *not* be disturbed. In this sense, Indigenous peoples are not positioned as the original occupants. Rather, they are positioned as peoples whose independence exists at the mercy of the Crown, whose "governing authorities operate within the larger jurisdiction of federal and provincial authority" (Alfred 2001, 9). The Crown, therefore, is quite clearly positioned as the entity with the political authority to recognize the existence of Indigenous self-determination. In this sense, despite the developments made in *Tsilhqot'in*, this practice still refuses "to challenge the racist origin of Canada's assumed sovereign authority over Indigenous peoples" (Coulthard 2007, 41).

Consultation According to Canadian Legal Norms

Finally, it is worth noting that this right to be consulted is first and foremost grounded in the Canadian Constitution, a fundamentally colonial document. Clearly, then, the Canadian duty to consult is "not informed by international law obligations, but is seen first and foremost as a basic constitutional right" (Allard 2018, 37). According to Webber (2013), this is problematic because "rights are intrinsically bound up with the legal order by which they are defined and according to which they are interpreted, adjusted, and deployed" (79). This is because the Constitution "merely represent[s] the continuation of the colonial legacy and the forced imposition of western...traditions on Aboriginal communities" (Ladner 2001, 4). Regardless of the extent of these rights, then, the fact that they emerge from Canadian law prevents Indigenous peoples from truly reclaiming their political independence outside of the Canadian framework. Gilbert (2016) confirms this point, arguing that these structures

impose significant limitations on how well Indigenous peoples are able to govern themselves according to their own political practices, as their legal authority is ultimately still a product of the colonial legal system (239).

As an extension of this, it is also worth recognizing that it is at the discretion of the Supreme Court to determine what qualifies at a justified intrusion on behalf of the Crown. Despite the fact that *Tsilhqot'in* explicitly rejected the doctrine of discovery and therefore should have undermined Crown sovereignty, in duty to consult disputes, "the Crown will [still] get the last word in land use decisions" (Borrows 2015, 726). When operating according to the assumption that Canadian legal norms have the rightful authority to guide this process, the fact that the Supreme Court is positioned as the final arbiter in such cases would seem appropriate. However, as we have already established, given that Indigenous peoples occupied this territory long before colonization, the Crown has no rightful basis to govern. As an extension of the judiciary, then, the fact that the Supreme Court has the ultimate authority to make decisions about Indigenous sovereignty also rests on the flawed premise of Crown sovereignty.

In fact, according to Borrows (2002), pursuing Indigenous sovereignty through the Canadian legal system is a rather hopeless feat. More specifically, he argues that, in interpreting the Constitution, the Supreme Court "unquestionably support[s] notions of underlying Crown title and exclusive sovereignty in the face of contrary Aboriginal evidence" (116). Considering that questioning the legitimacy of the Crown would only serve to undermine the foundation on which the Supreme Court itself is premised, this "uncritical acceptance" (Borrows 2002, 116) of Crown sovereignty is perhaps not surprising. Therefore, when approached with a question about the validity of Crown interference without consent, it is unlikely that the Court would have an interest in challenging the Crown's legitimacy for the benefit of Indigenous sovereignty.

Using colonial institutions to recognize the existence of Indigenous rights traps them within the colonial framework that is responsible for their dispossession in the first place. In turning to the Courts to secure their rights, Indigenous peoples are forced to concede that the state has the supposed authority to determine the existence of these rights. When operating within the recognition framework in the context of the duty to consult, "the terms of recognition...remain in the possession of those in power to bestow on their 'inferiors' in ways they deem appropriate" (Coulthard 2007, 39). Therefore, while *Tsilhqot'in* secured the (qualified) right for Indigenous peoples to determine what happens on their land, this right nonetheless only exists because the supposedly sovereign colonial authority says so.

In Conclusion: Towards A Treaty-Federalist Framework

As it currently exists, the duty consult serves as a means through which the Crown can continue to assert its sovereignty at the expense of that of Indigenous peoples. Although the *Tsilhqot'in* case does provide Indigenous peoples with a greater opportunity to participate in the negotiation process, it still operates under the wrongful assumption that the Crown has the proper legal authority to recognize the independence of Indigenous peoples. Of course, then, the only way to escape from this framework is to establish a diplomatic relationship in which the Crown and Indigenous peoples are positioned as equal sovereigns. This is properly known as treaty-federalism. Though it is beyond my purpose in this paper to describe exactly how this practice would operate under a treaty-federalist framework, is it important to

take note of the principles that would guide this process. According to Ladner, the treaty federalist relationship is "premised on the idea that the treaties between the various Indigenous and colonial nations established (in law) federal relationships" (Ladner 2001, 9). In this sense, the Crown would be in no position to consult the Indigenous peoples whose land they wish to use; rather, the Indigenous peoples would be appropriately positioned as that body which administers the consultation in the event that the Canadian state wishes to proceed on their territory. Given the colonial tradition of consultation and recognition, this would perhaps seem like a rather provocative statement. However, considering that the Canadian state continues to rest on the flawed premise of Crown sovereignty, establishing this nation-to-nation partnership is the only way that this relationship can truly be reconciled.

References

Alfred, Taiaiake. 2001. "Deconstructing the British Columbia Treaty Process." *Balayi: Culture, Law and Colonialism* (3): 37-65. AGIS Plus Text.

Allard, Christiana. 2018. "The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts." *Arctic Review on Law and Politics* 9 (0): 25-43. https://doi.org/10.23865/artic.v9.729.

Ariss, Rachel, Clara MacCallum, and Diba Nazneen Somani. 2017. "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation." *McGill International Journal of Sustainable Development Law and Policy* 13 (1): 1-58. HeinOnline.

Borrows, John. 2015. "The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia." *University of British Columbia Law Review* 48 (3): 701-742. InfoTrac LegalTrac.

Borrows, John. 2002. "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism." In *Recovering Canada: The Resurgence of Indigenous Law.* Toronto: University of Toronto Press.

Coulthard, Glen, S. 2007. *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition.* Minneapolis, Minnesota: University of Minnesota Press. eBook collection (EBSCOhost).

Damstra, Jacob. 2015. "Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada's Extractive Industries Strategy." *Transnational Law & Contemporary Problems* 25 (1): 153-177. HeinOnline.

Gilbert, Jeremie. 2016. *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors.* Ardsley, N.Y.: Transnational Publishers. https://doi.org.10.1163/ej.9781571053695.1-352.

Haida Nation v. British Columbia (Minister of Forests) [2004]. 3 SCR 511, 2004 SCC 73. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do.

Indigenous and Northern Affairs Canada. 2011. "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011." *Government of Canada. http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675.*

Keith, Jennifer. 2015. "The Totalizing Nature of the Canadian State: Modern-Treaties in the Era of recognition." *Canadian Journal of Native Students* 35 (1): 45-67. *Academic OneFile,* EBSCO*host.*

Ladner, Kiera. 2001. "Negotiated Inferiority: The Royal Commission on Aboriginal People's Vision of a Renewed Relationship." *American Review of Canadian Studies* 31 (1-2): 241-264.

Papillon, Martin, and Thierry Rodon. 2017. "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior and Informed Consent in Canada." *Environmental Impact Assessment Review* 62: 216-224. https://doi.org.10.1016/j.eiar.2016.06.009.

Rosenberg, David M., and Jack Woodward. 2015. "The Tsilhqot'in Case: The Recognition and Affirmation of Aboriginal Title in Canada." *University of British Columbia Law Review* 48 (3): 943-970. InfoTrac LegalTrac.

Tsilhqot'in Nation v. British Columbia [2014]. 2 SCR 257, 2014 SCC 44. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

United Nations General Assembly. 2008. *United Nations Declaration on the Rights of Indigenous Peoples.* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

Valverde, Mariana. 2011. "The Honour of the Crown is at Stake: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty." *UC Irvine Law Review* 1 (3): 955-974. HeinOnline.

Webber, Jeremy. 2013. "The Public-Law Dimensions of Indigenous Property Law." In *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, edited by Nigel Bankes and Timo Koivurova, 79-102. Oxford, United Kingdom: Hart Pub. https://10.5040/9781472566379.ch-003.

Youdelis, Megan. 2016. "'They Could Take You Out for Coffee and Call It Consultation!': The Colonial Antipolitics of Indigenous Consultation in Jasper National Park." *Environment and Planning A* 48 (7): 1374-1392. EconLit.

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 7

Canadian Narcotics Policy: A Relic of Settler Colonialism

By Michael Mytrunec

In this paper, I examine the formation and enforcement of Canadian narcotics policy through the lens of settler colonialism. By examining the rationale for Canadian policies towards opium, cannabis, and quat, I challenge the notion that public health and safety played a material role in the formation of Canadian narcotics policy. Rather, racialized targeting of minority groups was a key driver for creating laws to prohibit certain narcotics and incidentally target undesirable subcultures. Evidence that punitive and enforcement-oriented strategies for controlling narcotic drugs are ineffective have frequently been met by the continuation of these very strategies, further undermining the stated purposes for enacting strict drug laws. Language of "law and order" and the propensity to crack down on drug users, coupled with racial profiling and police biases, has continued the disproportionate racial impacts of drug laws, and the successes of narcotics policy in entrenching the status quo have outweighed their failures in reducing drug consumption. I conclude that, as it exists currently, Canadian narcotics policy is inseparable from Canada's past as a settled, colonial nation-state.

Introduction

Under the guise of public health and safety, narcotics such as opium and marijuana have been made illegal in Canada (Cook 1969, 36). These policies, meant to reduce and discourage drug use, have achieved neither, yet have remained active and unchanged despite their ineffectiveness. Why continue to enforce such ineffective laws?

An implicit goal in settler colonial societies such as Canada is to root and reproduce the norms and power structure of the British mother culture. Settler colonialism, historically, "refers to the intentions of colonial administrators to build ... an 'overseas extension' or replica of British Society" (Stasiulus and Jhappan 1995, 97). The ineffectiveness of narcotics policy in reducing drug use has been masked by its effectiveness as a tool by which the government can reinforce the longstanding "racial/ethnic... hierarchies expressed through laws [and] political institutions" (Stasiulus and Jhappan 1995, 96). Racial profiling and an imbalance in power have exacerbated the perception of minority groups as drug users and the implementation of a punitive narcotics policy has inadvertently targeted

these groups and disproportionately tarnished their legal standing. I argue that the implementation and enforcement of our current narcotics legislation is a relic of our settler colonial history and a means of institutionalising white dominance in the Canadian status quo. I will do so by first demonstrating the failure of current narcotics laws in achieving their stated purpose of reducing drug use. I will then highlight the history of our drug laws in order to demonstrate how racialized fears and immigration anxiety were inherent in their formation and apparent in their enforcement. Finally, I will outline the ways in which biased enforcement of punitive narcotics legislation perpetuates the imbalance of power developed by the settler colonial status quo.

The Failure of Current Narcotics Policies

The assertion that narcotics policies are a tool to reduce drug use and increase public health does align with drug control strategy pursued by the Canadian government. Punitive enforcement of drug laws has exacerbated the health and usage problems that they are purported to solve. Paula Mallea's *The War on Drugs: A Failed Experiment* outlines some of the inconsistencies between the stated purpose of drug laws, their actual effects once implemented, and the enforcement strategies pursued by the federal government. Mallea outlines how the conservative government under Stephen Harper shifted the control of the national anti-drug strategy from the department of health to the department of justice (Mallea 2014, 111). This shift is emphasised when funding disparities are examined. 73% of the drug strategy budget is devoted to enforcement whereas a meagre 20% is devoted to treatment, prevention, and harm reduction (Mallea 2014, 111). The nearly four-fold difference in funding between enforcement and healthcare strategies undermines the notion that narcotics policy is primarily health focused and reinforces the assertion that there are other motives at play. Prohibition and the associated legal punishments appear to be the goal, whereas healthcare is simply a political justification for these harsh and ineffective policies.

The emphasis on enforcement is proven more counterproductive when usage rates and the prevalence of narcotics are taken into consideration. Health Canada reports that, despite political assertions to the contrary, drug use for nearly all illegal drugs has declined since 2004 (Mallea 2014, 113). This decline in the usage of drugs has been concurrent with an increased intensity of enforcement and condemnation of narcotic users. The Harper conservatives, once in power, implemented a regime of mandatory minimum sentences for drug offences at a time when drug use was in decline. The increasing and expanded intensity of enforcement pursued by the Harper government was in contrast to trends occurring in other western democracies where relaxation of drug laws had become prevalent. The failure of harsh enforcement measures at reducing drug use is not a revelation, but rather, a documented fact known to previous governments. The House of Commons Special Committee on the Non-Medical Use of Drugs, formed in 2001 to explore drug use, concluded that intensive "policies of repression had failed to reduce consumption and supply" of narcotics (Mallea 2014, 177). This information was available to the Harper government prior to the legislative crackdown on minor drug offences, which suggests that the committee's report was either ideologically ignored or unscientifically rejected.

The goal of drug prohibition to reduce drug use has failed by any metric that could indicate success (Mallea 2014, 177). The inability of a punitive narcotics policy to reduce drug use is less surprising when the context of prohibition is examined. The history of drug prohibition and the

racialized motivations of heavy enforcement are intrinsically tied to present day laws and practices. As recently as 1998, narcotics policy has been developed to criminalize and target minority groups (Mallea 2014, 27-28). These laws can be more accurately understood when reducing usage and public health are viewed as *justifications* rather than objectives.

The History of Canadian Narcotics Policy

The first targets of racially motivated narcotics policy were Asiatic immigrants to Canada in the early 1900's. In her book *Canadian Narcotics Legislation*, Shirley Cook analyzes the formation of narcotics legislation developed to combat opium, as well as the shift in public opinion that moved drug use from a medical issue to a criminal one. Cook recognises that "narcotics legislation developed as a political process and reflected current power differentials" between the dominant whites who ran most of society and the Asiatic immigrants who represented a distinct "other" (Cook 1969, 36). The issue was examined from a sociological perspective and emphasised the imbalance of power that permeated the resulting narcotics legislation. Although both whites and recent Chinese immigrants used opiates, it was only the latter group whose use was deemed to be deviant. White opiate users were typically middle class users with a prescription from a physician, or physicians themselves, who did not stray far from the image of an ideal Canadian settler. Recent immigrants could not separate their opiate use from their identity and this allowed them to be targeted. Opiate prohibition was originally manifested in the 1908 Opium Act which evolved into the Opium and Narcotic Control Act in 1922 (Mallea 2014, 25). The goals of this prohibition were twofold. Canadian authorities sought to "eliminate two evils simultaneously – the distribution of opiates and the presence of a despised racial group" (Cook 1969, 43). The legislative response to outlaw opium was coupled with the law enforcement response to only target the recent immigrants who were breaking these laws, largely ignoring the many white users who were not seen as deviant in their culture or appearance (Mallea 2014, 25). Opium legislation was developed to provide "law enforcement officials with a weapon to suppress an undesirable subculture. The precedent for using narcotics legislation in this manner was established half a century ago" and this practice of outlawing a habit to target its users has been revisited in multiple instances (Cook 1969, 45).

The history of marijuana and its criminalization has many parallels to that of opium. With opium, a decision was made to "label narcotic drug users as criminals, and to explain why a very punitive law was adopted to repress what was a relatively minor social problem" (Cook 1969, 36). The decision to ban marijuana shared many of these motivating factors. The first prominent anti-marijuana campaign was spearheaded by Judge Emily Murphy in the early 1920's. Murphy wrote articles in *Macleans* depicting marijuana as a "new menace" to Canadian society and these articles played prominently in the decision to outlaw marijuana (Erickson 1980, 1). Much like opium, "Cannabis use did not present as a problem in 1923 when it was first added to the schedule of prohibited "narcotics" (Erickson 1980, 1). The addition of marijuana to the Schedule of Narcotic drugs was not debated or undertook with much critical insight. It was simply stated that "there is a new drug in the schedule" (Mallea 2014, 25).

Patricia Erickson's *Cannabis Criminals: The Social Effects of Punishment on Drug Users* examines the effects of cannabis criminalization and also offers a history of marijuana laws and their relative staying power. Erickson notes that "originally, [cannabis] laws were directed at a racial and social minority" and it was both unexpected and unintended that they would eventually be applied to

mainstream whites (Erickson 1980, 2). The harshness and punitive nature of marijuana laws reflect this malicious intent. Task forces and commissions designed to study the effects of cannabis laws have reinforced the assertion that they are discriminatory and overly harsh. The Le Dain Commission, formed to study cannabis use, determined that "cannabis was not a "narcotic" in any pharmacological sense... and its use did not cause people to become criminals or moral degenerates" (Erickson 1980, 4). This undermines Murphy's argument that marijuana leads to moral decay and highlights how race may have played a factor in her fervent opposition. The Senate Special Committee on the Traffic in Narcotics made a statement in 1955 concerning marijuana use that noted that "no problem exists in Canada in regard to this particular drug" (Erickson 1980, 18). This parallels the lack of a clear drug problem at the time of marijuana's addition to the schedule of narcotic drugs and spurs questions about why laws were implemented and enforced to solve a problem that did not exist.

The most recent use of narcotics policy to indirectly target minority groups was the least newsworthy yet the most brazen example in recent history. Quat, an herb chewed traditionally in West Africa and the Middle East, was added to the Schedule of Narcotic Drugs in 1998 (Mallea 2014, 27-28). It is chewed for its effects as a stimulant and is used primarily by ethnic Somali immigrants. Quat use presented almost no problem to public health or safety but was it nonetheless prohibited "even though no science exists to justify the prohibition" (Mallea 2014, 27-28). This recent example of newly implemented drug prohibition echoes the process by which opium and cannabis were prohibited and clarifies how "hostility towards immigrants ... predated any public concern over drug abuse" (Cook 1969, 42). The intent, and real purpose, of the prohibitions is implied in the context of a clear target and a lack of a problem to the greater public.

The lack of an apparent problem to be solved by narcotic prohibition spurs questions about the true intent of these policies, and the racialized origins of drug laws suggest an answer. Canada's desire to "preserve the British type in our population" required a mechanism to harass those that did not fit this image (Cook 1969, 42-43). Narcotics policy served this purpose. A strong tenet of settler colonialism is a "multi-layered and deeply rooted" hierarchy perpetuated by a nation's laws and institutions (Stasiulus and Jhappan 1995, 116). Knowledge of the history and ineffectiveness of narcotics policy is prerequisite to examining how its existence, enforcement, and staying power in spite of scientific evidence perpetuates Canada's legacy of settler colonialism.

The Biased Enforcement of Narcotics Legislation

The Fractious Politics of a Settler Society, by Daiva Stasiulis and Radha Jhappan, examines Canadian society and the historical roots from which modern settler colonialism grew. The authors demonstrate that modern "racial/ethnic and class relations grew out of specific historical, material, and ideological conditions" that are directly related to Canada's history as a settled, colonial state (Stasiulus and Jhappan 1995, 96). This echoes the findings of Lorenzo Veracini in *Settler Colonialism: A Theoretical Overview,* where it is noted that the colonial relationships of subordination and subjugation are "exercised from *within* the bounds of a settler colonising political entity" (Veracini 2011, 6). In Canada, narcotics policy created an institutional capacity for law enforcement to reinforce these racial hierarchies at a time when they were overt and explicit.

Narcotics policy demonstrates the use of laws to target and harass those who did not fit the image of an ideal settler at a time when this was a legitimate goal of the government. Law enforcement and the justice system, two institutions heavily shaped by settler colonialism, have reinforced the racialized origins of drug policy through a lack of fair enforcement. The biased enforcement reinforces the settler colonial "politics of exclusion and segregation" where the whites in power are dominant and maintain the means to preserve this dominance (Veracini 2011, 10). The structural racism inherent in creating narcotics policy undercut the "imperial philosophy of race-blind justice and equality before the law" (Stasiulus and Jhappan 1995, 112). The enforcement of narcotics policy, as outlined below, further reinforces the settler-colonial power imbalance inherent the creation of these laws.

The impact of law enforcement between groups in Canada is not race-neutral. In *The Colour of Justice: Policing Race in Canada,* David Tanovich examines racial profiling as an underlying factor in the unequal impact of police enforcement. Tanovich examines statistics from policing in Toronto in order to make his case. Racial profiling is defined as more than just unconscious bias, but rather "as a current manifestation of the historical stigma of blackness as an indicator of criminal tendencies" (Tanovich 2006, 13). Canada's settler colonial history has broadened this stigma to include all who depart from the image of a traditional, British settler. Tanovich notes that "racial profiling occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any locations to greater scrutiny based solely or in part on race, ethnicity..., or on other stereotypes associated with these factors" (Tanovich 2006, 13). With narcotics policy, a stereotype was not created to fit the criminal, but rather, the crime was created to target the stereotypical racialized minority. This stereotype was actively sought out by enforcement which resulted in disparities in arrests that do not correlate to disparities in crime rates. Tanovich notes how, in Toronto, black students were stopped and searched by police six times more often than their white counterparts of equal criminality (Tanovich 2006, 1). The increased incidence of enforcement stems from stereotypes that grew out of settler colonialism and undermines the race-neutral justice system that Canada claims. The fact that cannabis prohibition accounts for "one in every eight federal criminal charges" ensures that this disparate targeting by law enforcement will be reflected in drug arrests and prosecution (Erickson 1980, 143).

Michael Tonry's, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System,* analyzes some of the reasons for the continuing popular support of discriminatory policies such as narcotics laws. Tonry's research has noted that "whites support policies that maintain traditional racial hierarchies" and in Canada the traditional racial hierarchy was developed by a settler colonial past (Tonry 2010, 273). Canada's acceptance of an imbalanced narcotics policy may not be driven by explicit racial hostility, but rather, apathy towards those with less societal power who disproportionately suffer at the hands of narcotics laws. White Canadians may also be persuaded by critics who suggest that increasing prevalence of drug arrests indicates increasing drug usages rates among minorities. These criticisms are unfounded, given that minorities are no more likely to use drugs or be involved in the drug trade when compared to whites, but persist because they are easy to accept (Tanovich 2005, 89). Attempting to reconcile laws shaped by a colonial past is unattractive since it requires the white political class to challenge institutions "that have maintained white dominance and protected the interests of whites as a class" (Tonry 2010, 280).

The tendency of whites to be apathetic to those who suffer disproportionately at the hands of law enforcement is a common trend in states with a colonial past. *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice,* examines how support for racially targeted laws persists even when the outright racism that created the laws has dwindled. Racial resentment is determined to be a heavy motivator in support for punitive policies, such as drug laws, that emphasize "deterrence, incapacitation, and retribution over the goal of rehabilitation" (Barkan and Cohn 2005, 300). This echoes the approach taken by the Harper conservatives who strongly emphasised enforcement and punishment over forms of prevention and healthcare in their national drug strategy (Mallea 2014, 111). Racial prejudice established by our settler colonial history has created a "disproportionate allocation of funds to crime-reduction spending at the expense of" effective narcotics policy (Barkan and Cohn 2005, 312). Enforcement of laws that were designed to target minorities has evolved into the modern-day desire to crack down and enforce the law without regard for the fact that racialized persons suffer disproportionally.

Nikhil Singh's, *The Whiteness of* Police, examines the racial imbalance inherent in policing as an institution rather than a practice. Singh notes that "police power revolves around its ongoing links to ... settler colonial methods and relationships including extermination and population transfer" and this power is most often exerted over marginalised groups with little power (Singh 2014, 1096). The racialized motivations behind drug policy have actually increased police power in the Canadian context. The desire to punish narcotics users was what extended the power for police "to search unconditionally without a warrant" any dwelling that is not a residence if it is suspected that narcotics are present (Cook 1969, 44). This displays that the institution tasked with enforcing racially motivated laws has actually been empowered by them. "Enhancement of institutional capacities for policing" was a result of narcotics policy and demonstrates a lingering legacy of racially motivated legislation driven by a settler colonial history (Singh 2014, 1096).

Conclusion

The successes of narcotics policy in entrenching the status quo have outweighed their failures in reducing drug consumption. When history and the effectiveness of narcotics policy are examined, it becomes clear that these harsh laws are unfair and difficult to objectively justify. Restrictions on opium, cannabis, and quat were implemented to deliberately target minority groups and continue to persist because they are enforced by institutions that do the same. Racial bias has been integrated into every aspect of law enforcement, both as a practice and an institution, as a result of Canada's settler colonialist past. Although the outright racism that spurred narcotics policy may no longer exist, the colonial subjugation and subordination that these laws perpetuate can be disguised in the language of law and order in order to reinforce the power structures of Canada's settled, colonial history.

References

Barkan, Steven E and Steven F Cohn. 2005. "Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice". *Social Problems.* Vol. 52 (2): 300-314. DOI: http://www.heinonline.org.login.ezproxy.library.ualberta.ca/HOL/Page?handle=hein.journals/socprob52&div=22

Cook,Shirley J. 1969. "Canadian Narcotics Legislation, 1908-1923: A Conflict Model Interpretation." *Canadian Review of Sociology & Anthropology.* Vol. 6 (1): 36-46. http://web.b.ebscohost.com.login.ezproxy.library.ualberta.ca/ehost/detail/detail?sid=2e790db-8b87-4299a6f3b74b1afa151f%40sessionmgr104&vid=0&hid=101&bdata=JnNpdGU9ZWhvc3QtbGl2ZSZzY29wZT1zaXRl#AN=10620379&db=poh

Erickson, Patricia G. 1980. *Cannabis Criminals: The Social Effects of Punishment on Drug Users.* Toronto: Alcoholism and Drug Addiction Research Foundation.

Mallea, Paula. 2014. *The war on drugs: a failed experiment.* Toronto: Dundurn Publishers. http://www.deslibris.ca.login.ezproxy.library.ualberta.ca/ID/446699

Singh, Nikhil Pal. 2014. "The Whiteness of Police" *American Quarterly.* Vol. 66 (4): 1091-1099. DOI: https://doi.org/10.1353/aq.2014.0060

Stasiulis, Daiva and Radha Jhappan. 1995. "The Fractious Politics of a Settler Society." In *Unsettling settler societies: articulations of gender, race, ethnicity and class*. London: Sage, 95-13.

Tanovich, David M. 2006. *The Colour of Justice: Policing Race in Canada.* Toronto: Irwin Law Inc.

Tonry, Michael. 2010 ″The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System,″ *Crime and Justice* Vol. 39 (1): 273-312 DOI: 10.1086/653045

Veracini, Lorenzo. 2011. *Settler Colonialism: A Theoretical Overview*. Houndmills, Basingstoke: Palgrave Macmillan. http://link.springer.com.login.ezproxy.library.ualberta.ca/book/10.1057%2F9780230299191

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 8

A Critique of Diversity, Inclusion, and Equity Policies in Canadian Universities

By Julie Moysiuk

As Canada has become increasingly multicultural, so have its universities – but their demographic representation (or lack thereof) creates a need for diversity, inclusion and equity policies to be evaluated. An intersectional analysis of university institutions reveals a lack of diversity among those who hold positions of power. This paper argues that while institutionalized diversity, inclusion and equity policies are well intentioned, they are also often poorly delivered. Focusing on proposed policy objectives rather than their impact can create barriers to meaningful and lasting change. After establishing a number of basic tenets to this argument, two main ideas will be explored: the importance of disrupting pre-existing assumptions about diversity, inclusion and equity policies, and the implementation of methods to substantively remedy the unequal power relations these policies can reinforce.

Introduction

The title of a "university" in Canada is protected under federal regulation, with the intent that institutions housing scholars of autonomous and critical thought need to maintain a particular standard of quality (Universities Canada 2018). As Canada has become increasingly multicultural, so have its universities – but their demographic representation (or lack thereof) creates a need for diversity, inclusion and equity policies to be evaluated. An intersectional analysis of university institutions reveals a lack of diversity among those who hold positions of power. This paper will argue that institutionalized diversity, inclusion and equity policies are weakened by focussing primarily on the proposed objectives of the policy, rather than its potential long term impact. After establishing a number of basic tenets to this argument, two main ideas will be explored: the importance of disrupting pre-existing assumptions about diversity, inclusion and equity policies, and the implementation of methods to substantively remedy the unequal power relations these policies can reinforce.

Background and Context

The theory of Critical Race Feminism, which focuses on the intersection of gender, race, class, ability, and any other form of social oppression, will be used to frame this paper as the definition has "increasingly been used by educators to look at ways in which schools reproduce inequality, despite the rhetoric of equality of opportunity" (Childers-McKee 2015, 394). Adrienne Chan rightly extends the definition of diversity to encompass all principles of inclusion and recognizing difference (2005, 131). By acknowledging intersectionality and diversity as more than a set of categories to which people self-identify, underlying issues with diversity, inclusion and equity policies (herein referred to as "diversity policies") can be effectively explored. Intersectionality is defined by Crenshaw as a conceptualization of discrimination that does not operate on a categorical axis: it involves the simultaneous consideration of multiple aspects of identity (1991, 1244). However, it is acknowledged that intersectionality is a broad and challenging topic to engage with, which becomes evident through exploring scholarly research and institutional data. In this paper, intersectionality will be analyzed through specific examples, while recognizing the difficulty in representing all non-exclusive sub-categorizations encompassed by the definition.

The first step in assessing diversity and inclusion policies is identifying sources of power within university institutions, as done by Paul Ross. Although Ross analyzes a vast number of power sources in university institutions, the focus of this paper will be on faculty departments, as they primarily "deal with the daily academic business of the institution and are a main source of ideas and proposals" - meaning that they shape formal policies which uphold the bureaucratic power structures of educational institutions (Ross 2012, 65). Chan deepens the analysis of formal power structures by commenting that universities embody normalizing ideologies rooted in organizational structure and patriarchy, which becomes evident in policies created (2005, 141). For example, in 2014 only 23% of contributors to the Canadian Journal of Political Science were women (Vickers 2015, 757), and this is a common trend across disciplines in terms of who creates content and guides university policy-making decisions.

It is also important to clarify why diversity policies within universities are a relevant site of analysis. Chan comments that "policies for diversity did not originate as educational policies, but emerged from Canadian legislation and values" (Chan 2005, 130). Universities are a reflection of the changing values of society, and they are a learning platform for young professionals who will shape social constructs in the future. Educational institutions are also political sites because they control how "power is managed through the distribution of resources, knowledge, and information" (Chan 2005, 131). This political management, which occurs through faculty operations, can lead to institutional power benefiting dominant ideologies over 'othered' worldviews. Since universities incubate social change, a close analysis of diversity policies within this setting will illustrate their impact on both institutional and everyday life.

Issues with Institutional Diversity, Inclusion and Equity Policies

In recent years, diversity policies have understandably garnered support, as accepting the need for diverse representation is often regarded as a step in the right direction. However, this paper asserts that such policies often fail to acknowledge the bias inherent in policy creation, as well as the systemic

and historical barriers that impact marginalized groups today. The "objective" of a policy will refer to the intentions of the policy writers, whereas the "impact" will refer to the substantial, long term change for the people the policy affects.

Policy-making tends to be a formulaic process, where the problem is considered as an unquestioned fact, and where potential solutions focus on how to "do it better" (Iverson 2007, 589). The issue with this approach is that policy solutions may lend further legitimacy to the socially constructed norms of a privileged majority. Iverson recognizes this issue with her comment of how "diversity action plans profess the rightness of democracy, while ignoring the structural inequality of capitalism" (2007, 603). When forming diversity policies, the process of defining the problem should be discussed in context to historical injustices against marginalized groups, and the solution should allow a space for the unmapping of this oppression. Another issue is that policies often only concentrate on one aspect of intersectionality such as race or gender, without considering the combined impact of all factors. As a result, policies that aim to empower all women may only be accessible to a particular demographic, such as able-bodied, middle-class White women. A truly intersectional analysis demands tailored recommendations to the subtle differences between groups to encourage substantive, long term solutions. However, institutional policies are often focussed on moving forward under the generalized democratic ideal of equality, failing to recognize comprehensive and often painful histories that create barriers for intersectional identities to exist within the university space.

An example of this shortcoming is observed through one objective in the Government of Canada's 2017 Equity, Diversity and Inclusion Action Plan, which aims to increase the diversity of Aboriginal representation in Canadian Research Chairs. It is interesting to note that the Action Plan identifies the four categories of women, persons with disabilities, Aboriginal Peoples, and members of visible minorities, yet fails to consider the intersecting identities within these defined groups, which instantly restricts the policy's scope of impact. One item in this policy calls for limiting the renewal of elected Chair term lengths to meet diversity targets (Government of Canada 2018). While this item is well-intentioned, it fails to consider the underlying barriers of economic and cultural oppression, which result in Aboriginal students entering university 21% less than the average Canadian (Statistics Canada 2015). Rather than encouraging higher Aboriginal representation in universities to then rise into Research Chair positions, increasing the Chair turnover rate creates an appearance of equity while leaving underlying barriers to accessing the education system untouched. This policy also reinforces a hierarchical, voting-based system of governance which does not reflect the traditional values of many Aboriginal bands who engage through consensus decision-making. The lack of consent and consultation in policy-making raises barriers for Aboriginal representation in the overall education system, and further marginalizes sub-identities such as gender by subsuming them within the Aboriginal category. In this way, the intended benefits of the policy are weakened because only the symptoms of the defined issue are addressed, while systematically avoiding root problems that reinforce institutional inequality.

A second issue with diversity and inclusion policies is the way in which measures of accountability are constructed. As Iverson notes, "a Critical Race Theory analysis interrogates the unquestioned use of a White, male majority experience as criteria against which to measure the progress and success of people of colour" (2007, 607). A predominantly White, male standard is the classic ideal of academic success, which threatens the intended objective of diversity policies to consider

intersectional experiences. An example from Iverson's research is how one university released a diversity report recommending a faculty professional development track for "high performing people of colour, women, and members of under-represented groups in staff positions" (2007, 595). The problematic nature of this criterion is that 'high performing' refers to individuals who were successful in the past, which is often not an accurate reflection of current groups in need of greater representation. While one may argue that this program is a positive opportunity, defining 'high performing' individuals through a White, male-centric lens ensures that those who rise to positions of power will identify with those already in power, thus defeating the intention of diversity policies to disrupt the conventional definition of success.

Thirdly, an issue arises in the discussion of accountability when quotas are set for the representation of women and marginalized groups. While having a particular number of women in a discipline may be viewed as a progressive action, this paper argues that setting quotas does not result in substantive change. On one hand, setting a number creates a clear measure of accountability that can force policy-makers to follow through with their promises. An example of this concept is Prime Minister Justin Trudeau's gender-balanced Cabinet. The general public appears to have accepted this decision with Trudeau's justification of "Because it's 2015", which was stated during the early days of his term. However, Vickers contrasts this idealistic view with her research demonstrating that although the number of women in the field of political science has increased drastically over the past forty years, topics about women and gender have not been normalized into mainstream political science (2015, 767). Simply increasing the number of women within a discipline is not enough to shift underlying beliefs about women's roles; in Vickers' study, women were less likely to be journal editors or department chairs, and even in Trudeau's Cabinet, historically male-dominant roles such as Minister of Finance and Defense have remained unchanged. While there are benefits to having women present at the table, it is troubling when achieving a numerical policy goal does not fundamentally alter deep-seated norms regarding the expected place for women.

The two arguments thus far, pertaining to policy formation and measures of accountability, can result in surface-level diversity policies. This issue is exacerbated when diversity policies do not enable those who create them to recognize their own privilege. As Henry and Tator state, "White university administrators and non-racialized faculty often do not realize that discrimination is a matter of impact, and not intent. White privilege is like an invisible, weightless knapsack of special provisions, passports, and resources" (2009, 29). Even though policy writers may have no ill intent, if they are not impacted by the policy themselves, they may fail to grasp its shortcomings. As a result, if a policy is approached with a 'checklist' mentality, an objective may appear to be fulfilled without creating its intended outcome. Iverson provides an example with how the implementation of diversity policies tends to increase a university's ranking and federal funding level. This incentive creates an environment where people of colour become "commodities to promote the self-interest of the White institution" (Iverson 2007, 599). An issue arises when policy writers fail to acknowledge their own privilege, because once a policy benefits the institution, there may be the appearance of a solution that in reality, has failed to create meaningful change.

Methods to Substantively Remedy Unequal Power Relations

Upon identifying and analyzing issues with diversity, inclusion and equity policies, this paper will move into discussing how diversity can be effectively promoted within universities. Methods explored will focus on policy writers, the policy-making process, and those who are impacted by the policies themselves. A "substantial transformation" in this context refers to when the impact of a policy exceeds its stated objectives and envisioned intent.

"A barrier [in making political science more inclusive] is the expectation of mainstream political scientists that marginalized diverse groups are responsible for solving this problem" (Vickers 2015, 767). This comment indicates an inadvertent fallacy within diversity policies: that the privileged majority does not need to play a role in shifting the needle to benefit marginalized identities. In fact, a change in attitude amongst current policy writers is essential to creating policies that achieve their intended long term impact. This is where diversity policies that have been critiqued for emphasizing numerical targets can still be useful. By increasing women and people of colour within institutional settings, a greater number of interactions will occur with those currently in power. Collaborating with and recognizing the merit of marginalized groups in a conversational setting that policy writers are familiar with has the potential to shift perspectives of faculty management substantively.

However, improving diversity policies through the view of policy writers is only the first step. The second step is creating a space for the narratives of underrepresented identities to influence the impact of policies. Counter-storytelling is a central concept in Critical Race Feminism because it breaks the silence of how hegemonic cultures have distorted marginalized realities that cut across the boundaries of race, class, and gender, while also creating a space for common understanding (Henry and Tator 2009, 38). However, for the creation of this space to lead to healing and progress, institutions must be wary to avoid classifying marginalized groups as 'victims' in need of assistance. If institutions approach stories of diversity with a view of superiority, then there is a risk of creating an 'othered' space that further divides marginalized groups from the dominant group. Creating spaces in universities where marginalized groups can bring their stories forward, in a way where they are heard and valued in the policy-making process, will encourage substantive transformation in the intent and impact of diversity policies.

Methods of data collection in researching policies for intersectional groups must also be improved for the long term impact of diversity policies to be effective. Intersectionality is a relatively new concept in the political domain, with "little guidance and no synthesis of 'best practices' for scholars wanting to apply intersectionality methodologies" (Hankivsky and Cormier 2011, 225). A quick search of the University of Alberta's demographic information makes this challenge apparent: while there are statistics on proportions of age, faculty representation, and student status, there is no measure indicating the levels of these factors combined. Furthermore, it is very difficult to source public data on intersectional identifiers such as women of colour in universities, leading one to question what information is relied upon to inform policy-making. Aligning with the argumentation of this paper, Hankivsky and Cormier suggest that intersectionality research needs to consider the full impact of a policy on the marginalized groups it affects. They also discuss a "multistrand approach" of policy-making, which accounts for the simultaneous operation of various dimensions of inequality within

intersectional groups. This method focuses on engaging with the narratives of all stakeholders throughout the collection, analysis and synthesis of information, with a specific focus on monitoring policy outcomes and examining the cross-impacts between various identities, such as gender and race (Hankivsky and Cormier 2011, 223). By focussing intersectionality as a policy's guiding principle rather than its named objective, the counter-stories and complex relationships that an intersectional analysis demands can be reflected through policy design. This shift in methodology will enable faculty departments who collect information to measure the robustness of intersectionality in their research processes, resulting in more inclusive policy-making.

A final suggestion to substantively remedy unequal power relations focuses on the agency of those impacted by diversity policies. An example of the impact on intersectional groups is demonstrated through a Canadian study by Begum Verjee, which gathered the perspectives of women of colour engaged in service-community learning; a program that focuses on developing community partnerships to promote institutional equality. Findings of the study revealed that when faculty chairs lead curriculum development, there is often a lack of consultation with marginalized communities, resulting in 'add-on' methods of teaching where the dominant curriculum erases 'othered' worldviews (Verjee 2012, 60). To remedy this issue, it was recommended to teach principles of anti-oppression and regularly invite guest speakers from various intersectional groups into the classroom. By building constructive relationships with marginalized communities rather than cherry-picking from narratives to build a curriculum, the goal is that young professionals will become naturally attuned to the complex nature of discussions about intersectionality, and bring tangible skills of empathy and collaboration into the broader social space. Thus, the objectives of diversity policies can extend beyond ideation and impact the realm of lived experience.

Conclusion

This paper has explored the effectiveness of diversity policies in institutional educational environments. It is found that while diversity policies are often well-intentioned, a number of issues arise in constructing and assessing policies, which can subvert their intended impact. Substantive change is made possible by recognizing bias in the policy writing process, and encouraging community building between intersectional groups to create a space for diverse narratives. In researching this paper, it is interesting to note the limited information available on intersectional identities within universities, which is an area that is challenging to explore and requires improvement. When writing policy, intersectionality should be recognized through the unique and rich identities present within Canada's learning institutions. If this is achieved, diversity policies will not only give marginalized groups a seat at the table; they will also ensure that all voices play a role in shaking the foundations of the institutions that create social norms.

References

Chan, Adrienne. 2005. "Policy Discourses and Changing Practice: Diversity and the University-College." *Journal of Higher Education* 50(1): 129-157.

Childers-McKee, Cherese. 2015. "Critical Race Feminism and the Complex Challenges of Educational Reform." *The Urban Review* 47(3): 393–412.

Crenshaw, Kimberle. 1991. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review* 43(6): 1241-1299.

Government of Canada, Canada Research Chairs. 2018. *Equity, Diversity and Inclusion Action Plan.* Accessed March 18, 2018. http://www.chairs-chaires.gc.ca/program-programme/equity-equite/action_plan-plan_action-eng.aspx

Hankivsky, Olena and Renee Cormier. 2011. "Intersectionality and Public Policy: Some Lessons from Existing Models." *Political Research Quarterly* 64(1): 217–229.

Henry, Frances and Carol Tator. 2009. "Theoretical Perspectives and Manifestations of Racism in the Academy." In *Racism in the Canadian University: Demanding Social Justice, Inclusion, and Equity,* 22-56. University of Toronto Press, Scholarly Publishing Division.

Iverson, Susan VanDeventer. 2007. "Camouflaging Power and Privilege: A Critical Race Analysis of University Diversity Policies." *Educational Administration Quarterly* 43(5): 586-611.

Ross, Paul. 2012. "University Governance and Institutional Culture: A Canadian President's Perspective." In *University Governance and Reform*, edited by Hans G. Schuetze, 63-77. New York: Palgrave MacMillan.

Statistics Canada. 2015. *Aboriginal Statistics at a Glance: 2nd Edition.* Catalogue 89-645-X. Accessed March 18, 2018. http://www.statcan.gc.ca/pub/89-645-x/2015001/education-eng.htm

Universities Canada. 2018. "Member universities." Updated January 21, 2019. https://www.univcan.ca/universities/member-universities/

Verjee, Begum. 2012. "Critical Race Feminism: A Transformative Vision for Service-Learning Engagement." *Journal of Community Engagement and Scholarship* 5(1): 57-69.

Vickers, Jill. 2015. "Can we change how political science thinks? 'Gender mainstreaming' in a resistant discipline: Presidential Address delivered to the Canadian Political Science Association." *Canadian Journal of Political Science* 48(4): 747-770.

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 9

Multinational Corporations and Civil Society: A Case Study Comparison of H&M and Hoang Anh Gia Lai Group in Cambodia

By Solomon Kay-Reid

This paper examines the impact both positive, and negative of two multinational corporations (MNCs), H&M and Hoang Ahn Gia Lai Group both of whom operate extensively in Cambodia. It examines the important role domestic civil society plays in resisting the worst predatory tendencies in MNCs, and how the capacity to resist may be curbed by authoritarian regimes. Furthermore, the essay examines the role of international groups as well as consumer society on holding MNCs accountable for their actions. Particular attention is paid to the impact these multinational corporations have on women and indigenous communities, who are in the Cambodia context two of the most vulnerable groups in society. Moreover, it is suggested that while multinational corporations may ameliorate their practices in some areas, this often requires sustained pressure from a variety of actors, with this being especially true when governments cannot or are unwilling to regulate the behaviour of corporations. Lastly, it is suggested that civil society in the host state is the most important actor for bringing pressure to bear on MNCs, they must be supported by either international actors, or the domestic government to truly reign in the most predatory behaviour of MNCs.

Introduction

Multinational corporations (MNCs) are undeniably powerful actors on the international stage possessing economic, political, environmental, and sociocultural influence that is unavoidable in today's globalized world. Their power has drawn a considerable amount of attention and debate from both critics and supporters, especially regarding their actions in the Global South[1]. Critics, such as Monshipouri, argue that the structure of the neoliberal global economy permits MNCs to exploit workers in the Global South as cheap labour, capitalizing on lower standards on labour rights and environmental regulations (Monshipouri, Welch, & Kennedy, 2003). As a result, MNCs low labour and environmental standards create concerns that MNCs exert pressure on states in the Global South to suppress wages, curtail labour

[1] "Global South" is a deeply contested term within the literature, lacking any universally accepted definition. Nevertheless, for this paper I define it as follows: The Global South indicates generally the regions of Latin America, Asia, Africa, and Oceania; it is more than a mere metaphor for undervelopment, rather, it alludes to a shared history of colonialism, neo-imperialism, and continued economic and social exploitation rooted in the global economic system.

rights, and relax environmental regulations with the goal of attracting the jobs and investment that these corporations provide (Monshipouri, Welch, & Kennedy, 2003). Advocates, conversely, view MNCs as a relatively benign vehicle for promoting development and enhancing domestic living conditions by generating employment, income and wealth, as well as introducing and distributing advanced technologies throughout the Global South (Monshipouri, Welch, & Kennedy, 2003). Despite the clear value in this debate, it runs the risk of obfuscating important nuances in the individual encounters that occur between MNCs, states, and civil society.

In this paper, I will argue that the role of civil society in both the state that is hosting the MNC's operations and in the region that the MNC is based is critical in constraining the aforementioned predatory behaviour of these corporations (Thuon, 2017). Moreover, when civil society is incapable of adequately regulating this behaviour, global governance, in the form of international organizations and NGOs, can play a key role by assisting civil society within the host state in holding the MNC accountable through the lobbying of investors. This will be achieved through a case study examination of the economic, environmental, and social impact of two MNCs operating in Cambodia, the Vietnamese Hoang Anh Gia Lai Group (HAGL) and the Swedish H&M.

H&Ms Impact on Cambodia

Economic Consequences: Low Wages and Lack of Ownership

The garment sector is vital to Cambodia's economy and future economic growth, accounting for an estimated 13% of Cambodia's GDP and 80% of exports, employing approximately 700,000 Cambodians. Furthermore, Cambodia has been the sixth fastest expanding economy in the world over the past two decades, with an average GDP growth rate of 7.6%, which is driven largely by growth in the garment sector (International Labour Organization [ILO], 2017). H&M plays an important part in this for two reasons. First, as the second largest global corporation, with around 4,500 stores in 62 countries and annual revenues of $26.8 billion USD in 2016, H&M has significant influence over both its own supply chain, and through isomorphic pressures over trends and practices throughout the garment industry (H&M, 2018).[2] Second, in terms of the garment industry, H&M has a particularly large presence in Cambodia, enabling them to exert pressure on the state (H&M, 2018).

H&M itself does not own any of the factories it operates globally; instead, they prefer to license out production to third-party corporations that are often based in East Asia. In Cambodia, H&M sources from 69 factories, 43 of which are engaged in manufacturing while 26 are engaged in processing (H&M, 2018). As previously stated, these factories are rarely owned by Cambodians, but rather, by investors from larger, more developed East Asian economies such as China, South Korea, and Taiwan (Asia Floor Wage Alliance [AFWA], 2016). This system has been criticized because foreign owners have very little

[2] Isomorphic pressures are an explanation of why and how organizations in similar industries begin to look and act alike. Institutional theory claims that isomorphism occurs predominantly through coercive, mimetic, and normative pressures (Dimaggio and Powell, 1983). Coercive pressures are those exercised by powerful organisations within industry networks as well as cultural or societal pressures. Mimetic pressures occur when an organisation, due to unpredictably, mimics the actions of successful rivals in the industry. Normative pressure relates to professionalization, principally the expansion of formal education and professional networks (Dimaggio and Powell, 1983).

incentive to pour money into the Cambodian garment sector, consequently limiting the creation of a more advanced domestic supply chain (Natsuda, Goto, & Thoburn, 2010).

In terms of labour force, these sixty-nine factories employ between 107,968 and 142,399 workers directly involved in the production of H&M garments, with 90-95% of whom are women between the ages of 18 and 35 (H&M 2018; Human Rights Watch [HRW], 2015). These factories provide an important source of employment for women, especially those from rural areas who often migrate to garment producing hubs such as in Phnom Penh (AFWA, 2016). However, despite their prevalence within the industry, women are often are stuck in low skill positions with little chance at advancement (AFWA, 2016). Moreover, despite claims H&M made in 2013 that by 2018 they would ensure workers are paid a living wage of $216 USD per month, they are still predominantly sourcing from factories that pay just above, or at, the $140 USD minimum wage as of 2016 (AFWA, 2016). Consequently, numerous workers have been forced to seek overtime to support their families (Board, 2016). This has generated intense criticism from a combination of actors, including Cambodian labour unions and activists, concerned consumers in the Global North, and international organizations and NGOs, who have called on H&M to honour its promise to provide a living wage (Board, 2016). However, it has been acknowledged by some NGOs that H&M is making a visible effort to implement changes which focus on reduced overtime, higher wages, and increased worker satisfaction (Board, 2016). Nonetheless, H&M still has significant issues that must be addressed regarding the treatment of workers involved in garment production.

Social impact: Gendered Discrimination

Despite providing a much-needed source of employment for women, there are several structural factors that directly have a negative impact on women. Predominant amongst these is that most contracts in H&M factories are short-term, ranging between 1 to 4 months (HRW, 2015). Numerous studies have demonstrated that employment insecurity, resulting from short term contracts, causes greater perceptions of workplace fatigue and greater psychological stress; increasing the propensity for drug abuse, and suicide (Moscone, Tosetti, & Vittadini, 2016). Furthermore, although the Cambodian labour code regulates working conditions including minimum age, pregnancy entitlements, leave and occupational health and safety standards, these are rarely enforced due, in part, to "inefficient labour inspections, corruption and the rapid expansion of the number of factories in Cambodia" (AFWA, 2016). This confluence of factors has had severe consequences on women, including reports of bathroom breaks being monitored or outright denied by male supervisors, even in cases of illness (HRW, 2015). The same occurs for food and water breaks, even when employees are working 12+ hour shifts (HRW, 2015). Lack of food and water breaks, as well as extreme food budgeting caused by low wages, has been correlated with numerous health concerns, as 32.6% of female garment workers are underweight, 26.9% suffer from anemia, and 22.1% are iron-deficient (Makurat, et al., 2016). These health concerns have serious long-term social implications as most of these women are in their reproductive years and malnutrition during pregnancy is strongly correlated with increased morbidity, post-partum cognitive impairment, prematurity, and intrauterine growth retardation (Abu-Ouf & Jan, 2015). Further issues surrounding pregnancy are rife with employers generally refusing to hire pregnant women (HRW, 2015). Additionally, women who become pregnant "are routinely denied sick leave to visit doctors, terminated from their contracts early, or left without any maternity leave when their short-contracts are not

renewed" (AFWA, 2016) This creates extreme pressure on pregnant women, often leading to them seeking out risky 'back alley' abortions (AFWA, 2016). Beyond just health associated risks and discriminatory working conditions, women also report being subject to an unsafe work environment.

Female workers are often exposed to sexual harassment and assault by their male coworkers and supervisors, with 20% of women reporting experiences of violence in the workplace (ILO, 2012). Creating an atmosphere of fear in which women report feeling intimidated but are unwilling to speak out as they fear retaliation in the form of termination, and industry blacklisting. (ILO, 2012). Although these issues are widespread throughout the industry and H&M is not solely responsible for labour conditions in the factories they source from, they have the financial resources and power within the industry to be a leader in improving labour standards and the treatment of women throughout both their suppliers and the garment sector more generally.

Environmental Impact: A Partial Success Story

H&M, as previously mentioned, has been at the forefront of environmental reform. They were the first major garment producer to ban perfluorocarbons (PFCs) across all products, one of the first to ban the sandblasting of denim, and is the world's largest consumer of organic cotton (Shen, 2014). Additionally, H&M was at the forefront in partnering with Greenpeace with the goal of achieving zero discharge on hazardous chemicals across the supply chain (Shen, 2014). H&M has also been working with the World-Wide Fund for Nature (WWF) in creating a strategy to improve their management of water resources throughout the textile production cycle (Shen, 2014). Further, H&M aims at sending zero waste from the organization to landfill through the extensive use of recycled materials such as cotton, plastic, wool, polyamides and polyester (Shen, 2014). Supporting their recycling initiative is an extensive garment recollection program that turns garments that are no longer suitable for wear into a variety of products including cleaning cloths, textile fibres, or components used to manufacture industrial products such as insulating material for the auto industry (Shen, 2014). H&M's focus on sustainability has helped to reduce its environmental impact on Cambodia, but there are still areas of concern, especially related to the high levels of air pollution caused in part by the intensive operations of the garment industry (San, Spoann, & Schmidt, 2018). Furthermore, despite 4 million people in Cambodia lacking access to safe water, H&M's factories continue to consume vast quantities of water to meet the intensive demands of production (San, Spoann, & Schmidt, 2018). Notwithstanding these persistent issues, H&M's relatively progressive environmental practices are laudable and can be attributed to a confluence of factors: market pressure from environmentally conscious consumers in the Global North, advocacy by civil society in Global South countries that H&M sources from, and the presence of international institutions such as the ILO and Greenpeace supporting H&M's improvements in environmental sustainability (Mak, 2016; Pimentel, Aymar, & Lawson, 2018). This clearly stands in stark contrast to the area of wage concerns and women's issues, which have unfortunately failed to garner the same level of prominence among consumers, in conjunction with the unwillingness, or inability, of international institutions to bring pressure on H&M (Pfeffer, 2013). Thus, Cambodian civil society, which is often heavily suppressed by the government, lacks meaningful international support in their lobbying of H&M to improve conditions at the factories they source from. These issues in Cambodia are not unique to H&M but can also be observed in the interaction between HAGL, Cambodian civil society, the State and Global Governance organizations.

HAGL's Impact on Cambodia

Economic Concerns: Issues of Transparency

It is difficult to accurately determine HAGL's economic impact in Cambodia, as much of their financial documentation and reporting is opaque and remains unverified by reputable third-party sources. Therefore, the data that HAGL does provide should be viewed with a degree of skepticism. Further complicating matters is that HAGL operates numerous subsidiaries and shell companies allowing it to circumvent Cambodian laws surrounding limitations on the amount of land any one company can lease (Reuters, 2013). According to HAGL "once their projects enter stable operations, they will employ approximately 8,000 workers with an average monthly salary of $250 USD each" (Vietnam Chamber of Commerce and Industry [VCCI], 2014). Additionally, evidence suggests that HAGL's total foreign investment in Cambodia is estimated to be in excess of $100 million USD (Minh, 2013). Two iron mines comprise of $40 million USD of this investment, while the rest is primarily in the rubber industry, with smaller investments in other agricultural products such as palm oil and bananas (Minh, 2013).

HAGL reports that in the areas where they operate these projects, primarily in Ratanakiri province, they have provided two infrastructure development packages, "the community support package" (CSP) and the "community investment infrastructure program" (CIIP) (VCCI, 2014). These projects both ran from 2013-2016 with $10 million USD provided under the CSP for the construction of roads, houses, wells, schools and clinics, and $3 million USD provided under the CIIP to "execute items agreed with the communities... mainly essential public works like roads, bridges, community houses, schools, water wells, toilets" (VCCI, 2014). HAGL′s final major investment in Cambodia was their $4 million USD sponsorship of the Cambodian Football Federation to build the National Football Academy in Bati, Takeo Province (VCCI, 2014). Although these numbers appear impressive, they are difficult to verify as previously noted. Furthermore, reports by the Cambodian government are equally dubious, owing to considerable evidence of corruption and reported high-level connections between HAGL and the Hun-Sen administration (Work, 2016). Additionally, concerns have been raised that illegal land and resource grabs have negatively impacted the economies of local farmers and Indigenous communities, as their ability to engage in traditional activities such as hunting, fishing, resin tapping, and sustainable agriculture has been impeded (Thuon, 2017). Although this has led to activism against HAGL and their international investors by Indigenous communities and global NGOs, progress towards a meaningful remedy has been slow (Work, 2017). This can be attributed to both the inability of Vietnamese civil society to bring pressure on HAGL and the persistent view by Cambodian policy makers "...that Indigenous peoples "waste" precious land that could be used to further the country's economic development" (Thuon, 2017). Beyond just economic concerns, HAGL's actions have had a disastrous impact on the traditional social and spiritual practices of Indigenous communities.

Social Impact: Indigenous Way of Life in Jeopardy

HAGL's operations have seen important spiritual sites of the Ratanakiri's Indigenous peoples polluted or destroyed, including spirit forests, burial grounds, and sacred streams, ponds, and fields

(Bugalski & Thuon, 2015). Spirit forests are central to the identity of Indigenous communities and play an integral role in traditional ceremonies (Thuon, 2017). Indigenous peoples make offerings to the spirits in these forests, and they believe that their inability to protect the forest will be punished through disease and natural disaster (Bugalski & Thuon, 2015). Moreover, HAGL has callously attempted to address these grievances through the promise of jobs on rubber plantations and gifts of rice, money, and other goods. This has caused great anger and concern among indigenous peoples who consider the gifts as insufficient given the extent of the devastation caused; they also view the new livelihood on the rubber plantations promised by the government and HAGL as "discordant with their traditional livelihood practices" (Bugalski & Thuon, 2015). These acts by HAGL, which impede the ability of Indigenous peoples to practice and enjoy traditional cultural acts and customs, amount to a violation of Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples to which both Cambodia and Vietnam are signatories (Bugalski & Thuon, 2015). Considerable pressure was brought upon HAGL and their international investor, the International Finance Corporation, a member of the World Bank Group, to remedy this situation by a combination of international NGOs such as Inclusive Development International and Global Witness on behalf of local indigenous groups (Work, 2016). In 2017, five years after initial reports showed the destruction of HAGL's actions, a settlement was brokered between local communities and HAGL by the IFC's Compliance Advisor Ombudsman (CAO) "to return nearly 20 community spirit mountains, restore streams filled or polluted by its activities and repair roads and bridges" (Seangly & Bourmount, 2017). Indigenous communities, although pleased by the resolution, maintained concerns over the possibility of similar future abuses, and the extent of environmental degradation (Work, 2016).

Environmental Degradation

As noted, HAGLs actions have caused widespread environmental devastation throughout Ratanakiri province. Intensive logging and the cultivation of plantations has caused the destruction of both dense old-growth forests and secondary evergreen and tropical forests (Bugalski & Thuon, 2015). Owing to the continued disappearance of the forests, numerous species, including the yellow-cheeked gibbon, the giant ibis, the gaur, and the Asian elephant, are increasingly endangered (Bugalski & Thuon, 2015). Additionally, although rubber trees function as a carbon sink, they are less effective in this role than the original forests they replaced. Furthermore, widespread water pollution has damaged fish habitats and poisoned drinking sources. In conjunction with significant air and soil pollution, this has caused a retrogression in health outcomes (Bugalski & Thuon, 2015). To counteract these health concerns, HAGL instituted a medical program under their CSP initiative providing much needed services to communities, with notable improvements for those who have received treatment for visual impediments and eye disease (Bugalski & Thuon, 2015). Additional issues exist in the significant water consumption required by mining and rubber plantations, further stressing water supplies in rural regions (Ziegler, Fox, & Xu, 2009). Although HAGL has been pressured by Cambodian civil society and NGOs to ameliorate its environmental practices, there has been only modest improvement beyond the area of Indigenous land dispute (Work, 2016). This can be potentially attributed to a lack of pressure from both the Cambodian state and international investors upon HAGL in the area of environmental sustainability (Thuon, 2017).

Conclusion

MNCs can function as an important engine for economic growth, providing jobs, investment, and infrastructure development. However, their operations often come with heavy consequences in terms of labour issues, sociocultural problems, and environmental degradation. Although the most desirable solution is for MNCs to move away from the prevailing culture of placing profit above all else, it is difficult to imagine this occurring soon. Thus, in situations where the state is unable or unwilling to regulate the most predatory actions of MNCs, thereby failing to ensure the rights and wellbeing of its citizens, other groups must apply pressure to such corporations (Work, 2016). Civil society within the host state is the most pivotal actor for change; even in the case of a repressive regime like Cambodia, it has played a principal role in publicizing the issues caused by both H&M and HAGL. However, there are limits to what civil society can achieve, especially in authoritarian states (Thuon, 2017). Therefore, civil society's effectiveness in lobbying for better conditions is bolstered by the assistance of international organizations and NGOs, and the ability of consumer/civil society in the region of the MNC's origin to place pressure on the MNC (Thuon, 2017). When one or more of these groups is incapable or unwilling to bring sustained pressure upon the MNC to improve their operations, especially if that MNC has support from the host state, it becomes difficult to achieve better conditions (Thuon, 2017). Tragically, it is often the most vulnerable in society who experience the greatest abuse and suffering at the hands of MNCs, as is evident in the impact that H&M and HAGL have had on women and indigenous communities, respectively.

References

Abu-Ouf, N., & Jan, M. (2015). The impact of maternal iron deficiency and iron deficiency anemia on child's health. *Saudi Medical Journal, 36*(2), 146-149. doi:10.15537/smj.2015.2.10289

Asia Floor Wage Alliance. (2016). Precarious Work in the H&M Global Value Chain. Retrieved from https://asia.floorwage.org/workersvoices/reports/precarious-work-in-the-h-m-global-value-chain

Board, J. (2016, May 23). Paid meagre wages, Cambodian workers at H&M supply factory plead for longer work hours. *Channel NewsAsia*. Retrieved from https://www.channelnewsasia.com/news/asia/paid-meagre-wages-cambodian-workers-at-h-amp-m-supply-factory-pl-8033768

Bugalski, N,. Thuon, R. (2015, June 5-6) *A HUMAN RIGHTS IMPACT ASSESSMENT: Hoang Anh Gia Lai Economic Land Concessions in Ratanakiri Province, Cambodia.* Paper presented at Land grabbing, conflict and agrarian-environmental transformations: perspectives from East and Southeast, Chiang Mai University.

DiMaggio, P., & Powell, W. (1983). The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. American Sociological Review, 48(2), 147-160. Retrieved from http://www.jstor.org/stable/2095101

H&M. (2018). Supplier list. Retrieved April 7, 2018, from http://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html

H&M. (2018). About the H&M Group. Retrieved April 9, 2018, from https://about.hm.com/en/about-us.html

Human Rights Watch. (2015, March 11). "Work Faster or Get Out" | Labor Rights Abuses in Cambodia's Garment Industry. Retrieved from https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry

International Labour Organization. (2012). Action-oriented research on gender equality and the working and living conditions of garment factory workers in Cambodia. Retrieved from http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_204166.pdf

International Labour Organization. (2017). *Cambodian Garment and Footwear Sector Bulletin* (Rep. No. 5). Retrieved http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_541288.pdf

Koenig-Archibugi, M. (2004). Transnational Corporations and Public Accountability. *Government and Opposition, 39*(2), 234-259. doi:10.1111/j.1477-7053.2004. 00122.x

Mak, P. (2016, January 14). Millennial Shopping Habits Are Changing Fashion - Here's How. *Huffington Post Canada*. Retrieved from https://www.huffingtonpost.ca/2016/01/14/millennial-shopping-habits_n_8980380.html

Makurat, J., Friedrich, H., Kuong, K., Wieringa, F., Chamnan, C., & Krawinkel, M. (2016). Nutritional and Micronutrient Status of Female Workers in a Garment Factory in Cambodia. *Nutrients, 8*(11), 694. doi:10.3390/nu8110694

Minh, D. N. (2013, January 14). Hoang Anh Gia Lai has invested billions of dollars in four countries in the region. Retrieved from http://nhipcaudautu.vn/doanh-nghiep/hoang-anh-gia-lai-da-dau-tu-hang-ty-usd-vao-4-quoc-gia-trong-khu-vuc-3164516/

Monshipouri, M., Welch, C. E., & Kennedy, E. T. (2003). Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities. *Human Rights Quarterly, 25*(4), 965-989. doi:10.1353/hrq.2003.0048

Moscone, F., Tosetti, E., & Vittadini, G. (2016). The impact of precarious employment on mental health: The case of Italy. Social Science & Medicine, 158, 86-95. doi:10.1016/j.socscimed.2016.03.008

Natsuda, K., Goto, K., & Thoburn, J. (2010). Challenges to the Cambodian Garment Industry in the Global Garment Value Chain. *The European Journal of Development Research, 22*(4), 469-493. doi:10.1057/ejdr.2010.21

Pfeffer, J. (2013, June 7). Jeffrey Pfeffer: Companies Emphasize the Environment Over Employees. Retrieved from https://www.gsb.stanford.edu/insights/jeffrey-pfeffer-companies-emphasize-environment-over-employees

Pimentel, D. A., Aymar, I. M., & Lawson, M. (2018). Reward Work, Not Wealth: To end the inequality crisis, we must build an economy for ordinary working people, not the rich and powerful. *Oxfam*. doi:10.21201/2017.1350

Reuters. (2013, May 13). Vietnam rubber firms illegally take land in Cambodia, Laos, group says. *Reuters*. Retrieved from https://www.reuters.com/article/vietnam-rubber-land/vietnam-rubber-firms-illegally-take-land-in-cambodia-laos-group-says-idUSL3N0DQ2T520130513

San, V., Spoann, V., & Schmidt, J. (2018). Industrial pollution load assessment in Phnom Penh, Cambodia using an industrial pollution projection system. *Science of The Total Environment, 615*, 990-999. doi:10.1016/j.scitotenv.2017.10.006

Seangly, P., & Bourmount, M. D. (2017, July 27). Vietnam rubber firm reaches accord with Ratanakkiri ethnic villages. *The Phnom Pehn Post*. Retrieved from https://www.phnompenhpost.com/national/vietnam-rubber-firm-reaches-accord-ratanakkiri-ethnic-villages

Shen, B. (2014). Sustainable Fashion Supply Chain: Lessons from H&M. *Sustainability, 6*(9), 6236-6249. doi:10.3390/su6096236

Thuon, R. (2017). Holding corporations from middle countries accountable for human rights violations: A case study of the Vietnamese company investment in Cambodia. *Globalizations, 15*(1), 152-167. doi:10.1080/14747731.2017.1370897

Vietnam Chamber of Commerce and Industry. (2014, May 8). HAGL: Investing in Community Development, Enhancing Social Life. Retrieved from http://vccinews.com/news_detail.asp?news_id=30409

Work, C. (2016). *Innovative approach to land conflict transformation. Lessons learned from the HAGL/indigenous communities' mediation process in Ratanakiri, Cambodia*. MRLG Capitalization Note Series #1. Vientiane & Phnom Penh: Mekong Region Land Governance, Equitable Cambodia and Inclusive Development International.

Ziegler, A. D., Fox, J. M., & Xu, J. (2009). The Rubber Juggernaut. *Science, 324*(5930), 1024-1025. doi:10.1126/science.1173833

POLITICAL SCIENCE UNDERGRADUATE REVIEW

VOL. 4 Winter 2019 ARTICLE 10

"Towards a Beautiful Country": The Nationalist Project to Transform Japan

By Matthew D. Boyd

Japan is often regarded by scholarship as an example of what a healthy East Asian liberal democracy ought to look like. Despite its reputation for pacifism and liberal democracy, Japan has demonstrated a remarkable shift in political culture in the last decade, as successive governments have embraced decidedly nationalist policy choices. As the Abe Administration continues to push ahead with its plan for Constitutional Revision, a goal long advocated for by nationalist groups, Japan seems poised to enter a period of renewed nationalist discourses and policymaking. Existing scholarship presents these shifting political trends as having been facilitated by the political elite, and many scholars argue that elite-driven, or top-down nationalism, is the driving force of political change in the modern Japanese political system. This paper challenges these assertions, instead arguing that resurgent nationalism in Japanese politics can be traced to the grassroots of society, within groups and organizations funded and run by private citizens with political interests. Through a study of two non-government organizations, Nippon Kaigi 日本会議 and Jinja Honchō 神社本庁, this paper clearly demonstrates the critical impact that grassroots organizing through non-government organizations has had on driving nationalist policymaking at the national level. The political success of these lobbying groups has been clearly evidenced in their presence at the highest level of Japanese government, as well as the remarkable similarities between their organizational goals and the political goals of the ruling Liberal Democratic Party. This paper demonstrates that the relationship between grassroots nationalist organizations and the Japanese government is one of influence and pressure, rather than a coincidental alignment of political ideals.

Introduction

Japan has entered an era of deep political change. The days of deep government factionalism and a laser-focus on economic development have since given way to shifts in mainstream Japanese political discourse. With the turn of the 21st century, Japan has faced new challenges and new political realities, as ideology is no longer taking a backseat to extreme economic growth. A nationalist revival is taking place in Japan, from the grassroots all the way up to the national Cabinet. This political shift

towards nationalism carries important implications for both policy and public discourse. An important marker of these shifts has been the increasing embrace of nationalist discourse by politicians within the Liberal Democratic Party (LDP) and in the opposition parties. This embrace of nationalist tendencies has taken many forms, from repeated visits to the controversial Yasukuni Shrine by elected officials to an increasingly aggressive push toward constitutional revision, a goal long advocated for by those on the right of Japan's political spectrum. Contemporary literature on Japanese politics is in relative agreement that this nationalist shift is taking place, and scholars such as Giulio Pugliese and Margarita Estévez-Abe have argued that this phenomenon is *elite driven*.[46] This top-down approach to examining Japan's nationalist discourses is rooted in the idea that elected officials are the primary force for advocating meaningful political change. It is easy to come to such a conclusion, as Prime Minister Shinzō Abe and his Cabinet have increasingly led the call for more nationalist policy choices, such as key changes to the Constitution. However, this assertion leaves out key factors in understanding the changing Japanese political landscape. By arguing that the nationalist revival is being driven by Japan's elites, these scholars ignore the critical role that non-government organizations and private institutions have played in advocating change at both the national and grassroots level. This paper will challenge existing assertions of elite-driven nationalism and demonstrate the rising influence of non-government nationalist organizations on public policy outcomes. Through two in-depth case studies of Japan's most influential nationalist organizations, Nippon Kaigi 日本会議 (Japan Conference) and Jinja Honchō 神社本庁 (The Association of Shintō Shrines), this project will clearly demonstrate the existence of a complex and influential network of nationalist activists that continue to exert significant influence on public officials and policymaking outcomes.[47] By examining the origins, organization, and goals of these two institutions, as well as their extensive connections to elected officials, this paper will highlight the extensive role in which private organizations have played in driving nationalist policy outcomes in Japan since the turn of the century. This paper argues that such organizations have created an expansive network of influence extending from the grassroots deep into the highest echelons of the political office, resulting in significant shifts in political discourse and the formation of nationalist policy outcomes.

Defining Nationalism

Any discussion of ideological trends in society or in government is at risk of abstraction, especially when dealing with a topic as politically controversial as nationalism. It is therefore critical that we construct a clear working definition for what this paper refers to as '*nationalist policies*' or '*nationalist discourses*.' Such terms as '*nation*' and '*nationalism*' are all too commonly misused or loosely applied by both academics and news media alike, which propagates contradiction and misunderstanding.[48] To understand what is meant by the term nationalism, a clear definition of *nation* must first be ascertained.

---

[46]. Giulio Pugliese, "The China Challenge, Abe Shinzo's Realism, and the Limits of Japanese Nationalism," *SAIS Review of International Affairs* 35, no. 2 (2015): 47. Pugliese argues that Abe has purposely fanned nationalist furor, coining the term "top-down nationalism"; Margarita Estévez-Abe, "Feeling Triumphalist in Tokyo: The Real Reasons Nationalism Is Back in Japan," *Foreign Affairs* 93, no. 3 (2014): 165. http://www.jstor.org/stable/24483416. Estévez-Abe argues that increased nationalist discourse has been promoted by Abe as a conscious policy choice.

[2]. All translations are by author unless otherwise noted.

[48]. Lowell W. Barrington, "'Nation" and "Nationalism": The Misuse of Key Concepts in Political Science," *PS: Political Science & Politics* 30, no. 4 (1997): 712.

Lowell Barrington, in his extensive attempt at defining such terms, defines the nation as a collective that is "united by shared cultural features (myths, values, etc.) and the belief in the right to territorial self-determination."[49] In the context of Japanese studies, this definition is easily applied as Japan has historically existed as a relatively homogenous society with well-defined territorial borders. In addition, Japanese history is rife with references to a common creation myth, which has served as a collectively unifying principle under the Imperial Household. With this definition in mind, nationalism can therefore be characterized as, in Barrington's terms, "the pursuit of a set of rights for the self-defined members of the nation, including, at a minimum, territorial autonomy or sovereignty."[50] This definition implies that nationalism must define both territorial boundaries that the nation has a right to control, as well as the membership boundaries of the individuals that are thought to have a right to belong to the collective.[51] In contrast to this definition, many popular definitions, such as those used in mass media, refer to nationalism as "right-wing political thought and action aligned with militarism," and as Matthew Penney explains, "a whole complex of beliefs, assumptions, habits, representations, and practices that reinforce the concept of the nation."[52] With these definitions in mind, it therefore becomes possible to define nationalist policies and nationalist discourses as those policy decisions and accompanying discourses aimed at strengthening a sense of collective national unity through the strengthening and protection of territorial borders and the boundaries that define that collective nation. In terms of Japan, this refers to a set of policies and beliefs that view the Japanese people as a quantifiable collective, unified through shared historical experiences, values, and collective identity.

Shifting Political Discourses

Since the turn of the 21st century, there has been a notable shift in policy priorities and discourse at the highest levels of the Japanese government. Beginning with the election of Prime Minister Mori Yoshirō in 2000, who famously declared that Japan was "a divine nation centring around the Emperor,"[53] along with his successor, Koizumi Jun'ichirō, who visited the controversial Yasukuni Shrine to pay homage to Japan's war dead an unprecedented six times, Japan's elected officials have grown increasingly bold in their embrace of nationalist discourses.[54] Under Prime Minister Abe Shinzō, these embraces of nationalist discourse have accelerated and taken the form of actual policy outcomes. Such policy outcomes include an expanded role for the Self-Defence Forces, continued revisions of history textbooks, the mandatory singing of the national anthem in schools, and the legalization of the Imperial Calendar. Abe's party, the LDP, has also released a draft constitution containing numerous proposed amendments favouring removal of pacifist clauses such as Article 9, which forbids Japan from maintaining the capacity to wage war.[55] Such developments have not gone unnoticed by scholars, the vast majority of whom have declared the trend toward nationalism as being driven by elites such as Abe and

---

[49]. Barrington, 712-713.

[50]. Barrington, 714.

[51]. Barrington, 714.

[52]. Matthew Penney and Bryce Wakefield, "Right angles: Examining accounts of Japanese neo-nationalism," *Pacific Affairs* 81, no. 4 (2008): 538.

[53]. BBC News, "Japanese PM sparks holy row," 16 May 2000, http://news.bbc.co.uk/2/hi/asia-pacific/750180.stm.

[54]. BBC News, "Koizumi shrine visit stokes anger," 15 August 2006, http://news.bbc.co.uk/2/hi/asia-pacific/4789905.stm.

[55]. Brad Glosserman, "The Abe Administration and Japanese National Identity: An Update," *Joint U.S. Korea Academic Studies,* (2016): 117.

his Cabinet. Fabian Schäfer refers to Abe's "hidden nationalist agenda" and writes that the government is purposefully utilizing populist right-wing strategies to advance a nationalist agenda.[56] Similarly, Mike Mochizuki argues that Abe's recent electoral success is not due to his ideological positions, but is instead the result of the collapse of opposition parties.[57] He continues to explain that this situation has simply presented Abe with the opportunity to "pursue his nationalist agenda" without an opposition to stand in the way.[58] Taking this argument even further, Jeff Kingston writes that all of the recent nationalist trends in contemporary Japan are a trend that is elite-driven and vigorously promoted by the nation's political leadership".[59] All of these scholars are correct in their assertions that nationalist policies and discourses are being *promoted* at the highest levels of Japanese government. There is little doubt that Abe and his Cabinet have voiced support for such policies, even if many policy goals yet to be attained. What these scholars ignore, however, is the underlying explanation for such a dramatic shift in Japanese political discourse. The argument that Abe and his government are the primary drivers of nationalist change does not adequately account for the dramatic uptake of nationalist discourse into the mainstream of Japanese politics, a reality that would likely have been dismissed by scholars before the year 2000. As scholars of liberal democracies know, democratic governments are designed to be representatives of certain interests. Democratically elected politicians are not only held accountable to voters but are almost always held accountable to interest groups or lobbies that support them financially and/or politically. This is undoubtedly the case in Japan, where the influence of interest groups and lobbies has continued to flourish since the electoral reforms of the 1990s.[60] Through an examination of such interest groups, which are by definition non-government organizations, it becomes clear that the recent trends towards nationalism in the Japanese government are the direct result of specific interests and influence campaigns with the intent of explicitly influencing policymaking at the government level.

Nippon Kaigi

The first of this paper's case studies examines the rise of Nippon Kaigi 日本会議 (Japan Conference) and its increasing activity at the highest levels of Japanese government. Nippon Kaigi is often described as Japan's most successful and most established right-wing advocacy group and lobbying organization.[61] The group was largely unknown outside of Japan until 2014, when the New York Times introduced it as "a nationalistic right-wing group that was all but unknown until recently," following a renewed media scrutiny on Nippon Kaigi's influence on politics after the 2014 Diet elections.[62] Nippon Kaigi was actually founded in 1997, as a merger of two existing right-wing nationalist organizations, the

---

[56]. Fabian Schäfer, Stefan Evert, and Philipp Heinrich, "Japan's 2014 General Election: Political Bots, Right-Wing Internet Activism, and Prime Minister Shinzō Abe's Hidden Nationalist Agenda," *Big data* 5, no. 4 (2017): 294.

[57]. Mike M. Mochizuki, and Samuel Parkinson Porter, "Japan under Abe: toward moderation or nationalism?," *The Washington Quarterly* 36, no. 4 (2013): 27.

[58]. Mochizuki, 26.

[59]. Jeff Kingston, "One-Hand Clapping: Japanese Nationalism in the Abe Era," *In Japan and Asia's Contested Order*, Palgrave Macmillan, Singapore, 2018: 147.

[60]. Yutaka Tsujinaka and Robert Pekkanen, "Civil Society and Interest Groups in Contemporary Japan," *Pacific Affairs* 80, no. 3 (2007): 429. http://www.jstor.org/stable/40023391.

[61]. James Babb, "The New Generation of Conservative Politicians in Japan," *Japanese Journal of Political Science* 14, no. 3 (2013): 361.

[62]. Daiki Shibuichi, "The Japan Conference (Nippon Kaigi): an Elusive Conglomerate," *East Asia* 34, no. 3 (2017): 179.

National Conference to Protect Japan and the Society for the Protection of Japan.[63] Nippon Kaigi's origin in these other two groups is notable, as the use of the term "protection", or *mamoru* in Japanese, is clearly in line with this paper's definition of nationalism. The prevalence of the term *mamoru* implies a sense that there are territorial or societal boundaries that must somehow be protected from some perceived harm. Utilization of such a term in this context can therefore be interpreted as explicitly nationalist in the framework of this paper's definition. Since 1997, Nippon Kaigi has quickly established itself as an umbrella organization of right-wing groups, intellectuals, business leaders, and politicians, as well as a grassroots membership of 38,000 fee-paying members across all 47 Japanese prefectures.[64] Nippon Kaigi has a clear set of organizational objectives which guide its activities, including such goals as: "A new constitution suitable for a new era," "Politics that protect the country's reputation and the people's lives," "Creating education that fosters Japanese sensibility," and "Contributing to world peace by enhancing national security."[65] A list of goals such as these serves as a set of guiding ideological principles for the organization. In order to measure the actual influence of Nippon Kaigi, however, it is necessary to examine the way in which these abstract organizational goals translate to real policy outcomes.

Nippon Kaigi maintains a parliamentary division, the Parliamentary League for Nippon Kaigi 日本会議国会議員懇談会 (Nippon kaigi kokkai giin kondankai), which serves as its direct connection to lawmakers.[66] Within the National Diet, Japan's parliament, 280 sitting lawmakers are listed as members of Nippon Kaigi's parliamentary league, including Prime Minister Abe himself, who serves as "special advisor" to Nippon Kaigi.[67] In addition to its influence in the Diet, Nippon Kaigi also claims 1,692 members elected to local councils across the country.[68] It is important to note that Nippon Kaigi did not obtain this substantial presence in politics by recruiting elected officials. Instead, as Thierry Guthmann notes in his overview of Nippon Kaigi, many of these politicians have maintained close personal ties with the nationalist lobby since the earliest days of their careers.[69] This implies that Nippon Kaigi members and sympathizers have actively sought out elected office, which challenges existing assertions made by some scholars that elected officials have gravitated toward the nationalist lobby for political purposes.[70] Nippon Kaigi, throughout its history, has demonstrated a multi-pronged approach at driving policy change at both the national and local level. This includes signature drives and a sustained grassroots effort at mobilizing both people and resources to enact political change and influence politicians.[71] These efforts have often been successful, and Nippon Kaigi is largely responsible

---

[63]. Sachie Mizohata, "Nippon Kaigi: Empire, contradiction, and Japan's future," *The Asia-Pacific Journal* 14, no. 2 (2016): 2.

[64]. Babb, 361; David McNeill, "Nippon Kaigi and the radical conservative project to take back Japan," *The Asia-Pacific Journal* 13, no. 48 (2015): 4.

[65]. Nippon Kaigi, "Nippon Kaigi ga meza sumono" 日本会議が目指すもの [The Aims of Nippon Kaigi], 7 December 2018. http://www.nipponkaigi.org/about/mokuteki.

[66]. Mizohata, 3.

[67]. Mizohata, 3.

[68]. Mizohata, 3.

[69]. Thierry Guthmann and Aike P. Rots, "Nationalist Circles in Japan Today: The Impossibility of Secularization," *Japan Review* (2017): 214.

[70]. Pugliese, 47. Pugliese asserts that Abe and his government have sought to use nationalism as a way to drum up support and create a politically favorable environment for those politicians on board with the national cause.

[71]. McNeil, 4.

for the Tokyo Metropolitan Government's passing of measures mandating punishment for teachers who refuse to stand, face the flag and sing the anthem during school ceremonies.[72] Nippon Kaigi's ability to mobilize at the grassroots level serves as the core of influence campaign, and members often hold "lectures and rallies to pressure local assemblies to submit resolutions to Tokyo by bombarding them with requests, petitions, and phone calls."[73] This type of grassroots mobilization has helped to drive the explosive growth that Nippon Kaigi has continued to enjoy across Japan.

In addition to this grassroots foundation, it can be argued that Nippon Kaigi's most successful approach to enacting change has been their extensive network of influence within the highest levels of Japanese government. As previously discussed, as many as 280 members of the Diet are associated with Nippon Kaigi's parliamentary group. Even more significantly, well over half of the 20 members of Cabinet are also Nippon Kaigi members. The fact that this organization has been able to create a network of politicians so vast that they hold the majority in the executive branch is a further indication of their growing influence. It is important to note, however, as James Babb points out, the presence of right-wing members in the government is not a new phenomenon, but rather "political dynamics now allow and even encourage them to express these views more clearly."[74] These political dynamics have largely been changed by the shifting political discourses around the idea of nationalism, which has largely been led by Nippon Kaigi. The group has facilitated the rise of a generation of politicians that appear to be less attached to post-war pacifism and are more willing to embrace significant change in the pursuit of the *protection* of the nation. The close relationship between these politicians has seen substantial policymaking achievements, such as Nippon Kaigi's successful lobbying for the reinterpretation of the constitution to allow for limited Japanese military action abroad. Nippon Kaigi has also led the lobbying for the introduction of revised history textbooks in schools that reinterpret Japan's role in the Second World War, and has helped to design the new LDP draft constitution, which contains several proposed amendments to the constitution that would enact sweeping changes on many aspects of life in Japan.[75] The LDP draft constitution is an almost perfect copy of the proposed constitution and calls for many of the same policy changes, such as the restoration of the Emperor as the head of state, and the rewriting of Article 9, which deals with the legal status of the Self Defense Forces.[76] Changes such as this have been the goal of nationalists and the Japanese right wing since the end of the war, but it has only been since the turn of the century that such reforms have been gained traction with the support of groups like Nippon Kaigi. In his book on Nippon Kaigi published in 2016, journalist Aoki Osamu wrote that the group only appears influential because the ideological tenets that they espouse are coincidentally aligned with that of the Abe Administration, concluding that there is no causal link between the operations of Nippon Kaigi and the noticeable shift in political discourse since the beginning of the Abe Administration.[77] Aoki insists that the relationship between Abe and Nippon Kaigi is one of sympathy and resonance, rather than

---

[72]. McNeil, 5.

[73]. Mizohata, 4.

[74]. Babb, 359.

[75]. McNeil, 4.

[76]. The Japan Times, "The LDP's draft constitution," 24 August 2016. https://www.japantimes.co.jp/opinion/2016/08/24/commentary/japan-commentary/ldps-draft-constitution/#.XAsNnKfMyYU.

[77]. Shibuichi, 191.

influence and control.[78] What Aoki fails to consider is the clear material connection between Abe, his Cabinet, and Nippon Kaigi. As Guthmann explained in his assessment of the ideological foundations of Nippon Kaigi, Abe and many of his colleagues have been members and deep supporters of Nippon Kaigi since the beginning of their political careers, and were supporters of nationalist values well before advocating for change within the government.[79] Further, Aoki's dismissal of any causal link between the government and Nippon Kaigi in spite of evidence to the contrary is explained as simply being a coincidence. The ideological coherence between members of the Abe Cabinet and Nippon Kaigi run deep, as evidenced by their unity on the topics of constitutional reform and education reform, which casts serious doubt on Aoki's suggestions of coincidence. Nippon Kaigi's ideological foundation, its organizational structure, and its ability to mobilize at both the grassroots and government levels demonstrate its significant influence on enacting policy change and introducing nationalist discourse.

Jinja Honchō

The second case study this paper will examine is Jinja Honchō 神社本庁 (The Association of Shintō Shrines), the expansive administrative organization responsible for overseeing the management of Japan's 80,000 Shintō shrines. Historically, Shintō was a belief system that existed as an extension of the Japanese creation myth, in which the Emperor was revered as a living God and spiritual leader of the Japanese nation.[80] This system, often referred to as State Shintō before 1946, reflected an attempt at unifying religion and state into a unitary Japanese identity; an identity that was based in the common belief that the Japanese people had descended from the gods, or *kami* 神, in Japanese.[81] According to this paper's previously established definition of nationalism, this attempt at unifying the Japanese people under a set of shared customs and myths is a critical element of nationalist discourse. While State Shintō no longer exists in an established political form, the impact of Shintō on Japanese identity is still noteworthy. Following Japan's defeat at the end of the Second World War, American occupying forces introduced what was called the Shinto Directive, aimed at dismantling the wartime influence of State Shinto and established a legal basis for secularism in Japan.[82] With the relegation of Shintō places of worship to the private realm, Jinja Honchō was established as a private, non-government association dedicated to the continued management of the Shrines that previously had been under the jurisdiction of the imperial government.

Despite its existence as an administrative organization, Jinja Honchō has proven to be one of the most influential and effective political lobbying organizations in Japan.[83] Through the establishment of its political arm, Shintō seiji renmei 神道政治連盟 (Shintō Association of Spiritual Leadership), Jinja Honchō has successfully lobbied for several nationalist causes, such as the legalization of the National Flag, the reinstatement of the National Anthem, and the establishment of a national holiday on April 29th

78. Shibuichi, 191.
79. Guthmann, 214.
80. Guthmann, 209.
81. Guthmann, 209.
82. Guthmann, 211.
83. Guthmann, 208.

in honour of wartime Emperor Showa.[84] Jinja Honchō's lobbying arm boasts high membership levels in the national Diet, with some estimates suggesting that the group has more membership among politicians than even Nippon Kaigi.[85] In addition to its nationalist policy lobbying efforts, Jinja Honchō has also been a staunch advocate for continued visits by public officials to the controversial Yasukuni Shrine, an act that many of Japan's neighbours in Asia view as a way of celebrating Japan's wartime military activities.[86] Any comprehensive study of nationalist discourses in Japan cannot be divorced from the study of Shintō and its ability to organize politically. Through Jinja Honchō's Shinto Association of Spiritual Leadership, the organization has established an influential network of sympathizing politicians in the highest levels of government. After the 2016 Cabinet reshuffle, 19 of Abe's 20 Cabinet members were members of the Shinto Association of Spiritual Leadership, which led some scholars to conclude that Shintō-inspired elements have been a central element of the Abe's government's ideological foundation.[87]

The true influence of Jinja Honchō and political Shintō, however, lies in the organization's hand in building the nationalist coalition that has proved to be so influential in enacting policy change in Japan under Abe. The existence of Nippon Kaigi is directly tied to its ideological unity with Jinja Honchō, and the ties between these two organizations suggest that little separates the two groups organizationally. The ideological foundations of Nippon Kaigi's founding in 1997 has been closely linked with Jinja Honchō political and religious syncretism. The two organizations are united by a profound resentment for the postwar order and share a deep nostalgia for the perceived "golden age" of Japanese political and cultural life.[88] Since Nippon Kaigi's founding in 1997, the board of directors has largely been staffed by representatives and leaders from within Jinja Honchō.[89] Ideologically speaking, these two organizations are highly synchronized as a result, and some scholars have suggested that Jinja Honchō continues to form the backbone of Nippon Kaigi both ideologically and organizationally.[90]

An Alliance of Nationalists

When viewed through the lens of nationalism, the policy proposals and discourses discussed throughout this paper reflect a deep concern with national identity, which in the Japanese context is profoundly reflecting in Shintō. The alliance between Nippon Kaigi and Jinja Honchō is further indicative of the religious foundation of Japanese nationalism, even within the framework of a secular state. The goals of these two organizations are highly aligned, even if they are not stated to be explicitly religious. Both Nippon Kaigi and Jinja Honchō are fundamentally built on the idea that Japanese identity ought to be protected, and the way to accomplish this is to "rebuild" a Japan that is centred around the Imperial Household, which they view as the "essential constitutive element of the nation".[91] It is important to remember that despite the extensive involvement of these groups in the Diet and in the

[84]. McNeil, 5.

[85]. Babb, 361.

[86]. Shibuichi, 182.

[87]. Mizohata, 10.

[88]. McNeil, 3; Guthmann, 207.

[89]. Guthmann, 214.

[90]. Guthmann, 215.

[91]. Guthmann, 216.

Cabinet, they are fundamentally private and non-governmental in nature. Both groups exist primarily as grassroots organizations that lead fundraising and signature drives in the pursuit of effecting policy change in the name of nationalism. The success that these groups have enjoyed in recent years is not the result of coincidentally aligned views between the grassroots and the elite. To the contrary, the evidence demonstrates the extensive inroads that Nippon Kaigi and Jinja Honchō have made in rallying elected officials to their causes, and it can be effectively argued that in many respects, these nationalist groups are the primary drivers of Japanese politics.[92]

The effect of these groups on mainstream political discourse goes beyond the confines of the Abe government or even the LDP. Since 2016, Japanese politics has seen a spectacular collapse of the opposition parties and the further entrenchment of power by the LDP. During the leadup to the 2017 Diet Elections, the LDP's main opposition, the Democratic Party, collapsed and announced that it would not contest the election.[93] In its place rose a new opposition party, Kibō no Tō 希望の党 (Party of Hope), led by Tokyo Governor Koike Yuriko. Interestingly, Koike herself had served as the Minister of Defense under Abe and was a member of both Nippon Kaigi and the Shintō Association for Spiritual Leadership.[94] In addition, Koike established a "litmus test" for politicians looking to join the Kibō no Tō, ensuring that the party was represented by politicians that supported Nippon Kaigi policies such as constitutional revision.[95] While this election resulted in a stunning defeat for the upstart party, it solidified an ideological trend in Japanese politics: the consolidation nationalist ideology across party lines. Nippon Kaigi and Jinja Honchō, as evidenced by the 2017 election, have accrued influence across multiple parties, and crafted a political system in which nationalist ideology has become the dominant political discourse. While these shifts in political discourse are most visible within the elected elite, it is important to consider the driving ideology and influence of groups like Nippon Kaigi in facilitating this consolidation of ideological influence.

Conclusion

There is little doubt among scholars that Japan is experiencing foundational shifts in its political discourse and ideologies which constitute its government, resulting in some degree of uncertainty about where the country is headed in the years ahead. While it is generally agreed that nationalism and nationalist rhetoric has become more mainstream in Japanese political life until recent years, the mechanism by which these changes have taken place is more complex and cannot be attributed simply to the ideological leanings of a few elected elite. While scholars such as Pugliese, Aoki, and Glosserman have argued that this phenomenon is elite-driven and a coincidental partnership between like minded politicians and interest groups, this paper has demonstrated that shifts in Japanese political discourse can be traced back to actions of grassroots political and religious movements with their ideological origins in the postwar order. Non-government organizations such as Nippon Kaigi and Jinja Honchō have spent years building a complex system of influence from grassroots activists straight up into the highest

---

92. Tawara Yoshifumi, "What is the Aim of Nippon Kaigi, the Ultra-Right Organization that Supports Japan's Abe Administration?," *Asia-Pacific Journal-Japan Focus* 15, no. 21 (2017): 9.

93. Robert J. Pekkanen, Steven R. Reed, Ethan Scheiner, and Daniel M. Smith, eds. *Japan Decides 2017: The Japanese General Election*, Springer, 2018: 31.

94. Mizohata, 3.

95. Pekkanen, 32.

echelons of elected government. These organizations embrace an ideology that can be defined as explicitly nationalist according to the definition put forward by this paper and have seen a high level of success in enacting meaningful policy change in line with their agenda. As this paper has explained, understanding the origins of these organizations and the ideological foundations on which they have been built is critical in crafting an accurate analysis of the mechanisms by which political change in Japan has been created. Nippon Kaigi and its ideological backbone Jinja Honchō have each created extensive political lobbying wings which reign in politicians at both the local and national levels in order to drive nationalist policy outcomes from the ground up. This is not a phenomenon that is primarily elite-driven, as evidence suggests that a nationalist movement has been built by these organizations from the grassroots of Japanese society. As elected officials in the Diet and Cabinet have continued to align themselves with the ideological platform of Nippon Kaigi and Jinja Honchō, these organizations will continue to consolidate power in the form of ideological unity across party lines. As Japan appears to be nearing a vote on constitutional revision, the activity of these groups will intensify, and the pressure placed on politicians to align themselves with a burgeoning 'nationalist movement' will continue to develop. Japan's increasing embrace of nationalist discourse has taken many forms, all with the goal of establishing a "new normal" in Japanese politics, and grassroots movements will continue to exist at the forefront of driving decision-making among Japan's elected elites.[96] Future scholarship in the field of nationalist political discourse in Japan ought to examine the foundations of such ideological shifts at the grassroots level, rather than viewing political change strictly through the lens of elite-driven political discourses.

[96]. Catherine Wallace, "Japanese Nationalism Today-Risky Resurgence, Necessary Evil or New Normal?," *Mejiro journal of humanities* 12: 76.

References

Babb, James. "The New Generation of Conservative Politicians in Japan." *Japanese Journal of Political Science* 14, no. 3 (2013): 355-378.

BBC News. "Japanese PM sparks holy row." 16 May 2000. http://news.bbc.co.uk/2/hi/asia-pacific/750180.stm.

BBC News. "Koizumi shrine visit stokes anger." 15 August 2006. http://news.bbc.co.uk/2/hi/asia-pacific/4789905.stm.

Barrington, Lowell W. "'Nation" and "Nationalism": The Misuse of Key Concepts in Political Science." *PS: Political Science & Politics* 30, no. 4 (1997): 712-716.

Estévez-Abe, Margarita. "Feeling Triumphalist in Tokyo: The Real Reasons Nationalism Is Back in Japan." *Foreign Affairs* 93, no. 3 (2014): 165-171. http://www.jstor.org/stable/24483416.

Glosserman, Brad. "The Abe Administration and Japanese National Identity: An Update." *Joint U.S. Korea Academic Studies,* (2016): 116-125.

Guthmann, Thierry, and Aike P. Rots. "Nationalist Circles in Japan Today: The Impossibility of Secularization." *Japan Review* (2017): 207-225.

Kingston, Jeff. "One-Hand Clapping: Japanese Nationalism in the Abe Era." *In Japan and Asia's Contested Order*, pp. 147-163. Palgrave Macmillan, Singapore, 2018.

McNeill, David. "Nippon Kaigi and the radical conservative project to take back Japan." *The Asia-Pacific Journal: Japan Focus* 13, no. 48 (2015).

Mizohata, Sachie. "Nippon Kaigi: Empire, contradiction, and Japan's future." *The Asia-Pacific Journal: Japan Focus* 14, no. 2 (2016): 1-19.

Mochizuki, Mike M., and Samuel Parkinson Porter. "Japan under Abe: toward moderation or nationalism?." *The Washington Quarterly* 36, no. 4 (2013): 25-41.

Nippon Kaigi. "Nippon Kaigi ga meza sumono" **日本会議が目指すもの** [The Aims of Nippon Kaigi]. 7 December 2018. http://www.nipponkaigi.org/about/mokuteki.

Penney, Matthew, and Bryce Wakefield. "Right angles: Examining accounts of Japanese neo-nationalism." *Pacific Affairs* 81, no. 4 (2008): 537-555.

Pugliese, Giulio. "The China Challenge, Abe Shinzo's Realism, and the Limits of Japanese Nationalism." *SAIS Review of International Affairs* 35, no. 2 (2015): 45-55.

Pekkanen, Robert J., Steven R. Reed, Ethan Scheiner, and Daniel M. Smith, eds. *Japan Decides 2017: The Japanese General Election*. Springer, 2018.

Schäfer, Fabian, Stefan Evert, and Philipp Heinrich. "Japan's 2014 General Election: Political Bots, Right-Wing Internet Activism, and Prime Minister Shinzō Abe's Hidden Nationalist Agenda." *Big data* 5, no. 4 (2017): 294-309.

Shibuichi, Daiki. "The Japan Conference (Nippon Kaigi): an Elusive Conglomerate." *East Asia* 34, no. 3 (2017): 179-196.

The Japan Times. "The LDP's draft constitution." 24 August 2016. https://www.japantimes.co.jp/opinion/2016/08/24/commentary/japan-commentary/ldps-draft-constitution/#.XAsNnKfMyYU.

Tsujinaka, Yutaka, and Robert Pekkanen. "Civil Society and Interest Groups in Contemporary Japan." *Pacific Affairs* 80, no. 3 (2007): 419-437. http://www.jstor.org/stable/40023391.

Wallace, Catherine. "Japanese Nationalism Today-Risky Resurgence, Necessary Evil or New Normal?." *Mejiro journal of humanities* 12: 63-77.

Yoshifumi, Tawara. "What is the Aim of Nippon Kaigi, the Ultra-Right Organization that Supports Japan's Abe Administration?." *Asia-Pacific Journal: Japan Focus* 15, no. 21 (2017).

Department of Political Science /
Power Moves

University of Alberta