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EDITORS' INTRODUCTION

As John Stuart Mill argued in *On Liberty,* even absolute truth may well turn into a useless dogma if it is not contested and debated, surely, the authors featured in the 13th edition of the UBC Journal of Political Studies have one integral thing in common—they wrestle with great debates about political questions, justice, relations and the institution of power ideas. During the preparation of this publication, the editorial board and I were exposed to many new ideas in the political discourse from deliberative democracy to religion. This will be evident in the array of topics that are discussed in great details in our publication. During this journey, the UBC Journal of Political Studies has been exceptionally fortunate to benefit from suggestions, questions, and challenges. First of all, I would like to thank the editorial board for their dedication. They have worked hard to make this publication timely, accurate, and intellectually engaging. They volunteered vast amounts of time reading every submission, corresponding with each other as well as with the authors, and editing papers to draw out their full potential. Certainly, I would also like to thank everyone who submitted papers for assessment. For administrational work, I happily acknowledge the spirited help of David Decolongon and Undergraduate Advisor Irina Florov.

The editorial board has been overwhelmed by both the quality and quantity of help that we have received from the Political Science faculty. Their support was apparent throughout every stage of this project. For their expertise and dedication to this student initiative, I would like to heartily acknowledge Dr. Barbara Arneil, Dr. Bruce Baum, Dr. Anjali Bolken, Dr. Maxwell A. Cameron, Dr. Arjun Chowdhury, Dr. Glen Coulthard, Dr. Antje Ellermann, Dr. Laura Janara, Dr. Richard Johnston, Dr. Angela O'Mahony, Dr. Richard Price, and Dr. Mark Warren. Additionally Ph.D candidates Nathan Allen, Shane Barter, Pascale Massot, Beth Schwartz, and Aim Sinpeng have provided written feedback, and we would like to also extend our gratitude to them.

I would especially like to thank Dr. Benjamin Nyblade for the length and depth of his contributions. Indisputably, the production of a JPS publication is an accumulation of substantial intellectual debates. As the faculty advisor, Dr. Nyblade nurtured the project during its long gestation and offered critical advice along the way. Without his unwavering support, none of this would have been achievable. As well, I am delighted to acknowledge the Department of Political Science

and Department Head, Dr. Allan Tupper for their generous financial assistance. Certainly, the Department's big-hearted and accommodating funding provided an opportunity with the journal to presents the current discourse of the UBC undergraduate students in a comprehensive and accessible way.

Additionally, I would like to extend my gratitude to the UBC Political Science Student's Association (PSSA) for their continued trust and faith of the journal. In particular, I would like to thank the PSSA Presidents, Min Lee and Daniel Lin, for facilitating this outlet for student voice and trusting in their ability to formulate interesting ideas as part of a larger political conversation.

I am grateful to all of them. To all contributors, my thanks both for their efforts and for what I learned from them. The 2011 edition of the UBC Journal of Political Studies is delighted to pay tribute to what has become a community of student learning. It is this dialogue that will hopefully inspire and motivate you with the wealth of ingenuity and intelligence that has come to be associated with the UBC Political Science Undergraduate Program. Perhaps these arguments will raise new questions and open some new horizons about politics.

Enjoy!

Jin Young Park
Editor-in-Chief

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EDITORIAL BOARD

Jin Young Park, Editor-in-Chief

Jin is a third year Political Science Honours student. She is currently interested in political equality and democratic communication. Her ultimate career goal is to research innovative and inclusive institutional designs that deepen citizen participation in the political decision making process in domestic and international politics. After graduation, Jin plans to cycle around Spain and Germany and travel around Asia before she settles down to pursue graduate studies.

David Decolongon, Assistant Editor-in-Chief

David is a first year student who already has a strong interest in Political Science. When he is not getting used to the university workload, he can normally be seen trying out Vancouver's restaurants or simply walking around the city with his friends. He would like to thank the Editor-in-Chief, Jin Young Park, for extending to him the opportunity to help put together this journal. Hopefully this will be a strong start to a promising Political Science education for David.

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Victoria is a Political Science student with a particular interest in security studies and conflict/post-conflict societies. After graduating this year she is planning to complete a Teacher Eduction program before obtaining a Masters in Education and International Development. Aside from being a full-time student, Victoria loves the live music scene, cooking, and traveling as much as she can.

Kelsey Croft

Kelsey is a third year Political Science major, Spanish minor. Her interests include political theory, social justice, languages and Bob Dylan. At U.B.C. Kelsey volunteers for the program Humanities 101, which provides free, non-credit university classes to adult learners from Vancouver's Downtown Eastside and whose students' work with manifestos has been featured in the Vancouver Art Gallery's recent exhibit WE: Vancouver. Following graduation (and post-graduate studies) she would like to work in constitutional law, ideally for Pivot Legal Society

or another non-profit. Kelsey would like to thank the Political Science department for their input and assistance, as well as congratulate the featured writers and editorial staff for all their hard work.

Aydin Habibollahi

Aydin Habibollahi is in his fourth year in the department of Political Science. Other than his activities at the JPS, Aydin is the Vice President of Alumni Relations at the UBC Political Science Student Association and maintains an active role in student government at the university. His areas of interest include: Electoral Systems, Comparative Democratization, Security Studies, West Asian Politics, and Middle Eastern Politics.

Elizabeth MacArthur

Elizabeth is a fourth year Political Science major with a strong interest in ethnic conflict and counter-terrorism. When she isn't procrastinating on an assignment, Elizabeth can often be found eating phở with her dad or backpacking somewhere in Asia. After completing her B.A., she hopes to attend graduate school in a warmer climate and eventually pursue a career in security politics. She is grateful to the Editor-in-Chief for assembling such an excellent JPS team!

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Aman is a third year Honours Political Science student, who also has a degree in journalism. When not busy with school, she can be found actively volunteering for Co-Development Canada, Immigrant Services Society of B.C., and the Canadian Centre for Policy Alternatives. She enjoys staying active, eating healthy, reading and travelling. She has a specialized interest in comparative politics and politics of immigration and human rights. Her post-graduation plans include pursuing a challenging career in international law.

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Vanessa is a fourth year student majoring in International Relations and minoring in Commerce. Thanks to her insomnia, Vanessa loves to multi-task by packing in as many activities as she can within 24 hours, all while still making time for videogames. Last semester while on exchange Vanessa interned at CARE Australia, an international humanitarian aid and development organization, which has reinforced her goal of working

in foreign affairs. Having already backpacked 12 European countries in 5 weeks, Vanessa hopes to see the rest of the world with South America next up on the list.

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Midas Panikkar is a third year student at UBC majoring in Political Science and Psychology. Born and raised in Vancouver, he has always been keenly interested in Political Science, epecifically voting behavior and electoral decision making. He hopes to attend graduate school after completing his bachelor's degree and would like to work in policy analysis or research in the future.

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Rebecca is a third-year completing a B.A. in Political Science with a minor in International Relations. Aside from studying and time spent on the journal, Rebecca is very involved with UBC Orientations and the planning of what has become one of the largest student welcoming events worldwide, Imagine UBC. Her studies are geared towards political theory and Latin American politics with a particular passion for US-Mexico relations. For Rebecca, this year has been about stepping out of her comfort zone and exploring new areas of study, sparking interests in environmental governance and for the first time braving the Department of Philosophy. As for the future she plans on going on to graduate school and from there, taking on the world.

CONTRIBUTORS

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Kristian is a graduating 4th year Honours Political Student at UBC with a minor in International Relations. His undergraduate career has focused on international political economy, electoral systems, and multicultural theory. His Honours thesis, titled "Heroes, Smiles, and Charisma: The Personalization of Politics in the Philippines," examines the dominance of political dynasties in the country, as well as the rise of the 'personality politician' to counter this dominance. Apart from his interest in political science, he is also an avid Canucks fan, major coffee aficionado, and frequent traveller. After taking part in the BC Legislative Internship program after graduation, Kristian plans on attending law school at the University of Ottawa in 2012.

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Genevieve is a fourth year student double majoring in English Honours and International Relations. Her academic interests include American political rhetoric, memorialization, war crimes, literature of the 19th and 20th centuries, trauma, HIV/AIDS and the plight of women and children in conflict zones. After graduating she hopes to pursue her masters in interdisciplinary studies.

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Connor recently graduated from UBC with a B.A. in Sociology, and is currently an MSc candidate at the Center for International Environment and Development Studies, Norwegian University of Life Sciences. Connor's research interests lie at the intersection of social theory, historiography, natural resource management, and the maturation of the modern world-system. At the moment, he is working on an MSc thesis project with the Norwegian Institute for Nature Research, which will focus on the historical linkages between colonial law, environmental management, and the government of indigenous peoples in East Africa. Connor divides his time between Oslo, Norway and Kampala, Uganda.

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Aaron is currently a second year student studying Human Geography and International Relations. His interest in global citizenship and the social sciences was sparked by his participation in the Coordinated Arts Program last year. Outside of school, some things that never fail to excite Aaron include cycling around the city, curling, graphic design and Lady Gaga. He is especially excited to be going on exchange to Lunds Universitet in Sweden next year.

Elizabeth MacArthur

Elizabeth is a 4th year Political Science major specializing in ethnic conflict, counter-terrorism, and Asian politics. Although the study of labour standards is generally beyond her purview, this paper was inspired by 6 months spent living in Hong Kong. When Elizabeth is in Canada, she can often be found wandering around UBC campus, Chai latte in hand. After completing a 5th year at UBC, she hopes to attend graduate school in a warmer climate.

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Stephen was born in Toronto, raised in Taiwan, and is now finishing his BA in Creative Writing and Political Science at UBC. At the time of writing, Stephen was working an Arts Co-op work term with UBC Press. Upon graduation, he plans to be a freelance writer and editor.

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Kaan is currently in his final year of his undergraduate degree in the Faculty of Arts, majoring in Spanish with a minor in politics. His early experience living in foreign countries heightened his interest in Latin American and Canadian politics, ethics, and jurisprudence. Throughout his time at UBC, he has taken executive roles in both the Arts Career Expo and the Political Sciences Students Association. He also spent a year working at the Federal Court through the Federal Government's Student Work Experience Program. This summer, he will turn his fluent trilinguality and keen interest in politics and policy to use as a guide at the Canadian Parliament. He is currently considering his next academic steps into a graduate program and hopes eventually to make a foray into the Foreign Service.

UNINTENDED CONSEQUENCES: HOW PURSUING ABORIGINAL TREATY RIGHTS INADVERTENTLY STRENGTHENS CANADIAN SOVEREIGNTY

Aaron Lao

Abstract

The issue of Aboriginal self-determination has been relevant in Canadian politics for several decades now, but Aboriginal groups seem no closer to their desired independence. I argue that Aboriginal groups are actually in a Catch-22 situation, where the mere act of petitioning the Crown for their rights inadvertently strengthens the Crown's sovereignty, and thus reduces Aboriginal autonomy. This phenomenon happens in several ways. Discourse legitimizes the Crown's position as already dominant and valid, thus marginalizing the Aboriginal position. The Canadian court system has proved to be problematic, as their rulings are often very ethnocentric, therefore exalting the Crown's position and rejecting Aboriginal claims. Finally, even if some sort of recognition is granted to Aboriginal groups, I contend that they only serve as a means of limiting and controlling Aboriginal title, and are not beneficial to Aboriginals. Rather, recognition acts as a method of assimilating Aboriginals into dominant Canadian norms. Given these structural problems, Aboriginal groups hoping for self-determination will find it difficult to achieve without a significant change in political will on the part of the Crown.

Unintended Consequences

The issue of Aboriginal self-determination has been a contentious one in Canadian politics. There are multiple on-going land-claim negotiations currently taking place in British Columbia and elsewhere. One of the most significant recent developments in Aboriginal rights is the 1997 Supreme Court of Canada ruling *Delgamuukw,* which established the existence of Aboriginal title, the idea that Aboriginal peoples have a legitimate right to their traditional land. Many First Nations have since entered negotiations with the provincial government in hopes of gaining some degree of ownership. Some, such as the Nisga'a, have negotiated a form of self-government, sparking debate on

the consequences for Canadian sovereignty. How much authority would Aboriginal officials have? Would Aboriginal governments exist outside of the Crown? Who would have the ultimate authority in Aboriginal spaces?

Such grandiose speculation was perhaps unfounded. A closer examination into the nature of the relationship between Aboriginals and the Crown reveals a clear disparity in power, and interactions fraught with domination, ethnocentrism and assimilation. The present state of the relationship between Aboriginals and Canada represents very little threat to Canadian sovereignty. In fact, as this paper will examine, the Crown's interactions with First Nations regarding Aboriginal rights may actually serve as an assertion of Canadian sovereignty, not a danger to it. This reaffirmation of Canadian sovereignty is borne through the ethnocentrism and colonialism embedded in the processes of recognizing Aboriginal title. As a result, negotiations with the intent of advancing Aboriginal self-determination actually strengthen the Crown's authority, and legitimize ideas of Native assimilation.

Firstly, there exists a general discourse of the superiority of the Crown, one which legitimizes Canada as the sole holder of power and insists on the inferiority of Aboriginals. As a result, Aboriginals are marginalized in practice, and are made to be dependent on the Crown. The Canadian legal system has also served to subvert Aboriginal interests. The courts have shown themselves to be significantly ethnocentric in matters of Aboriginal rights, as it both inherently exalts the power of the Crown and denies the legitimacy of Aboriginal claims. Finally, even in cases where some Aboriginal rights are recognized, as in Aboriginal title, they ultimately act to assimilate First Nations further into Canadian norms. These conceptions of Aboriginals through an ethnocentric and colonialist lens is important, as it constructs them as the inferior other. As Edward Said notes, "knowledge of subject races...makes their management easy and profitable"[1]. By constructing Aboriginals in this way, Canada is empowered to control and exercise sovereignty over them. Ultimately, engagements between the Crown and First Nations regarding Aboriginal self-determination only serve to assert and strengthen Canadian sovereignty. This relationship is manifest through a variety or ethnocentric and colonialist interactions which, ironically, promote assimilation into the mainstream "Canadian" norms.

Trash Talk: The Role of Discourse

From the onset, Aboriginals are at a disadvantage when

negotiating with the Crown, as the discourse surrounding the issue portrays First Nations as inferior and dependent on the Crown. The discourse surrounding treaties is especially significant. Treaties are the predominant form of reconciling Aboriginal title in Canada. However, an examination of the history of the discourse regarding treaties reveals that they are in fact tools of colonization[2]. They were used as colonial powers were settling in the New World as methods of legally seizing land and resources from indigenous groups, perceived to be inferior. For example, when Canada signed treaties in the 1840s with Aboriginal peoples, they agreed to make annual payments in exchange[3]. However, instead of referring to the technical term "annuity payments," the payments are called "presents" in the accounting records of the time. The discourse around "presents" suggests the payments are made voluntarily, out of kindness of the benevolent colonizers, whereas the Natives are dependent receivers[4]. While views on treaties have certainly changed, the underlying condescending discourse and its implications have not.

In British Columbia, these negotiations are taking place in the form of Comprehensive Land Claim (CLC) treaty negotiations. The CLCs are meant to address the issue of ownership and Aboriginal title to land in disputed areas, ultimately producing a land use plan for the area. As the owner and sovereign authority of these areas is under dispute, it would be expected that the negotiating parties - the government of British Columbia and the First Nations claimants - be seen as equals; neither can claim to have more right to the land. Even the Supreme Court of Canada was unable to determine that Aboriginal peoples have been legitimately conquered with a degree of proof consistent with "conventional justifications for the assertion of sovereignty"[5]. Alcantara recounts how Aboriginal groups saw the dynamic as equal, but the provincial government saw negotiations as being between "representatives of the Crown" and "minorities within Canada"[6]. The treaty discourse remains as condescending as ever: not only are Aboriginals seen as an inferior minority, but one further step is taken and they are assumed to be subjects "within Canada", that is, already under Crown control. As this discourse is carried through land use discussions, as well as public consultations on the issue, Aboriginal groups are immediately placed at a disadvantage.

There exists another binary discourse in the public regarding First Nations, that Aboriginal land ownership is against the public interest, whereas ownership by private resource companies is positive. This attitude is firmly based in ethnocentric, neoliberal perspectives on

land use: it is a European idea to exploit land for profit. Aboriginal groups see themselves as one with the land, in a reciprocative relationship. The much more sustainable and environmentally respectful practices of the First Nations are given no credit. This unfair discourse manifests itself with great clarity in the *Delgamuukw* ruling of the Supreme Court of Canada. While the decision grants Aboriginals title to land, it also has a clause reading that Aboriginal title can be revoked by the Crown in cases where "the general economic development" of British Columbia is at stake, including forestry, mining, infrastructure, hydroelectricity and more[7]. Aboriginal land ownership is seen as so contrary to the public good and "general economic development" that the legal right of Aboriginals to land ownership must be revoked to protect it. Such a view is blatantly insulting and ethnocentric. These unfair forms of discourse, which have as their bases assimilation and ethnocentrism, are perpetuated and realized each time a First Nations group in so much as interacts with the Crown. It is clear how Aboriginals are placed at an immediate disadvantage, both in the treaty process itself and in public opinion.

Trial By Amateur Anthropologist: The Role of the Courts

Much of the debate surrounding Aboriginal title has taken place in the courts, which have proven to be a site of much ethnocentric and myopic decision-making. Prior to the 1997 decision in the Supreme Court of Canada on *Delgamuukw,* the case was heard at the Supreme Court of British Columbia. The presiding judge, Judge McEachern, made numerous decisions based on Western views and the English Common Law system, and eventually declared Aboriginal claims to title void. Ultimately, even disregarding the bias of Judge McEachern, there are fundamental structural disadvantages for First Nations in the legal system.

Firstly, it is important to recognize that by entering the Canadian legal system at all, Aboriginal groups are placed at a disadvantage. In acknowledging the authority of the Canadian courts, they situate themselves as subjects of a Canadian sovereign. Supposedly, the purpose of these land claims is to determine ownership where land title is undetermined, that is, between two equal parties, as Aboriginal peoples never forfeited sovereignty. However, the presence of the court - an assertion of the sovereign power of Canada - subjugates Aboriginals to the status of a conquered people[8]. Furthermore, Aboriginals enter the legal system as petitioners, requesting rights from the government,

which becomes a rights-granting entity[9]. As a result, an odd irony forms: by entering treaty negotiations, which is a process meant to increase Aboriginal autonomy, the Crown assumes the position of the sovereign distributor of rights and land, and thus, inadvertently, it is the Crown's authority that is asserted and reinforced. Aboriginal groups are hence left in a Catch-22. They have little recourse but to pursue their rights through legal channels, but doing so serves to validate the notion of Aboriginals as the conquered people of the Crown.

Judge McEachern's original 1991 ruling at the Supreme Court of British Columbia regarding *Delgamuukw* has been the subject of much criticism. His ethnocentric, positivist opinions led to changes in the guidelines for what constituted evidence in later trials, but a detailed reading of his judgement can reveal underlying prejudices that may still be relevant today. In the case, the Delgamuukw First Nation claimed Aboriginal title based on the fact that they had lived continuously on their traditional land since before the arrival of Europeans. Because sovereignty had never been transferred to the Crown, the Delgamuukw people should still have ownership of their traditional land. The case revolved around proving the existence of an "organized society" with a notion of land ownership prior to European arrival[10] The First Nations plaintiffs in the case presented proof of their presence through traditional Aboriginal oral histories, *adaawk* and *kungax*. These oral histories are a collection of sacred reminiscences, traditional Aboriginal expressions of territoriality that included songs about the land, and the trails between sacred places[11]. The Delgamuukw people also presented their totem poles as confirmation of these oral histories. McEachern, ever the amateur anthropologist, rejected this unfamiliar form of territoriality, dismissing it as "vague" "myth" [12]. His ethnocentrism is clear as he holds Western written records, a journal by a Hudson's Bay Company employee, in high regard. In fact, he even criticizes the oral histories when they do not match the white HBC employee's account of "primitive" Aboriginal institutions such as native Houses, as if the journals were the standard for interpreting First Nations history[13]. As a result of his narrow-mindedness, McEachern ruled that organized society did not exist prior to European arrival, and hence, there was no Aboriginal title.

It is not only perceptions of history that differ between Aboriginal and Western cultures. Aboriginal perceptions of land, for example, are manifest in performative trail songs and recollections. The framework of Canadian legal treaties, however, requires that space be perceived cartographically, as absolute space denoted on a map. Because of the superior position of the Common Law system, Aboriginals cannot

be understood on their own terms, and must assimilate into Canadian legal norms if they are to engage the courts. This ethnocentric bias is in fact defined in law. In outlining guidelines for evidence, a note on page 1066 of the Supreme Court of Canada *Delgamuukw* ruling states that evidence must not "strain the Canadian legal and constitutional structure," a blatant assertion that Aboriginal evidence must be distorted to fit in Western frameworks[14]. In the *Delgamuukw* case, the Aboriginal plaintiffs were forced to present their cultural evidence not as it was meant to be presented, but through a Western lens, using anthropologists, linguists, lawyers and historians. Once again, by engaging in the legal system, and by adopting this Western conception of evidence, Aboriginals are forced to legitimize the Western system as the one that has jurisdiction, even in disputed lands. Simultaneously, they become unable to present their own culture and traditions as they are.

Two Rights Make A Wrong: The Paradox of Aboriginal Title

Despite the damaging discourse and critical court cases contributing to a curtailing of Aboriginal title, the courts ultimately did recognize that First Nations had some sort of right to the land with the *Delgamuukw* ruling. Once again, however, there arises a paradox: the mere constitution of Aboriginal rights affirms Canadian sovereignty in that such an act is an exercise of sovereign power, and hence it further emphasizes colonial relationship between the Crown and First Nations[15].

The idea of Aboriginal title in and of itself represents not the height of Aboriginal interests, but a Western, assimilationist stand-in for Aboriginal interests. Gordon Christie contends that the best manifestation of Aboriginal interests - including the ability to express their culture, determine their own identity, and reach self-understood conclusions of their relationship to the land - is in unsettled land claims, as they are open to interpretation and the possibility of Aboriginal self-determination[16]. They represent an unstable political entity, and, as the only entity not constructed within the Canadian legal system, the only real threat to Canadian sovereignty. This insecurity is reconciled only by assimilating the political entity into the Canadian system, by transforming into some safe construct that exists under the Crown[17].

With the *Delgamuukw* decision and treaty processes, the assimilationist construct of choice is Aboriginal title - essentially a form of fee simple ownership, subject to colonialist Crown regulation.

Therefore, the idea of Aboriginal title is a tool of assimilation, meant to bring Aboriginal rights under the control of the Crown, and represents a reduction and clear limitation of what entitlements First Nations have. The Nisga'a Final Agreement (NFA), the self-government settlement of the Nisga'a First Nation, represents the substitution of Aboriginal legal rights with written treaty rights[18]. It "exhaustively sets out rights", effectively freezing them with absolutes and specifics, instead of relying on broad agreed-upon principles to be refined over time[19]. The goal of the NFA is clear: to delineate clear limits on Aboriginal rights that lie comfortably within the framework of Canadian sovereignty.

Additionally, Aboriginal title has little to do with empowering Aboriginals to reach self-understanding on ideas of culture and land relationships; rather, it is a construct that imposes Western ideas of land-use[20]. Fee simple ownership and government land-use negotiations revolve around the Western vision of land-use, one that sees land as a resource to be exploited for wealth creation for its owner. By adopting Aboriginal title and entering into land-use negotiations and consultations, Aboriginal groups essentially allow the government to set the parameters of the discussion, and are assumed to have accepted this neo-liberal conception of land. There is no discussion of Aboriginal visions of land-use, which has traditionally been seen as a partnered relationship with the land, one that, if treated with respect, will provide for the society; the land and its spirits are incorporated into the social fabric of Native society[21]. Hence, land-use negotiations are ultimately inconsequential, as Aboriginal conceptions of land relationships are never even considered. Christie likens the superficial consultations to being asked how you would like your house to be looted[22]. Unfortunately, given the power of the state, if Aboriginal groups want any input whatsoever into the land-use of their territory, they must participate in these assimilationist, ethnocentric consultations.

Another reason why Aboriginal title affirms Crown sovereignty is that it conveniently gives the government the right to extinguish ownership rights and dictate land-use, if necessary[23]. As mentioned earlier, a clause in Delgamuukw allows for government infringement on Aboriginal title in the interest of general economic development. The government is required to consult with Aboriginal groups if such seizure occurs, but as explored before, such consultations are inconsequential. In the Voisey's Bay case in Labrador, the government invoked its authority and removed certain tracts of land from treaty deliberations after large deposits of nickel were discovered there[24].

Some argue that in many cases, Aboriginal title has decreased the autonomy of First Nations groups. In the Nisga'a Final Agreement, the Nisga'a title to the majority of the disputed land - the Nass Wildlife Area - was extinguished, effectively converting it to Crown land. The government can use the land for economic purposes, requiring only superficial consultations with the Nisga'a[25]. The remainder, a small patch of Nisga'a heartland, was converted to fee simple ownership, with further limits, such as restricted ownership of rivers[26]. The taking of such vast amounts of land reveals the colonial nature of the treaties, while the conversion of Aboriginal rights into the construct of Aboriginal title, existing under the Crown, shows the assimilationist nature of the policies.

In a final exercise of power, the government has incentive to prolong treaty negotiations, as a means of increasing legal costs for Aboriginal groups. Some First Nations have withdrawn from the treaty process because of high costs. Other groups are forced to borrow money from the government, sometimes borrowing more than the value of the claim itself, thus ironically becoming economically dependent on the government as they seek political autonomy. It is clear that the treaty process is fraught with implicit elements of ethnocentrism and assimilation. The institutions meant to recognize Aboriginal rights are in fact tools used to bring them securely under the sovereign authority of the Crown.

Conclusion

The situation of Canada's First Nations is a difficult one. Though they may rightfully pursue their yet-unrecognized rights to the land and to self-determination, the mere act of seeking recognition reaffirms Canadian sovereignty, because of a series of ethnocentric, colonial and assimilationist institutions and processes. The legal system, based on English Common Law, places Aboriginal forms of expression at a huge disadvantage. As well, the treaty process and Aboriginal title serve only to limit and contain potential Aboriginal entitlements. The largest problem is that the only way Aboriginals can engage Canada in seeking self-determination is through the Canadian system; they must play by Canada's rules, whether that be Western conceptions of land-use, English Common Law, or imbalanced treaty negotiations. As a result of doing so, these institutions are inadvertently validated, and are given more strength. Although theoretically no one system has jurisdiction in disputed territories, Canadian sovereignty is given the gift of jurisdiction

by the First Nations' mere act of engaging with it. This leaves Aboriginal groups little recourse, if the Canadian system will not recognize their rights. Either a completely new, independent system is required, or First Nations must appeal to an international authority. Both being unlikely, fair allocation of Aboriginal rights appears unlikely without a major paradigm shift from the Crown. Given the relatively poor socioeconomic situation many Aboriginal populations find themselves in at present, one hopes this shift comes soon.

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[1] Edward Said, Orientalism. New York: Vintage Books, 1979: 30.

[2] Caskey Russell, "The Paradox of Sovereignty: Contigencies of Meaning in American Indian Treaty Discourse." American Indian Culture and Research Journal. 32.1 (2008): 1-19: 2.

[3] Dean Neu, "'Presents' for the 'Indians': land, colonialism and accounting in Canada." Accounting, Organizations and Society. 25 (2000): 163-184: 173.

[4] Ibid., 174.

[5] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia." Osgoode Hall Law Journal. 37 (1999): 537-596: 566.

[6] Christopher Alcantara, "To Treaty of Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada." Publius: The Journal of Federalism. 38.2 (Dec 2007): 343-369: 347.

[7] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia." Osgoode Hall Law Journal. 37 (1999): 537-596: 567.

[8] Ibid., 566.

[9] Christopher Alcantara, "To Treaty of Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada." Publius: The Journal of Federalism. 38.2 (Dec 2007): 343-369: 354.

[10] Julie Cruikshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in Delgamuukw v. B.C." BC Studies. 95 (Autumn 1992): 25-42: 40.

[11] Ibid., 34.

[12] Ibid., 35.

[13] Ibid., 36.

[14] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia." Osgoode Hall Law Journal. 37 (1999): 537-596: 557.

[15] Gordon Christie. "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation." Windsor Yearbook of Access to Justice. 23.1 (2005): 17-53: 38.

[16] Ibid., 46.

[17] Ibid., 46.

[18] Paul Rynard, "The Nisga'a Treaty: Are We On the Right Track?" International Journal of Minority and Group RIghts. 11 (2004): 289-298: 290.

[19] Ibid., 290.

[20] Gordon Christie. "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation." Windsor Yearbook of Access to Justice. 23.1

(2005): 17-53: 42.

[21] Ibid., 48.

[22] Ibid., 42.

[23] Ibid., 42.

[24] Christopher Alcantara, "To Treaty of Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada." Publius: The Journal of Federalism. 38.2 (Dec 2007): 343-369: 353.

[25] Paul Rynard, "The Nisga'a Treaty: Are We On the Right Track?" International Journal of Minority and Group RIghts. 11 (2004): 289-298: 293.

[26] Ibid., 293.

RECOGNITION, RESPECT, AND RIGHTS: THE REALMS OF MULTICULTURALISM EXPLORED

Kristian Arciaga

The idea of multiculturalism has been entrenched within the Canadian ethos since the inception of an official multicultural policy enacted by Prime Minister Pierre Trudeau in the 1970s. Yet, the concept is not as agreed upon amongst scholars, notably Canadian political theorists Charles Taylor and Will Kymlicka. Both engage in the "politics of recognition" but have divergent views in theorizing multiculturalism. I argue that although Taylor makes a poignant argument with respect to identity, Kymlicka has a more persuasive view of multiculturalism. Kymlicka's line of argumentation is more convincing due to its focus on group rights, explanation on the transition between accommodation and integration, and elaboration on rights as the cornerstone of a pluralistic society.

The idea of multiculturalism has been entrenched within the Canadian ethos since the Pierre Trudeau's Liberal Government adopted an official multicultural policy in 1971. However, the concept is not as easily accepted upon among scholars, notably Canadian political theorists Charles Taylor and Will Kymlicka. Both engage in the "politics of recognition" but have divergent views on embracing multiculturalism. Taylor, on one hand, believes that inter-subjective contact shapes recognition and that misrecognition can "inflict harm [or] can be a form of oppression."[1] On the other hand, Kymlicka places an emphasis on rights in his approach towards recognition and his endorsement of multiculturalism. In this paper, after briefly explaining the "politics of recognition" and discussing both theorists' views, I argue that Kymlicka has the more persuasive view of multiculturalism as a means to secure recognition for all groups because of a clearer emphasis on group rights, a stronger explanation on the transition between accommodation and integration, and a more evident understanding that rights are the appropriate means to allow a pluralistic society to prosper.

Although Kymlicka and Taylor define the politics of recognition in a similar manner to one another, they emphasize different aspects of the concept. Kymlicka describes the concept in terms of a struggle against status hierarchies.[2] For example, marginalized groups such as religious

minorities and immigrants assemble under the belief that they are not properly recognized. He believes that this belief "focuses on cultural injustices, rooted in social patterns of representation, interpretation, and communication"[3] and the solution is "cultural or symbolic change to upwardly revalue disrespected identities"[4] of under-recognized groups. Taylor, in contrast, discusses recognition through the lens of a "thick" concept of citizenship. He is concerned with the idea of the whole; specifically that the individual is merely embedded within the whole. Drawing upon the views of Hegel and Rousseau, he underscores the importance of community in the development of identity. He also emphasizes the nature of dialogue; stating that in order to comprehend the link between identity and recognition, one has to "take into account a crucial feature of the human condition…[which is] its fundamentally dialogical character."[5] Taylor theorizes that exchanges with others, such as through language and action, are essential to the idea of recognition. I will briefly elaborate on Kymlicka and Taylor's respective views regarding multiculturalism that emerge from their attitudes towards a politics of recognition. First, Kymlicka argues that any formation of a society must first involve the assumption of an individual's rights. In fact, he argues that "extending citizenship to include common social rights [is] a tool of nation-building,"[6] with the purpose of creating a sense of national identity. However, as portrayed by pluralist societies, there are ethnocultural groups, such as national minorities and indigenous peoples, which do not agree with the idea of a single national culture. These types of groups make claims in which

> they go beyond the familiar set of common civil and political rights of individual citizenship which are protected in all liberal democracies [and] they are adopted with the intention of recognizing and accommodating the distinctive identities and needs of ethnocultural groups.[7]

He therefore uses multiculturalism as an "umbrella term"[8] for these groups' claims. He also contends that building nations gives minorities four options: group emigration, the acceptance of integration into the majority culture, the seeking of culture-maintaining rights, or the acceptance of permanent marginalization.[9] Kymlicka reasons that a "liberal theory of minority rights, therefore, must explain how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice."[10] He essentially frames his theory of multiculturalism within the liberal context of rights.

Taylor theorizes multiculturalism along different lines than Kymlicka. He attributes the modern day emphasis on universal dignity and self-identity to two historical changes. First, honour, which was a symbol of status, was eventually replaced by universal dignity due to the collapse of social hierarchies.[11] The term "universal dignity" implies that, unlike honour, all humans have an inherent self-worth. The second historical shift that Taylor recognizes is the development of the modern notion of identity, described under the ideal of "authenticity."[12] He states that identity can be described as having a morality with a voice within, but also with independent significance. In order to act rightly, humans must become in touch with their moral feelings.[13] Hence, two forms of politics, according to Taylor, have emerged: "a politics of dignity" and "a politics of difference." While the former seeks to enforce the notion of equal human worth, the latter "insists on the need to recognize the unique identity of [an] individual or group."[14] Taylor employs these ideas as a means to justify his theories of multiculturalism. The challenge of multiculturalism, in his view, has turned into an "us versus them" mentality. That is, society has diminished the issue of multiculturalism as merely one to "deal with their sense of marginalization without compromising our basic political principles (emphasis added)."[15] In sum, his theory of multiculturalism revolves around the concepts of community and dialogue, and the tension between the politics of dignity and difference.

Kymlicka's clearer emphasis on group rights is the first way in which he analyzes multiculturalism more effectively than Taylor. Kymlicka is able to differentiate a specific set of rights for minority groups in his theory of multiculturalism. He describes five kinds of ethnocultural groups that are found in Western democracies: national minorities, immigrants, isolationist ethno-religious groups, metics, and racial caste groups. I will examine the effectiveness of group rights with respect to national minorities and metics.

Kymlicka's discussion of national minorities, which consist of 'substate nations' and 'indigenous peoples', provides evidence of his strong emphasis on group rights. National minorities are "groups that formed complete and functioning societies in their historic homeland prior to being incorporate into a larger state."[16] Due to the fact they were amalgamated into a larger society, he reasons that the most effective way to "ensure the loyalty of national minorities has been to accept, not attack, their sense of distinct nationality."[17] Accepting the cultures of these particular ethnocultural groups can help prevent extremes, such as

complete secession. By catering to national minorities through group rights such as those involving schools and courts, liberal democracies can counter these groups' tendencies "of forming a distinct nation, and their desire for national autonomy."[18] For instance, Quebec, unlike other provinces in Canada, has the civil code legal system to go along with its common law tradition. Although Quebec continually faces cultural identity problems within Canada, implementing – rather than resisting – the civil code legal system showed acceptance towards the province's cause. Another example comprises indigenous peoples who "reject integration in the name of maintaining themselves as distinct nations or peoples,"[19] such that they have been granted land claims and self-governmental powers.

Metics[20] are another example of a Kymlicka-defined ethnocultural minority that is worth exploring with respect to group rights. Kymlicka describes this group as "long-term residents who are nonetheless excluded from the polis,"[21] typically consisting of irregular and temporary migrants. Although they have lived in another society for a long time, such as Mexicans in California, metics have difficulties integrating, whether economically, politically, or socially. Furthermore, Western democracies have been reluctant to incorporate metics into their societies because they have "grudgingly accepted"[22] the group's demands for access to citizenship in the first place. Even worse, some countries have chosen to resist such demands because they initially did not admit metics as immigrants, such that they lack an "established process or infrastructure"[23] for integration. Kymlicka argues that it is both prudent and morally required for countries to adopt amnesty programs for illegal immigrants and allow citizenship to guest workers and their children.[24] By establishing the appropriate rights for this group, its members will have the means to fully incorporate themselves into the society they moved into. In this case, he realizes that group rights are important for metics because waiting for them to voluntarily return to their country of origin is "both morally and empirically flawed."[25] Due to his emphasis on group rights, he is able to set out an appropriately specific set of rights that countries should grant to particular ethnocultural minorities, especially metics.

In contrast, Taylor does not clearly emphasize the importance of group rights within his multicultural framework. Taylor realizes that "societies are becoming increasingly multicultural"[26] but merely states that acknowledging the worth of different cultures is the most important aspect of recognition.[27] It is evident that acknowledgment of

worth is a crucial step in accepting a particular culture, but Taylor does not support his claim with the concept of group rights or alternative to further allow groups to live amidst diversity. As evident in the aforementioned discussion of national minorities, recognizing these particular groups is only one step to solving their problems. Taylor is correct when he states that multinational societies can split apart "in large part because of a (perceived) recognition of the equal worth of one group by another."[28] However, as has just been argued, Kymlicka satisfies Taylor's claim by arguing that specific "minority rights satisfy the need for recognition."[29]

In terms of feasibility, Kymlicka's theory of multiculturalism faces a few notable problems. Taylor refutes the practicability of Kymlicka's theory with respect to the issue of Canada's case with Quebec. In particular, he argues that that procedural rules[30] are unable to "impartially enhance or cultivate a distinct Francophone culture,"[31] and instead, undermine it. He states that the "rigidities of procedural liberalism may rapidly become impractical in tomorrow's world."[32] Kymlicka, in response, tries to offer a feasible solution for the problem of groups integrating themselves into societies by endorsing the implementation of group rights. However, the results are still relatively unclear in Quebec as to whether or not group rights have actually encouraged Francophone culture. Quebec still boldly endorses its own culture, despite relatively strong Canadian federalism, so Taylor makes a strong theoretical argument with respect to a practicability issue in Kymlicka's views.

Despite raising an astute point, Taylor nonetheless faces some feasibility problems with his own theory as well. Waldron argues that Taylor's linking of authenticity, recognition, difference, and equal dignity is rooted in a romantic individualism. Waldron contends that this romantic individualism has "often had a hard time holding its own in modern politics against the idea of national, ethnic, and cultural identities."[33] Because of this difficulty, Waldron's theory, similar to Kymlicka's, is "more plausible sociologically [because it assumes] that people forge their identities in the crucible of the nation, culture, or ethnos in which they are reared and raised."[34] While Kymlicka's theory of multiculturalism faces some hurdles, Taylor's reasoning faces several practicality issues as well.

Kymlicka's emphasis on accommodation and integration also demonstrates that he has a more comprehensive understanding of multiculturalism in comparison to Taylor. Finding the difference between

accommodation and integration involves exploring what ethnocultural groups perceive as state forces that act for and against them. Hence, rights are a major aspect of accommodation for minorities in liberal democracies. Kymlicka argues that the protection of civil and political rights is "one of the major mechanisms for accommodating difference in Canada."[35] He makes a distinction between groups that choose to be part of liberal societies, and those that do not choose to be part of liberal societies. Immigrant groups and racial castes are significantly relevant examples of groups that integrate themselves but need to be accommodated in order to properly do so.

Immigrants are a noteworthy part of Kymlicka's theory of multiculturalism due to their choices upon arrival in a liberal democracy. Immigrants, unlike isolationist ethno-religious groups, choose to integrate themselves into the liberal society that they have moved into.[36] For example, immigrants seek access to their new society's education or technology. Kymlicka realizes that integration is not a quick process so he recommends that "special accommodations," such as mother tongue services, act as an intermediary basis.[37] Fair terms of integration are required for immigrants to incorporate themselves properly into their new societies. Kymlicka lists numerous examples in which fairer terms of integration may be examined, such as through education, dress codes, and public holidays.[38] These aspects of life must be closely inspected if they disadvantage particular immigrant groups. Although integration for immigrants is important, it is only permissible to the extent that they are properly accommodated within their new society.

The choice of wanting to be full participants in modern liberal democracies also applies to African-Americans in the United States. Described as a "racial caste group,"[39] Kymlicka points out that African-Americans commit to liberal principles the same way as [Euro-Americans] do.[40] Hence, their commitment to integrate into American society is already evident. What is needed, Kymlicka argues, is an appropriate scheme of accommodation. In order to level the playing field for African-Americans in the US, Kymlicka supports "historical compensation for past injustice, special assistance in integration, (e.g. affirmative action) [and] guaranteed political representation."[41] The realization that racial castes must be accommodated in order to integrate into the wider liberal society strengthens Kymlicka's argument.

Unlike Kymlicka, Taylor does not provide a thorough account of accommodation and integration in his theory of multiculturalism. Rather, he merely covers one aspect of accommodation and integration:

the acknowledgment that stronger groups must be willing to recognize dominated groups. He contends that because recognition forms identity, "dominant groups tend to entrench their hegemony by inculcating an image of inferiority in the subjugated. The struggle for freedom and equality must therefore pass through a revision of these images."[42] His contentions are valid, but his discussion does not include a possible way in which minority groups can possibly integrate themselves into a society. Kymlicka's proposal, then, which endorses some sort of rights and means of accommodation, trumps Taylor's view of multiculturalism.

      The final factor that makes Kymlicka's case for multiculturalism more persuasive than Taylor's is the fact that rights are the appropriate means to allow a pluralistic society to prosper. This argument involves Kymlicka's notions of *internal restrictions* and *external protections*. Internal restrictions involve intra-group relations, as in an ethnocultural group "may seek the use of state power to restrict the rights of its own members in the name of group solidarity."[43] External protections, in contrast, are based on inter-group relations, which means that a minority group "may seek to protect its distinct existence and identity by limiting the impact of the larger society."[44] These two notions are key to understanding his theory of multiculturalism because they address the acceptance of cultures, only to the extent that they fit within the liberal framework.

      Internal restrictions are not justified in Kymlicka's liberal perspective. It is unacceptable for a group to impose particular restrictions on its members to the point that it infringes on its members' rights. Kymlicka defends a liberalism that is consistent with group rights, "without sacrificing their core commitments to individual freedom and social equality."[45] Hence, Kymlicka's theory also defends individuals within a group who may disagree with the group's views or who may feel marginalized. For example, consider an indigenous person within a group who may disagree with his or her band's policies. Overly stringent group rights would drown out this person's opinions, but Kymlicka's theory gives credence to a minority within a minority. In other words, it is not acceptable to allow "oppressive practices"[46] in the name of group solidarity. An example of an internal restriction that must be countered is the oppression of women within various groups.[47] Following Kymlicka's theory, groups should not impose or restrict its own members if it violates individual rights. Kymlicka's model assumes that rights should always protect individuals within a group, especially minorities within minorities.

Taylor dismisses the idea that liberalism can be culturally neutral. For him group rights can never equalize one culture's status with respect to another's. He refutes the claim that "'difference-blind' liberalism can offer a neutral ground on which people of all cultures can meet and coexist."[48] The reasoning behind his argument revolves around the problem that "political society cannot remain 'neutral' between those seeking to maintain cultural traditions and those wishing to 'cut loose' to promote individual self interest."[49] Kymlicka cites however that "very few of the mainstream immigrant organizations within Western democracies have sought"[50] internal restrictions. Although strong group rights are important for Kymlicka, his theory is still able to protect the individual's rights and opinions amidst the majority of his or her minority group. In addition, Kymlicka and Taylor essentially argue about the "reducibility of community interests to individual interests."[51] Although collectivist claims such as Taylor's apply to internal restrictions, they cannot explain external restrictions.[52] In other words, collectivist claims are unable to elaborate on the inequality of distributed rights between groups.

External protections, in contrast, are necessary to protect the rights of those within groups because they can promote inter-group fairness and can reduce internal restrictions. In fact, numerous types of rights, if applied properly, can help decrease the vulnerability of minorities to political and economic pressures.[53] In regards to poly-ethnic rights, for instance, specific religious and cultural practices may be protected, which may not have been protected otherwise through the market or current laws.[54]

Taylor does not follow Kymlicka's emphasis on individuals' rights as an appropriate means to allow a pluralistic society to prosper. By discussing the stark contrast between the politics of dignity and the politics of difference, Taylor introduces a paradox for the liberal culturalist. That is, while the former "seeks to promote non-discrimination among all citizens in a 'difference-blind manner,'"[55] the latter "redefines non-discrimination as requiring differential treatment based on individual and cultural distinctness."[56] The latter is needed, according to Taylor, to garner a deeper understanding of cultures. Kymlicka, nonetheless, points out that there are "compelling interests related to culture and identity which are fully consistent with liberal principles of freedom and equality."[57] In other words, it is possible to link cultural membership with citizens seeking freedom.[58]

Kymlicka and Taylor theorize multiculturalism in significantly divergent approaches. Taylor raises the tension between the politics of

dignity and the politics of difference as a threat to liberal democracy and argues that the latter must be implemented in order to truly understand the worth of cultures. However, I have argued that Kymlicka has successfully countered Taylor's claims. Kymlicka has shown that ethnic and national group demands are, in fact, compatible with liberal principles like individual freedom. Despite making several valid concerns, Taylor's theory on multiculturalism falls short. Kymlicka's analysis is more effective because of its emphasis on group rights, feasible distinction and transition between accommodation and integration, and the use of rights as an appropriate tool within a liberal pluralist framework.

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[1] Charles Taylor, "The Politics of Recognition," in Multiculturalism: Examining the Politics of Recognition, ed. Amy Guttmann (Princeton, NJ: Princeton University Press, 1994) 25

[2] Will Kymlicka, Contemporary Political Philosophy: An Introduction, Second Edition (Oxford: Oxford University Press, 2002) 332

[3] Ibid., 332

[4] Ibid., 333

[5] Taylor, 32

[6] Kymlicka, Contemporary 329

[7] Kymlicka, Contemporary 335

[8] Ibid.

[9] Ibid., 348

[10] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Human Rights, (Oxford: Clarendon Press, 1995) 6

[11] Taylor ,27

[12] Ibid., 28

[13] Ibid.

[14] Fred Dallmayr, "Democracy and Multiculturalism," in "Three Forms of Group-Differentiated Citizenship in Canada," in Democracy and Difference: Contesting the Boundaries of the Political, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996) 286

[15] Taylor, 63

[16] Kymlicka, Contemporary 349

[17] Ibid., 352

[18] Ibid., 351

[19] Ibid., 330

[20] As defined by Michael Walzer in Kymlicka, Contemporary 357

[21] Kymlicka, Contemporary 357

[22] Ibid., 358

[23] Ibid.

[24] Ibid., 359

[25] Ibid.

[26] Taylor, 63

[27] Ibid., 64

[28] Ibid.

[29] Will Kymlicka, "Introduction: An Emerging Consensus?" Ethical Theory and Moral Practice 1.2 (June 1998): 154

[30] Reference to Michael Sandel's "Procedural Republic"

[31] Dallmayr, 287

[32] Taylor, 61

[33] Jeremy Waldron, "Cultural Identity and Civic Responsibility," in Citizenship in Diverse Societies, ed. Will Kymlicka and Wayne Norman (Oxford: Oxford University Press, 2000) 157

[34] Ibid.

[35] Will Kymlicka, "Three Forms of Group-Differentiated Citizenship in Canada," in Democracy and Difference: Contesting the Boundaries of the Political, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996) 153

[36] Ibid., 338

[37] Kymlicka, Contemporary 354

[38] Ibid., 355

[39] Ibid., 360

[40] Ibid., 338

[41] Ibid., 361

[42] Taylor, 66

[43] Kymlicka, Contemporary 341

[44] Ibid.

[45] Kymlicka, Multicultural 126

[46] Ibid., 41

[47] For more information on this topic, read David Wicks and Pat Bradshaw, "The Oppression of Women in Canada: From Denial to Awareness and Resistance" in Canadian Diversity: 2000 and Beyond, ed. Ed. Stephen Nancoo and Subhas Ramcharan. (Mississauga: Canadian Educators' Press, 1995): 145-162

[48] Taylor, 62

[49] Dallmayr, 287

[50] Kymlicka, Multicultural 41

[51] Kymlicka, Multicultural 47

[52] Ibid.

[53] Kymlicka, Multicultural 38

[54] Ibid.

[55] Dallmayr, 286

[56] Ibid.

[57] Kymlicka, Contemporary 339

[58] Ibid.

TOCQUEVILLE'S *DEMOCRACY IN AMERICA*: THE "IMMARVELOUS" COMBINATION OF THE SPIRIT OF RELIGION AND THE SPIRIT OF FREEDOM

Dalaina Heiberg

Abstract:

Throughout *Democracy in America,* Alexis de Tocqueville expresses astonishment over the peculiar relationship between religion and liberty in nineteenth century America. Elsewhere in history, these distinct elements were frequently at war but in America Tocqueville sees the "spirit of religion" and the "spirit of freedom" as forming a "marvelous combination." Tocqueville argues that in America, Christianity assists securing his beloved republican, self-governing, civic liberty in the face of an increasing threat of "soft despotism" stemming from particular side effects of equality. This paper argues against Tocqueville's belief that religion is beneficial to balancing civic liberty with equality. Based on Tocqueville's *own* description of the general psychological character of Americans, this paper argues that Christianity in the early-mid 1800s directly arrested individual *intellectual liberty*, which is a *precursor* to civic liberty.

While the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare" (Tocqueville[1])

Throughout *Democracy in America,* Alexis de Tocqueville expresses astonishment over the peculiar relationship between religion and liberty in nineteenth century America. Elsewhere in history, these distinctive elements were frequently at war, but in America, Tocqueville sees the "spirit of religion" and the "spirit of freedom" as forming a "marvelous combination."[2] Specifically, he believes religion promotes liberty in the face of an overwhelming passion for equality, which he argues has the potential to lead to soft despotism stemming from individualism and materialism. The second volume's final passage warns of this threat: "The nations of our day cannot prevent conditions of

equality from spreading in their midst. But it depends upon themselves whether equality is to lead to servitude or freedom."[3]

How Tocqueville defines liberty is somewhat ambiguous but in general he uses it to express the power of individual self-government in a democratic republican sense (defined below).[4] There is some evidence that Tocqueville values liberty in a more basic, personal sense, in terms of "freedom of the mind" and "intellectual authority."[5] In this vein, I argue that an ability to reason free from social pressure or soft moral despotism is a liberty more basic that civic liberty. Whereas civic liberty may be thought of freedom to *act* (external freedom), intellectual liberty may be thought of as the freedom to *think* (internal freedom). In this paper, I focus on this deeper sense of internal liberty that I equate with autonomy over one's own rationality and the liberty and potential to justify a moral code different from that of public opinion. Without such moral and intellectual autonomy, the liberty to vote or participate in politics lacks genuine articulation of individual interests. While Tocqueville is justified in his belief that Christianity (particularly Catholicism) promotes *external* freedom that is, activity in public affairs, it does not protect against soft despotism. In fact, religion is the *first* source of soft despotism and to demonstrate this, I will use Tocqueville's *own* description of the general psychological character of Americans.

Republican Democracy

In republican democracy, "society acts by and for itself."[6] Tocqueville would like to see liberty and equality balanced in a way that allows for a flourishing republican democracy, which involves a mix of institutional arrangements and the right social character. People must actively take part in "choosing the lawgivers and…by electing the agents of the executive power."[7] With equal and free participation in these political activities, citizens can be through of as taking part in making the laws. The large role taken by citizens in this system of separated powers[8] and decentralization[9] leaves administration power "feeble" compared to the administering activity and power of citizens.[10] He places special importance on townships because it allows for the most direct exercise of civic power.[11] Freedom of the press is also of crucial importance for his vision of republicanism, where each citizen and electoral candidate has the freedom to disseminate her views.[12] Since the freedom to express and circulate views is necessary for democratic debate amongst voters, Tocqueville insists, "censorship and universal suffrage[13][13] contradict each other."[14] Political associations are also necessary political actors in

democracies since they encourage people to stay involved in many areas and levels of government. Tocqueville believes that they are even "more powerful than the press," in that they can immediately and sustainably direct the "energies of divergent minds" toward a "clearly indicated goal."[15] In other words, they allow people to achieve political goals that would be out of reach for a single or many dispersed individuals. Religion acts as a type of civic association in that it to unites large swaths of independent people toward a common goal. Furthermore, Tocqueville argues religion serves republican democracy by directing the mores of the country, which in turn regulate "domestic life."[16] Finally, women are argued to be the prime enunciators of mores, leading Tocqueville to suggest that in order to fulfill their role in republican democracy, they must be educated in religion and prepared with "reasoning powers."[1717]

How Equality Can Compromise Civic Liberty

Tocqueville maintains that when equality and liberty are well balanced, republican democracy may be achieved. On the other hand, when equality is valued far above liberty "democratic despotism"[18] emerges. The despotic oppression he is concerned about is of an entirely different nature than hard, physical force. He is concerned about a "soft," or subtle power that is more deeply pervasive than physical oppression. Soft despotism, according to Tocqueville, attacks and controls *private* preferences and degrades men rather than tormenting them.[19] In cases where those in formal political positions have all the political power, while citizens have only illusionary power, soft despotism is at play. In soft despotism, citizens are passive subjects rather than active, self-governing citizens.

In the context of nineteenth century America, Tocqueville is concerned about citizens *voluntarily* withdrawing from the political process, in the form of "individualism" and "materialism." He claims that where people are equal, they tend to believe their wealth ought to match the wealth of others, inclining people to focus heavily on material status. Tocqueville saw the love for material comforts as excessive in America. He claims Americans "never stop thinking of the good things they have not got" and they never grow "tired of this futile pursuit" as "love of comfort has become a national taste."[20] Ultimately, this drive for "petty aims" causes people to "shut out the rest of the world"[21] and not until "death steps in"[22] do they stop. As Americans grow used to immediate material pleasures, they are unable to appreciate more admirable but difficult-to-achieve goods of mankind.[2323] The result is that individuals

may become complacent in the government's actions, even when the government increases the centralization of power as long as they are able continue pursuing material comfort.[24]

A related threat to civic liberty is "individualism." Individualism leads people to "gladly"[25] leave public affairs to focus excessively on the well-being of themselves[26] and close family and friends.[27] Tocqueville contends that in societies that espouse equality, ironically, individuals tend to forget they benefit by living a community-oriented lifestyle. When each exercises civic liberty, each participates in making the laws they must live under, and this type of self-government enhances one's freedom. It is "misguided judgment,"[28] therefore, to think one will personally benefit from withdrawing from political life, since he will be confined to a social character defined without his contribution.

Hence, the danger of individualism and materialism is that they distract citizens from appreciating and exercising civic liberty. Tocqueville believes these forces depreciate the individual to such an extent that what individuals think is undervalued, while the opinion of the majority is elevated to the status of authority.[29] Public opinion can create a dominating moral force[30] that directs how people think and function in both private and public matters.[31] Tocqueville worries that when there is one dominant discourse, creative, innovative and philosophical thinking, and democracy more generally, suffers.

How Religion Supports Civic Liberty

It is important to keep in mind that religion has always been *formally* distinct from the American state. In addition, it is important to note that Tocqueville speaks about Christianity broadly and also about particular sects. However, it is the commonalities amongst Christian sects or as Tocqueville says, "Christian morality common to all sects" that is the concern of this essay, therefore, I broadly refer to "Christianity" and "religion." What Tocqueville believed was common across Christian sects is "*the art of being free*."[32]

The mores of Christianity are an aid to soft despotism because they motivate people to exercise their freedom in the face of individualistic and materialistic tendencies. Tocqueville writes that it is the job of religion to "purify, control, and restrain the excessive and exclusive taste for well-being which men acquire in times of equality."[33] He says that Christianity teaches followers that they must "do good" to fellow man, in order to receive God's love. The wonder of following "God's plan" inspires many individuals to sacrifice private preferences

in order to experience it. Therefore, by imposing obligations onto others, Christian morality combats "the spirit of individualism."[34] Christianity also curbs the passion for materialism by orienting the minds of its followers beyond the material earth and earthly possessions. In addition to directly working against individualism and materialism, Tocqueville maintains religion respects and supports civic liberty in a general sense. Christianity, he writes, regards political activity as "noble" and politics as something God intended for the "free play of intelligence." Tocqueville argues that religion is the prime source of mores for Americans and that mores are the guarantee of laws and justification for freedom itself.[35]

As citizens become more and more equal, distinctions like class, educational level or political status become less apparent. In one sense the leveling of distinctions means that individuals are more equal in their opportunity to participate in political decision making. Each can feel "proud" that they are in equal measure to others. On the other hand, when a single individual "compares himself with *all* his fellows and measures himself against this vast entity, he is overwhelmed by a sense of his insignificance and weakness."[36] Therefore, in another sense, the leveling of distinctions means there are no obvious bonds beyond formal equality. Fortunately, all American Christians "see their religion in the same light,"[37] despite the great variation in Christian sects. In this way, religious mores act as adhesive to bond otherwise "isolated and defenseless"[38] individuals. Christianity is a common source of self-identification that unites otherwise separate individuals in a similar but more powerful way than civil associations. With the support of a Christian classified and coordinated code of morality, citizens have the potential to strive for ends that may otherwise be divided on. Christian mores provide a solid foundation of values upon which specific political issues can be contested and collective action may spring from. In this sense, religious mores are a harmonious accompaniment to Tocqueville's ideal of political liberty.[39]

In addition to serving Republican democracy at the broad political level, Tocqueville believes religion serves individual liberty and moral dignity. He claims general beliefs about God underlie almost all human decisions and actions, making it immensely important for individuals to have settled views about God.[40] However, due to the demands of daily life and the drive for material goods, individuals are prevented from having the time, energy and capability to use their own reason to settle fundamental questions about God and humanity. Christianity - as an established religion that society on the whole accepts - provides answers.

Tocqueville clearly values religion for the way in which it encourages and assists individuals to make use of civic liberty. To reflect on the distinction I made in the introduction regarding internal (intellectual) and external (civic) freedom, there are reasons to think Tocqueville believes religion supports both senses of freedom. In the next section I challenge the notion that it supports *internal* freedom and that it leads to a comprised use of external freedom.

How Religion Damages Intellectual Liberty and Compromises Civic Liberty

Tocqueville persuasively concludes that by importing the well-established Christian religion "the first settlers exercised an immense influence over the fate of their new country."[41] *Democracy in America* presents considerable textual evidence that the importation lead to two significant affects concerning liberty: first, at the most basic level, Christianity affects individuals *internally* by shaping their rationality in a common way; and second, I propose it inevitably follows that Christianity affects the character of politics in predictable ways.

Tocqueville says the American people were born into a system of entrenched beliefs and with little theoretical or normative space for questioning. Christianity was not scrutinized or critically analyzed before acceptance, but rather was "a religion believed in without discussion."[42] Americans, Tocqueville says, had to "accept a whole heap of facts" that no individual had the time nor intellectual competence to investigate or confirm.[43] Non-deliberative acceptance of religious beliefs means Christianity "kept a strong hold over the minds of Americans."[44] In fact, Tocqueville plainly states, "in the United States it is not only mores that are controlled by religion, but its sway extends over *reason*" (emphasis added). This is of pivotal concern. That Christianity created strong "habits" in thinking[45] implies many Americans were denied an independent, critical reasoning capacity. Without a basic capability for independent reasoning, it is not surprising that Tocqueville describes Americans at length as non-philosophical,[46] non-innovative,[47] non-imaginative[46] and lacking "great characters."[47] Since Tocqueville himself describes religion's role in entrenching certain "primary assumptions" and "certain formalities" in logic,[48] there is good reason to doubt individual agency, in other words, intellectual liberty. Hence, Tocqueville's *own* portrait of the average American mind strongly indicates that religion contributes to fundamental psychological servitude, which in turn, compromises civic (i.e., external) freedom. This is *not* to assume that Tocqueville is

necessarily *right* in his description but rather that his argument that "the spirit of freedom" and "spirit of religion" are complementary is severely contradicted if one takes into account his observations of American psychology.

Due to the fact that Christian beliefs were rooted in American soil from the nation's Euro-inception, it was always feverishly backed by public opinion. It does not ever have to be defended[49] because once the majority decides an issue "it is no longer discussed."[50] The hypothetical potential to choose a different or no religion, or to choose a *different politics* considerably hampered because even if religion is not entirely successful at shaping the intellect of individuals, public opinion continuously reinforces Christian dogma. In fact, public opinion had such an enormous influence that Tocqueville describes it as a force that infiltrates the "intelligence" and "soul" of citizens.[51] It must be asked whether one can be a free political actor when born into a world dominated by religious dogma with, as Tocqueville says, "the majority as its prophet."[52] Tocqueville states "any man accepting any opinion on trust from another puts his mind in bondage."[53] His descriptions indicate that public opinion is accepted on the basis of "trust" rather than individually justified. Since religion is also kept alive through public opinion (this is not to say it solely survives by way of it), it necessarily means that religious mores also enslave the mind. Once the mind is harnessed, all successive values and actions are conditioned. Thus, the individual is not intellectually in charge. Religion can, therefore, be thought of as the first source of soft despotism.

While religion may motivate people to take part in public affairs, which is to say exercise *external* freedom, as individuals each would have been making political decisions based on reason and values that were not adequately justified by the individual himself. Although Tocqueville argues religion does not *directly* influence political opinions "in detail" he recognizes that as the main producer and authority of mores it regulates private life, which means it indirectly "[regulated] the state."[54] I have argued further that not only are substantive values conditioned by religion, but one's very personal intellect is also conditioned. Based on Tocqueville's text, Christian despotism drew its power from an intellectually deprived population; by controlling liberty at the intellectual level, Christianity indirectly determined the political outcomes of the state. Religion stunted the reasoning capacity of Americans and so, the decisions they made in the civic realm would inevitably have complemented Christian beliefs, and no others. Christianity in America may cure one type of soft despotism that arises

from individualism and materialism but it does so only after it has created its own despotic damage to intellectual liberty.

Conclusion

Tocqueville believes the Christian faith played an immensely productive role in combating servitude to the government that results from individualism and materialism. Religion undoubtedly contributed to a profound state of moral cohesion amongst democratic, individualistically inclined citizens and, according to Tocqueville, espoused the use of political liberty. This lead Tocqueville to value religion as an instrument for balancing liberty with the important but potentially dangerous momentum of equality. Although in some ways, religion appeared a harmonious accompaniment to American politics in the nineteenth century, it came at a detrimental cost to the most basic sense of human liberty, intellectual liberty, which is a precursor to the civic liberty that Tocqueville passionately wished to be maintained. There is considerable evidence in *Democracy in America* revealing Tocqueville's concern for the negative effects religion has on liberty, morality and intellectual progression. Tocqueville says that religion was publicly "loved, supported and honoured" and suggests that it is "only by looking into men's souls will one see what wounds it has suffered."[55] Despite such sentiment, he does not, overall, see religion as a fundamental threat to individual liberty and meaningful republican democracy in the way I have argued. I argue the greatest wound suffered was denial of the opportunity to fully develop rational and creative capacities, and this directly affects the freedom to identify with unconventional religious and political standpoints. Without a strong capacity for critical thinking, the majority of American's during Tocqueville's historical moment were not equipped to voluntarily and intelligently accept and benefit from religion in a way compatible with liberty. In summation, the stretch of control exercised by religion – at the individual, interpersonal and political level – illustrates that, contrary to what Tocqueville claims, religion limited rather than promoted liberty. The combination of the spirit of religion and the spirit of freedom was not marvelous, therefore, but in fact these two forces *were* at war with each other all along.

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[1] Alexis de Tocqueville, *Democracy in America*. (New York: HaperCollins, 2006): 292.

[2] Ibid., 47.

[3]   Ibid., 705.
[4]   Ibid., 62-63.
[5]   Ibid., 436.
[6]   Ibid., 60.
[7]   Ibid., 60.
[8]   Ibid., 106.
[9]   Ibid., 62-63.
[10] Ibid., 60.
[11] Ibid., 64.
[12] Ibid.,181.
[13] It is important to keep in mind that women were not politically equal and, therefore, are not calculated in what Tocqueville would understand as "universal suffrage." While he believes women play an important role in republican democracy, he largely speaks of men. In light of this, when not specifically referring to females, the language of this essay is masculine.
[14] Alexis de Tocqueville, *Democracy in America*. (New York: HaperCollins, 2006): 182.
[15] Ibid., 190.
[16] Ibid., 291.
[17] Ibid., 591.
[18] Ibid., 693.
[19] Ibid., 691.
[20] Ibid., 536.
[21] Ibid., 533.
[22] Ibid., 536.
[23] Ibid., 507.
[24] Ibid., 690.
[25] Ibid., 506.
[26] Ibid., 448.
[27] Ibid., 506.
[28] Ibid., 506.
[29] Ibid., 430.
[30] Ibid., 289.
[31] Ibid., 436.
[32] Ibid., 290.
[33] Ibid., 448.
[34] Ibid., 529.
[35] Ibid., 47.
[36] Ibid., 435.
[37] Ibid., 449.
[38] Ibid., 435.
[39] Ibid., 47.
[40] Ibid., 442-443.
[41] Ibid., 48.
[42] Ibid., 432.
[43] Ibid., 434.
[44] Ibid., 432.
[45] Ibid., 292.

[46] Ibid., 429.
[47] Ibid., 436.
[46] Ibid., 692.
[47] Ibid., 257.
[48] Ibid., 292.
[49] Ibid., 432.
[50] Ibid., 254.
[51] Ibid., 435.
[52] Ibid., 436.
[53] Ibid., 434.
[54] Ibid., 291.
[55] Ibid., 300.

THE EICHMANN APORIA: TRANSITIONAL JURISPRUDENCE IN THE POSTMODERN PRESENT

Connor Cavanagh

ABSTRACT

This paper offers a postmodernist critique of transitional justice in the post-World War II era. The author describes attempts at transitional justice in the wake of mass atrocity as an 'aporia' that encompasses broader debates about morality, power, and the nature of justice. In examining the case of *Attorney-General of the Government of Israel v. Adolf Eichmann,* the author problematizes the mechanisms through which tribunals mete out 'justice', and offers a conceptual framework for alternative models of jurisprudence in the aftermath of genocide, war crimes, and crimes against humanity.

"If today there is no longer any one clear vision of sacred man, it is perhaps because we are all virtually *homines sacri*."
- Giorgio Agamben, *Homo Sacer[1]*

Introduction

On 11 May 1960, the Israeli Mossad kidnapped Adolf Eichmann near his family's home in Buenos Aires, and brought him before an Israeli court on charges of "crimes against the Jewish people".[2] Although Eichmann played a key role in the Holocaust by orchestrating the transportation of Jews to Auschwitz and Dachau, Hannah Arendt would later describe his role as "terrifyingly normal". For Arendt, Eichmann was "neither perverted nor sadistic"; rather, his crimes were horrifying precisely because he committed them with a clear conscience.[3] Despite his apparent banality, the Israelis found Adolf Eichmann guilty of "crimes against the Jewish people with intent to destroy the Jewish people", and finally executed him on 31 May 1962.[4]

For Arendt and many others, Eichmann's trial highlighted not the horrors of the Holocaust, but the failure of the Israeli tribunal to produce anything other than an exceptionally retroactive and selective version of transitional justice[5]. For the purposes of this paper, transitional justice refers to a "restorative approach to justice which applies in the context of societies confronting a legacy of systematic or widespread

human rights abuse".[6] The tribunal attempted to mete out a symbolic punishment that would resonate on the international stage; instead, I argue, they created an enigma that encompasses the insoluble problem or *aporia* of delivering true justice in the wake of atrocities like the Holocaust. I will expound upon this assertion in three sections. I first offer a brief exegesis of my theoretical schema; second, I solidify these perspectives with reference to substantive problems within the trial of Adolf Eichmann. I conclude by advancing an alternative conceptual framework for postmodern models of "reflective" transitional justice.[7]

Derridean Deconstruction and Juridical Aporiae

Philosophers often invoke the concept of aporia to refer to a problem that is insoluble, but which does not involve irrationality on the part of anyone involved. The philosopher Jacques Derrida was particularly interested in aporiae, as he believed an examination of the tensions involved in such instances could yield a more sophisticated or de-naturalized understanding of the situation.[8] In a famous essay entitled "Force of Law", Derrida identifies three aporiae that he believes characterize the relationship between law and justice.[9] For the purposes of this brief essay, I concentrate on just one of these: "the *epoche* of the rule".[10]

Notwithstanding Derrida's convoluted prose style, the "*epoche* of the rule" simply concerns the straightforward observation that in order to deliver justice one must have free will; however, no judge ever freely delivers a ruling – each of her judgments are inevitably based upon an existing law.[11] In this sense, the law-abiding judge is always to some extent a "calculating machine", doomed to simply apply and legitimate pre-existing laws. [12]Conversely, judgments that do not follow a set of predetermined rules are arbitrary and therefore also unjust. As such, the application of the law always contains an element of interpretive violence, because in its effort to avoid subjectivity it forces each uniquely individual case to conform to the 'prejudice' of the law.[13] Herein we find the irresolvable nature of the aporia. In Derrida's words:

> A just decision is always required immediately, 'right away'…
> [but] it cannot furnish itself with infinite information and the
> unlimited knowledge of conditions, rules, or hypothetical
> imperatives that could justify it.[14]

Consequently, the moment of judgment in the face of the impossibility of justice is actually a moment of madness: it is doomed to never accomplish its own purpose.

In this binary juxtaposition of law and justice, Derrida attempts what he terms 'deconstruction'. Contradictory definitions of deconstruction abound in both philosophical and sociological literature, but Derrida does offer a fairly clear definition in his "Letter to a Japanese Friend".[15] Although Derrida purposely avoids the verb "to be", he argues that deconstruction "takes place" when an observer sees "the blind spots within the dominant interpretation".[16] This is precisely what Derrida gathers from the deconstruction of the opposition between law and justice. From Derrida's account, it is clear that whatever we mean when we say 'transitional justice', we cannot mean 'justice' in the objective sense that is implied by tribunals like the one Adolf Eichmann encountered in Jerusalem. As such, deconstruction offers a decidedly "postmodern" viewpoint, as it contains an inherent critique of the rationalist and objectivist forms of logic that have characterized modernist approaches to justice.[17]

Viewed in light of this deconstruction, transitional justice is a highly problematic exercise – one that is fraught with both political contestation and conflicting logics. Of all the attempts at international transitional justice since the Allied-backed trials of German WWI commanders at Leipzig in 1919, the state of Israel's prosecution of Adolf Eichmann stands out as particularly controversial.[18] I now turn to the details of Eichmann's case to illuminate the relevance of the above theoretical discussion.

Attorney-General of the Government of Israel v. Adolf Eichmann

The cynical historian will posit that Adolf Eichmann's fate was sealed the moment a Mossad operative bundled him into a getaway car on the evening of 11 May 1960. The agents held Eichmann in a makeshift cell at an Israeli safehouse in Buenos Aires, 'interrogated' him for nine days, and finally snuck him aboard an El Al flight to Tel Aviv on 20 May 1960.[19] After Eichmann's arrival in Israel, Prime Minister Ben-Gurion[20] announced to the Knesset that:

> One of the greatest Nazi war criminals, Adolf Eichmann, who was responsible together with the Nazi leaders for what they called 'the final solution to the Jewish question' . . . was found by the Israeli Security Services . . . [he] will shortly be put on trial under the Nazi and Nazi Collaborators Act.[21]

As far as Ben-Gurion was concerned, there was no doubt that Eichmann was personally responsible for his role in the

Holocaust. As noted by several legal historians, such prejudice overshadowed the lead-up to Eichmann's trial, which was internationally broadcast on television, and threatened to delegitimize the entire process in the eyes of international audiences .[22] Prejudice, however, would prove to be neither the only nor the most salient problem with Eichmann's trial.

Aside from the international tort that Israel inflicted on Argentina by violating its territorial sovereignty[23], the Eichmann trial breached two foundational principles of the Continental legal tradition, of which the Israeli juridical system is mostly a product: *nullum crimen sine lege*[24] and *nulla poena sine lege*[25].[26] Eichmann was charged under the Nazis and Nazi Collaborators (Punishment) Act that the Knesset passed in 1950, even though neither the law nor the state of Israel were in existence at the time that Eichmann committed his crimes.[27] Controversially, the Act retroactively classified Eichmann's membership in the SS as criminal, in accordance with Article 9 of the International Military Tribunal Charter, which was first applied at Nuremberg in 1945.[28] Since the Israeli prosecution could easily prove that Eichmann was a member of the SS, his complicity in the crimes committed by the SS was established by default.[29] However, the prosecution also wanted to prove that Eichmann was *personally* responsible for 'crimes against the Jewish people with intent to destroy the Jewish people', 'crimes against humanity' and other war crimes.[30] Indeed, Eichmann's membership in the SS automatically guaranteed that he would receive a minimum seven year prison sentence, but it quickly became apparent that the prosecution's goal was to pursue a strong enough conviction to warrant the death penalty.[31]

Dr. Robert Servatius was Eichmann's sole defense counselor, and pursued what can broadly be described as a "rupture defense".[32] The goal of this defense is to exploit the "collision of worlds" that arises from cases of revolutionary struggle, regime change, or transitional justice. A rupture defense highlights the arbitrary nature of the relation between 'accused' and 'accuser', and seeks to portray any ruling other than an acquittal as an outpouring of victor's justice.[33] In his brilliant reading of Hannah Arendt's (1963) *Eichmann in Jerusalem*, the philosopher Giorgio Agamben notes how, within the context of the Israeli courtroom, one can actually view Eichmann as the Nazi equivalent of the Israeli prosecutor.[34] Indeed, Dr. Servatius repeatedly insisted that Eichmann was a "man of the law" who simply carried out "acts of state", not unlike the prosecutor and jurists they were faced with.[35] Servatius also tried to make the case that Israel did not have the jurisdiction to try Eichmann,

since he was not Israeli, did not commit any offences in Israel, and had allegedly harmed individuals who were not Israeli at the time of the commission of the offences.[36]

Nevertheless, the Israeli tribunal finally delivered its verdict on 11 December 1961. Eichmann was found guilty of fifteen counts of "crimes against the Jewish people with intent to destroy the Jewish people", crimes against humanity, war crimes, and membership in three criminal organizations: the SS, SD, and the Gestapo.[37] It should be noted that Eichmann was found *personally* responsible for these crimes, even though he was not physically implicated in any of the acts themselves. By extension, Dr. Servatius' claim that Eichmann only "aided and abetted acts of state" was dismissed in its entirety.[38] Instead, the court found that Eichmann had actually "acted as his own superior"[39] and that his actions eclipsed those who were further up on the Nazi Party hierarchy – a claim that remains quite controversial to this day. Despite pleas for mercy from both Jewish and Gentile groups around the world, the tribunal sentenced Eichmann to death on 29 May 1962, and executed him two days later.

As Hannah Arendt would later suggest, a more honest verdict for Eichmann might have read:

> You told your story in terms of a hard-luck story, and, knowing the circumstances, we are, up to a point, willing to grant you that under more favorable circumstances it is highly unlikely that you would ever have come before us or before any other criminal court . . . [but] in politics obedience and support are the same. And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations - as though you and your superiors had any right to determine who should and who should not inhabit the world - we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.[40]

As such, an alternative way to interpret the tribunal's ruling is that Eichmann's true crime was not the autonomous commission of crimes against humanity, but the *failure* to resist both the orders he received and the 'illegal' organization that he worked for. Indeed, what is so chilling about the Eichmann case is that many (if not all) of us are arguably implicated in power structures that we have come to view as natural and legitimate, but which perpetuate oppression and inequality to some degree. However, it is only when these structures crumble –

or are reversed – that we begin to truly awaken to the implications of our actions. To this day, I believe that much of the fascination with Adolf Eichmann's trial in Jerusalem stems from the realization that – to their horror – many people are actually able to see a fleeting reflection of themselves in Eichmann, the genocidal bureaucrat. Drawing on Kant and Lyotard[41], I now offer an alternative conceptual framework for understanding the mechanisms through which tribunals such as the Israeli one examined above seek to mete out 'justice' in the postmodern present.

Recognizing the 'Differend': Kant, Lyotard, and Reflective Judgment

In the late eighteenth century, Immanuel Kant drew a distinction between 'reflective' and 'determinant' judgment that still resonates in debates on morality today.[42] For Kant, a "determinant judgment" occurs when the outcome of individual cases are predetermined by an existing theory or structure; for example, when "the structure of arithmetic determines the result of its internally generated problems, such as those of addition or subtraction".[43] By contrast, Kant developed the idea of the "reflective judgment" to describe appraisals of beauty or other highly subjective qualities that are not guided by an overarching theory or structure.[44] In other words, while the individual may have a certain set of aesthetic tastes, these tastes do not automatically generate a standardized judgment when presented with a new *objet d'art.* It is precisely this tension between determinant and reflective judgment that Hannah Arendt highlights in her seminal report on Adolf Eichmann's trial in Jerusalem. As Arendt wrote:

> There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time ... those [Germans] who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which the particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented.[45]

In Arendt's view, Nazi war criminals were not the only actors that failed to make reflective judgments - the Israeli postwar tribunal arguably made the same mistake.[46] In this sense, Eichmann's trial

was not about Eichmann at all; the latent function of the court was not only to judge Eichmann's actions, but also the legitimacy of the Nazi *ideology* that influenced him prior to- and during the Second World War. By ignoring Eichmann's banality, his normalcy, and his bourgeois predictability, the Israeli tribunal simply transformed him into a conduit through which they could retroactively channel a politico-moral appraisal of the insanity of the Holocaust. In doing so, the Israelis failed to take advantage of an opportunity to ask important 'reflective' questions about Nazism and genocide *vis-à-vis* ideology and human nature.

Theorizing upon the Holocaust, Jean François Lyotard advanced the notion of the "differend" to encompass the problem of passing determinant judgments in the postmodern age.[47] In legal discourse, a 'differend' is a specific type of aporia that arises when two opposed parties in a dispute are in the right according to their own "terms of reference, but:

> cannot accommodate, or refuse to accommodate, with the other party; and there is no common ground or third set of terms of reference which will allow an adjudication between the two parties while respecting their terms of reference.[48]

As in Derrida's example, the differend exists wherever those who are in a position to pass judgment lack a neutral framework through which to effectively process radically different narratives. This acknowledgement of judicial inadequacy stands in direct opposition to modernist conceptions of justice. Historically speaking, "the just" is often associated with "the true" - justice often depends on a "revelation of truth" or an uncovering of fact.[49] Under modernism, the task of judgment is essentially an epistemological one; it involves a process of stripping away illusory layers of appearance to reveal the true nature of reality beneath.[50]

Lyotard's point is that such modernism is no longer an adequate model for seeking justice in the postmodern present; after Auschwitz, the grand historical metanarratives of Enlightenment 'Reason' and 'Progress' are demystified as social constructions, and history becomes a series of 'events' that are open to interpretation. Instead of the modernist quest to distinguish between 'appearance and reality', Lyotard's imperative to develop the capacity for reflective judgment highlights history as a relation between the "appearance and disappearance" of different forms of 'the real' or 'the true'.[51] This style of analysis acknowledges that Nazism did indeed contain its own twisted style of 'morality' that guided the actions of its adherents[52], but stops short of careless relativism or

nihilism. It is precisely this capacity for reflective judgment that I believe needs to be cultivated in order to develop a more legitimate transitional jurisprudence for the coming decades.

Conclusion

In *Survival in Auschwitz,* Primo Levi describes an identifiable category of concentration camp prisoners called the *Muselmänner* (Muslims):

> One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand . . . if I could enclose all the evil of our time in one image, I would choose this image which is familiar to me: an emaciated man, with head dropped and shoulders curved, on whose face and in whose eyes not a trace of thought is to be seen.[53]

The Auschwitz prisoners called these people Muslims because of the literal translation of the word 'Islam': peaceful submission to the will of God.[54] Above all, the *Muselmänner* were resigned to their fate – a condition that Giorgio Agamben refers to as "bare life" – both physically and psychologically, they were totally exposed to the power of the state.[55] Tragically, even the most casual perusal of history shows that Auschwitz was not the sole domain of the *Muselmänner*; in actuality, they dwell wherever oppression reigns supreme. Perhaps even more tragically, exploitation knows no ideological boundaries – neither capitalist, communist, nor fascist. It is not my intent to conclude that Eichmann's willful adherence to Nazism absolves him of responsibility for his actions; rather, my point is that we should not judge Eichmann without simultaneously judging ourselves. A self-reflexive model of transitional jurisprudence is thus based on a politics of anxiety; it notes the self-affirming tendencies of all ideologies and constantly seeks to transcend its own descent into a determinant style of judgment. Such an approach may be the only plausible way forward if transitional justice initiatives are to maintain their legitimacy throughout the coming decades.

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[1] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life.* (Stanford: Stanford UP, 1995): 115.

2   Seyla Benhabib, "Arendt's *Eichmann in Jerusalem"* (2000) In: Dana Villa (ed.), *The Cambridge Companion to Hannah Arendt.* (Cambridge: Cambridge UP, 2000): 66.

3   Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: The Viking Press, 1963): 129.

4   Benhabib, "Arendt's *Eichmann in Jerusalem"*, 67.

5   Arendt, *Eichmann in Jerusalem,* 128;
    Hans W. Baade, "The Eichmann Trial: Some Legal Aspects". *Duke Law Journal,* Vol. 3(1961): 410;
    Gary Bass, "Victor's Justice, Selfish Justice", *Social Research,* Vol. 69 No.4 (2002): 1044;
    Jonathan Turley, "Transformative Justice and the Ethos of Nuremberg", *Loyola of Los Angeles Law Review,* Vol. 33 (2000): 674.

6   Ronli Sifris, "The Four Pillars of Transitional Justice: A Gender-Sensitive Analysis" In: Sarah Joseph and Adam Mcbeth, *Research Handbook on International Human Rights Law.* (Northhampton, MA: Edward Elgar, 2010): 272.

7   Immanuel Kant, *Critique of the Power of Judgement.* (Cambridge: Cambridge UP, 2000 [1790]);
    Jean-François Lyotard, *The Differend: Phrases in Dispute.* (Manchester: Manchester UP, 1988).

8   Nicholas Royle, *Jacques Derrida.* (London: Routledge, 2003): 92-93.

9   Jacques Derrida, "Force of Law: The Mystical Foundation of Authority", *Cardozo Law Review.* Vol. 11 (1990).

10 Ibid, 961-967.

11 In Derrida's usage, the word 'epoche' is synonymous with 'suspension'; Leonard Lawlor, "Jacques Derrida". *The Stanford Encyclopaedia of Philosophy (Spring 2010 Edition).* Edward N. Zalta (ed.), URL= <http://plato.stanford.edu/archives/spr2010/entries/derrida/>.

12 Derrida (1990), 961.

13 Lawlor, "Jacques Derrida", para. 26.

14 Derrida (1990), 967.

15 Jacques Derrida, "Letter to a Japanese Friend" (1985) In: David Wood and Robert Bernasconi (eds.), *Derrida and Différance,* (Evanston, IL: Northwestern UP, 1988).

16 Simon Critchley and Timothy Mooney, "Deconstruction and Derrida" (1994) In: Richard Kearney (ed.), *Twentieth Century Continental Philosophy,* (London: Routledge, 1994): 366.

17 Michael Russell Olsson, "Postmodernism" In: Lisa M. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods, Volumes One and Two.*(London: SAGE, 2008): 655.

18 Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* (Princeton, NJ: Princeton UP, 2002): 59.

19 David Cesarani, *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer",* (Jackson, TN: Da Capo Press, 2007): 233.

20 David Ben-Gurion was Israel's first Prime Minister; he headed the Israeli government between 1948-1954 and 1955-1963. The Knesset is the Israeli legislature.

[21] Matthew Lippman, "The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law", *Houston Journal of International Law,* Vol. 5 No. 1 (1982): 1.

[22] Baade (1961);

J.E.S. Fawcett, "The Eichmann Case". *British Yearbook of International Law,* Vol. 38 (1962);

D. Lasok, "The Eichmann Trial", *International and Comparative Law Quarterly.* Vol.11(1962);

Lippman (1982);

Turley (2000).

[23] United Nations Security Council (UNSC), "Question Relating to the Case of Adolf Eichmann", *UN/S/4349* (1960).

[24] No crime can be committed except in accordance with the law.

[25] No punishment can be imposed without having been prescribed by a previous penal law.

[26] L.C. Green, *"The Maxim Nullum Crimen Sine Lege* and the Eichmann Trial", *British Yearbook of International Law,* Vol.38 (1962);

John K. T. Chao, "Individual Responsibility in International Law for Crimes Against Humanity: The Attorney-General of the Government of Israel V. Adolf Eichmann", *Chinese (Taiwan) Yearbook of International Law and Affairs.* Vol. 24(2006): 47.

[27] Israel Ministry of Foreign Affairs, Nazis and Nazi Collaborators (Punishment) Law, 5710-1950. (Tel Aviv, IL: Israel Ministry of Foreign Affairs, 1945), URL = <http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis%20and%20 Nazi%20Collaborators%20-Punishment-%20Law-%20571>.

[28] International Military Tribunal, *Constitution of the International Military Tribunal,* Article 9, (New Haven, CT: Lillian Goldman Law Library, 1945), URL = <http://avalon.law.yale.edu/imt/imtconst.asp>.

[29] Arendt, *Eichmann in Jerusalem,* 115.

[30] Chao (2006), 48.

[31] Green (1962), 458.

[32] Emilios Christodoulidis, "Strategies of Rupture". *Law Critique.* Vol. 20 (2009): 3.

[33] Jacques Vergès, *De La Stratégie Judiciaire,* (Paris: Les Éditions de Minuit 1968): 97.

[34] Giorgio Agamben and Judith Butler, "Eichmann, Law, and Justice". *European Graduate School Open Lecture Series.* (Saas Fe, CH: European Graduate School, 2009), URL = <http://www.egs.edu/faculty/giorgio-agamben/videos/ giorgio-agamben-and-judith-butler-eichmann-law-and-justice-2009/>.

[35] Arendt, *Eichmann in Jerusalem,* 115.

[36] Baade (1961), 416.

[37] Arendt, *Eichmann in Jerusalem,* 114.

[38] Ibid, 115.

[39] Ibid, 116.

[40] Ibid, 130.

[41] Immanuel Kant, *Critique of the Power of Judgement.* (Cambridge: Cambridge UP, 2000 [1790]);

Jean-François Lyotard, *The Differend: Phrases in Dispute.* (Manchester: Manchester UP, 1988).

[42] Kant, Critique, 43.

[43] Thomas Docherty, "Postmodern Theory: Lyotard, Baudrillard, and Others", (1994) In: Richard Kearney (ed.), *Twentieth Century Continental Philosophy.* (London: Routledge, 1994): 409.

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[45] Arendt, *Eichmann in Jerusalem,* 137.

[46] Swift, *Hannah,* 63.

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FORGOTTEN VICTIMS
Exploring why some wars are described in terms of rape while others are not, despite high levels of sexual violence in nearly all conflicts

Rape as a strategy of war first entered public consciousness during the 1990s. Within the conflict in Rwanda and the former Yugoslavia, it was seen as a new tactic. This diagnosis rested on the widespread and systematic nature of the sexual violence. Since then, the situations in Darfur and the Democratic Republic of the Congo have also come to be described in terms of rape. The sexual violence within this handful of conflicts is seen as somehow distinct and separate from the thousands of other wars that had occurred throughout the years. Despite these assertions, widespread rape has been a feature of the vast majority of wars from ancient to modern times. The varying levels of coverage are not due purely to numerical or strategic differences, but rather to social and political factors including: inaccuracy in reporting, social and cultural conditions, nationalism, propaganda and the international political situation. This essay will investigate the current effective cover up of rape as strategy of war within the 20th and 21st centuries, as well as seek to explore some of its consequences.

Background to rape as a war crime

While rape has been a part of every documented war in history,[1] for many centuries, sexual violence was viewed as an unavoidable byproduct of war. While unfortunate, it was not considered to be a purposeful or coordinated strategy of combat. There was an attitude that rape was a personal, opportunistic sexual act—after all: 'boys will be boys'[2]—rather than a crime against humanitarian law. This attitude began to change slowly throughout the latter half of the twentieth century, beginning with the recognition of the need to protect women in the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1949). However, this document did not establish parameters for rape as a crime of war.[3]

In the 1990s, the conflicts in Rwanda and the former Yugoslavia focused the media and publics attention on war rape. Rather than suggesting that it was public opinion that was changing, it was claimed that what was going on in these two countries was a new, never before seen, crime. In a *Medecins Sans Frontiers* report published in 2004,

MSF (which had been operating in many of the world's major conflicts since 1971[4]) claimed that the 1990s marked the first time that it had been confronted with rape as a strategy of war. Similarly, Amnesty International in 2004 claimed that opportunistic rape and pillage had been replaced by rape as an orchestrated combat tool.[5]   Eventually, due to the efforts of Asian scholars the human rights abuses of the Japanese military against the city of Nanking and the 200,000 so-called "comfort women" also came to be seen as part of a wider strategy of rape.[6] As a result, the *United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities* decided to commission an in-depth study on sexual violence during war[7]. The resulting document, the McDougall report (1998), provided a basis for establishing the systematic use of rape in conflict as its own war crime.[8] It was on this basis that the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia based their decisions, which in turn furthered the conceptualization of war rape as a crime against humanity.[9]

There seems to be a general consensus among both non-governmental organizations and scholars that prior to the 1990s, with the exception of the Japanese and possibly Soviets in WWII, no other actors used rape in the same coordinated, systematic manner as a weapon of war. It is claimed that rape was neither as widespread nor systematic throughout the wars of the 20th century as it is now. Upon close examination, however, it appears that it is not war rape that has changed but public opinion and historiography. The continued depiction of these former wars as somehow different from the current conflicts is due not to actual differences, but holes in the record.

Defining war rape: widespread and systematic

The first hurdle to overcome in a discussion of rape as a weapon of war is to determine exactly what constitutes war rape—that is rape that goes beyond the accepted levels of collateral damage. The McDougall report defined rape as: "… the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or… mouth..."[10] In addition, in order to be considered a crime against humanity, rape must be widespread and systematic. The McDougall report offers no clear definition or threshold for these terms. In addition, much of the other literature simply points to Rwanda and the former Yugoslavia as examples of what widespread and systematic look like. While this ambiguity may be useful legally, as

it allows the terms to be adapted to different circumstances, it makes it especially difficult to apply the terms retroactively, as evidence has long been covered up.

Despite these ambiguities, it is clear that sexual violence has been widespread in many conflicts—at least widespread enough to merit further investigation. Table 1.1 lists widely accepted numbers of rape victims in a variety of twentieth century conflicts:

Table 1.1

Conflict	Duration of Conflict	Perpetrator	Victims	Number of rapes
Second Sino-Japanese War: Rape of Nanking	1937	Japanese in Nanjing	Residents of Nanking and surrounding villages	20-80,000 women[11]
Second Sino-Japanese War	1937-1945	Japanese soldiers	"Comfort" women, mostly Korean	200,000 women[12]
WWII	1939-1945	Nazi soldiers and their allies on Eastern Front	Mainly Russian and Jewish women	More than 1 million[13]
WWII	1941-1945	Americans on Western Front	German, French and British Women	17,000 women[14]
WWII	1945	Soviets in Germany	Mainly German women	2 million in the first few months[15]
Bangladesh Liberation War	1971	Pakistani military	Bengal civilians	200,000 women[16]
Yugoslav wars of succession	1991-1995	Mainly Serbian and Croatian soldiers	Mainly Bosnian civilians	25,000-50,000[17];
Sierra Leone	1991-2002	Various militaries	Civilians	Over 50,000[18]
Rwanda Genocide	1994	Mainly Hutu militias	Mainly Tutsi civilians	250,000 to 500,000[19]
First and Second Chechen Wars	1994-1996; 1999-2009	Russian military	Chechen civilians	Unknown; thought to be in the thousands[20]
Current conflict in the Democratic Republic of the Congo	2003 to present	Various militias	Civilians, especially in the Eastern region	40 women/day[21]; 820 women from July to December 2003[22]

This is certainly not a complete list.

Beyond the issue of numbers, it seems that one of the main areas of contention in the literature surrounding war rape is the question of intention. It is posited that the intention behind rape ranges from purely opportunistic to intensely systematic. It is overtly systematic cases of rape that have drawn public attention in the last two decades. Some would argue that this is the difference between the use of rape as a weapon of war in current conflicts, and the instances of rape in conflicts prior to the 1990s. I would argue, however, that in war there are no purely opportunistic rapes. All rapes, even if they are not dictated or even condoned by military and political elites, are somewhat systematic in nature. Opportunistic seems to suggest that there is no purpose in these rapes beyond personal sexual pleasure. A close look at the specific circumstances surrounding rape quickly reveals that there are always wider implications. For one, it is widely recognized that rape is an effective manner to dissolve the social bonds in a community, to silence women, to terrorize both women and their families and to force the movement of civilians.

In addition, suggesting that rape in some conflicts is purely about pleasure and opportunity—the result of a disorganized military—does not explain the high levels of female mutilation, gang rape, forced impregnations and public assault seen in many wars. It is these types of crimes that have drawn the most attention in recent conflicts, however they are not a new phenomena. While there is not enough space in this essay to fully document these atrocities, Table 1.2 provides examples of similar incidents before and after 1990:

Table 1.2

	Post-1990	Pre-1990
Female mutilation	"Women's breasts were cut off; pregnant bellies were ripped open, so the fetuses could be pulled out; and genitals were torn apart with military tools."[23] (1991-1995, Serbian soldiers in Bosnia)	"Before the eyes of mothers… They took their knives and cut out sex organs, forced bodies, both dead and alive, into the most disgusting poses, and cut off noses, breasts, and ears."[24] (1942, Nazi soldiers in the Minsk ghetto)

Gang rape	"Gang rapes often took the form of very young victims enduring gang rapes, with rebel combatants lining up to take turns…The extreme violence with which girls and women were raped often resulted in severe initial bleeding; tears in the vagina, anus, and surrounding tissue; long-term bleeding and incontinence; and sometimes death."[25] (1991-2002, Sierra Leone Civil War)	"The soldiers then stripped the girls and took turns raping them… Chinese witnesses described the body of an eleven year old girl who had dies after being raped continuously for two days."[26] (1937, Japanese soldiers in the city of Nanking)
Forced impregnation	"Women were assaulted frequently, apparently for the purpose of forced impregnation (women were told that was the case, and pregnant women were sometimes held past the point when an abortion was possible)."[27] (1991-1995, Bosnian women raped by Serbian soldiers)	"The most serious crisis was pregnancy. Accurate statistics… were difficult to determine but 25,000 is the generally accepted figure."[28] (1971, Bengal women raped by Pakistani soldiers in the Bangladesh Liberation War)
Public Assault	"In many cases, women have been raped in public, in front of their husbands, relatives, or the wider community, Amnesty says. This is in order to humiliate her, her family and the entire group."[29] (2004, Janjaweed militia attacking Darfuri civilians)	"Most of the violations were gang rapes, usually in front of German eyewitnesses—especially before the eyes of husbands, sons, and fathers."[30] (1945, Soviet soldiers in Berlin)

Here, it is worthwhile to note that most of the counter examples in this paper are drawn from WWII. This is due simply to the absence of literature on other conflicts. While discussions of rape in WWII form only a remarkably small portion of the literature surrounding this conflict, resources do exist. In contrast, the literature surrounding many other conflicts, on which relatively less has been written, offers no specific examinations or inquiries into the use of rape as a weapon of war. Often, while general statistics as to the suspected number of rapes in these conflicts are available, there are no reports on the details of these attacks or these reports are not available in English. As such, this paper will focus to a large extent on the forgotten history of rape during WWII, but this should not be taken as a unique example. Where possible, other examples will be offered.

In addition, it should be noted that while systematic and widespread rape is the rule in most conflicts, there are some exceptions. The conflict between Israel and Palestine, for example, seems to have resulted in surprisingly few rapes.[31] Alternately, one side may commit rape while the other does not. For example, during the Sri Lankan Civil War there were almost no reports of the LTTE raping civilians, despite their policy of ethnic cleansing. In contrast, it is known that government security forces frequently raped Tamil women suspected of being potential suicide bombers.[32] While these examples are interesting and certainly merit further study, they must be recognized as exceptions to the rule and outside the scope of this paper.

Thus, having determined that widespread and systematic rape is a feature of most conflicts, why are only some conflicts described in these terms?

1. Inaccuracy in Reporting

Reports of rape, evening during times of peace, are notoriously inaccurate. Conflict only exacerbates this problem. First, there are issues of evidence. Most of the injuries sustained during rape are to soft tissue. As such, sexual violence often does not leave long-term forensic evidence. The exhumation of mass graves will not show sexual violence, unless there was mutilation or dismemberment.[33] As such, if a woman is murdered before she can report her rape it is unlikely that it will ever be discovered. Many soldiers are aware of this fact, and so murder often follows rape: "The [Nazis] would take girls, rape them, and then kill them. They shot them. They were ashamed… They wanted after they raped them, they wanted to wipe up the evidence."[34]

Second, women often have more incentives to stay silent than to report rape. They may fear reprisal from perpetrators, or even from friends and family.[35] Others cannot report their rape, as fighting restricts their movement: they may be stuck in a camp, or have to walk great distances in order to reach health facilities.[36] In the DRC, reports of rape are much higher in areas where health services are available. Where the fighting is fiercest, and logically where the greatest number of rapes are actually occurring, women would have to walk literally hundreds of miles, potentially risking their lives, in order to report their rape.[37] As such the numbers are severely skewed.

The actual assembly of statistics can also be difficult. Gang rape and repeated rapes make tallying the numbers almost impossible. A civilian can only be killed once, but they can be raped over and over

again. German journalist Marie Hillers was raped four times during the Soviet occupation after WWII, twice by more than one man:[38] how many times does her rape count? If a woman is treated by two different health facilities, do they both report her rape? If a woman is raped by two different armies or in two different conflicts, how many times does she count? As of now, it does not appear that anyone has come up with a fully comprehensive system of how to report these statistics. Even if there was, reporting is so inaccurate that these numbers would continue to be depressed.

Finally, the question of definition once again becomes an issue. During times of conflict, women sometimes offer up sexual services in order to obtain food or protection[39]. They may be forced into prostitution by the enemy army, as the "comfort women" during WWII were. Incidences of trafficking also increase during war. It becomes difficult to decide exactly which incidents count as rape and which do not. All these factors make it almost impossible to accurately determine the number of rapes that occur in any conflict. Instead, the sexual violence that accompanies war is often simply forgotten.

2. Social and Cultural Conditions

In discussions of rape as a strategy of war in recent conflicts, scholars point to the cultures of honor and possession surrounding female sexuality in these countries as the force behind the attacks that make rape such an effective weapon of terror and torture. Maria Olujic writes "war rape would not work as well as a policy of terror were it not for the cultural salience within the honor/shame complex generalized in the southeastern European cultural area."[40] Recently, many major news sources have reported on the phenomena of women being ostracized from their families after being raped in the Great Lakes region of Africa.[41] The risk of rejection by family and friends, not only increases the horror of being raped, it also decreases the likely hood that women will report their rapes and seek medical attention—which makes it difficult to ascertain numbers.[42] The tone of these articles often seem to suggest that this is an isolated cultural phenomenon, specific to these conflicts.

However, the honor/shame complex has cultural salience worldwide. While the exact consequences of rape for women may differ, there is not doubt that shame and the possibility of rejection are universal traits. For example, after the Bangladesh Liberation war, the social tensions between raped women and their communities became so

bad that the government tried to counter this by calling them heroines who needed protection and reintegration. While some men agreed, most did not and demanded extra dowry payments from the government before they would allow them to return home or marry them. [43] Thus, the honor/shame complex is not specific to Bosnia-Herzegovina, Sudan or the Democratic Republic of the Congo.

Nor is this phenomenon specific to developing, Muslim or non-Western countries. In the aftermath of World War Two, European women who were seen as "collaborators"—either because they were raped by the enemy soldiers and/or cohabited with them—were publically humiliated in the streets of many European cities. According to Jeffrey Burds,

In most cases [in France and Belgium], the women were hounded or kidnapped from their homes and forced to march in impromptu parades, performing symbolic gestures of collaboration along the way… all to the raucous cheers of appreciative crowds.[44]

In Soviet-occupied Germany, while most women who were raped by Soviet soldiers considered themselves loyal to their husbands, many men accused their wives of betrayal and collaboration: "The woman's implied "consent" to be a victim of violence (exemplified by the fact that she lived to tell the tale rather than dying in the struggle to save her virtue) meant ipso facto that she had collaborated with her perpetrator, and deserved not compassion but disdain."[45] As a result, vigilante violence against women suspected of sexual relations with non-German men became common. It is not known how many women suffered this double victimization: first at the hands of enemy soldiers and then their own community, however, estimates are alarmingly high. Fabrice Virgili suggests that as many as twenty to twenty five thousand French women were subjected to ritualized humiliation following liberation.[46] As a result, not surprisingly, many of these women refused to ever speak about what had happened to them. Their rapes, like their public humiliation, have become largely forgotten. It is the presence of this shame/honor complex in all societies that allows rape to be mobilized so effectively as a weapon of war across time and space.

3. Nationalism

Sometimes, even when someone is willing to discuss what has happened, patriotism and national pride prevent the public from even considering this revisionist history. In 2005, Sarmila Bose, an American political scientist of East Indian decent, presented a paper entitled *Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971* at

a US State Department Conference. In the paper she claims that violence
was inflicted on the civilian population by both sides—not just by the
Pakistani army—and in a small paragraph at the end of the article notes
that she found evidence of relatively few incidents of rape.[47] Before the
paper was even published in *Economics and Politics Weekly*, Pakistani
newspapers ran the story, focusing mainly on the brief paragraph on
rape. The article drew such a thunderstorm of criticism in India and
Bangladesh that it has since been removed from the *Economic and
Politics Weekly* website. Indeed, it is essentially impossible to find a
copy of this article online. There are, however, a number of different
Bangladeshi websites set up to refute the claims that Bose allegedly
made. Even six years after publication and forty years after the war,
the exact facts of the conflict remain controversial. Without access to
the original article and extensive research, it is difficult to determine
the facts of the case. In general, non-Bengal and Pakistani NGOs and
academics report that as many as many as 200,000 to 400,000 women
were raped throughout the conflict.[48] The issue of nationalism can cloud
reporting on the atrocities, long after the last rape has occurred.

4. Propaganda

Rape has also been used much more transparently as
propaganda. When the Germans invaded Belgium at the beginning of
WWI, rape became an international metaphor for Belgian humiliation.[49]
There is no doubt that the German army did commit many atrocities in
those first few months. There are reports of gang rape, statutory rape,
public humiliation and mutilation.[50] Towards the end of 1914, however,
substantiated incidents of rape began to decline as armies settled down
into stationary trenches. However, according to Susan Brownmiller, after
the first few months of the war, allied countries no longer even attempted
to determine the actual statistics or verify rumors. Instead they turned
rape into highly successful propaganda campaigns, coining such terms
as "the rape of the Hun."[51] This propaganda spurred American interest
in the war, and laid the groundwork for their eventual involvement.[52]
Ironically, after the war, this propaganda led to a backlash against women
who claimed to have been raped. The exaggerations and inventions of
Allied propaganda were assumed to apply to all atrocities, and the claims
these women made were dismissed.[53]

5. The Wider Narrative Context and International Political Situation

Finally, the international political situation at the end of a conflict often dictates what will and will not be remembered. In 1937, during the Rape of Nanking and its immediate aftermath, the public was relatively aware of what had happened. Within weeks of the atrocities beginning, American reporters in the city had filed stories that were picked up by every major Western newspaper.[54] News of the atrocities fueled anti-Japanese sentiments among American audiences. Stories of mass rape were so persistent that the term "Rape of Nanking" soon became a common metaphor to describe the invasion of the city.[55]

When the Japanese were tried for their war crimes at the International Military Tribunal for the Far East, the Western missionaries who had been in the city at the time testified to the enormity of what had happened in Nanking. The tribunal came to the conclusion that 20,000 rapes occurred within the first month of occupation.[56] Despite this initial awareness of what had happened in Nanking and the fact that some members of the Japanese military were found guilty, by the 1990s when Iris Chang began her book on the incident, the Japanese attack had been all but forgotten.

Chang suggests that this process of forgetting was due to the politics of the Cold War era. Almost immediately after the end of WWII, China descended into civil war, and when the Chinese Communist Party finally achieved victory in 1949, neither the government in Beijing nor Taiwan was particularly interested in seeking war reparations from the Japanese government, as they were competing for trade and international recognition. [57] A period of isolation descended on China. Even the United States, worried about the looming threat of the USSR, sought the friendship and loyalty of its former enemy.[58] Until the end of the Cold War, the Rape of Nanking remained nothing more than a footnote in history. In the 1990s, young Chinese Canadian and American scholars began to investigate the stories they had heard from their parents and grandparents.[59] They began a process of historical revision that continues till this day.

Conclusion

Ultimately, these facts lead to a question: why, if the use of rape was systematic and widespread throughout the conflicts of the twentieth century, has it come to the forefront recently with such dramatic results?

Like in Belgium in 1914, rape was used to bring attention to the conflict in Bosnia. The government used the atrocities to evoke sympathy in the West and make a plea for military intervention.[60] Like in WWI, that help came—but this time the rape was not forgotten. Bosnia is not set apart by the "systematic and organized use of war rape as a strategy,"[61] but by the response to that strategy. For the first time in history, war rape resulted in a serious open debate about the gendered aspects of war.[62] For centuries, war rape has resulted in a mass silencing of women.[63] Raped women have remained socially invisible; historical records reflecting mainly men's experiences of war. This was not the case in Bosnia. Only at the end of the twentieth century had women gained enough power internationally to challenge old perceptions of rape.[64] Thus, the 1990s did not mark a new strategy of war, but a new perception of an old strategy.

Recognizing this changing perception is important. If we view Bosnia, Darfur, and the DRC as unique we run the risk of silencing future generations. Accepting some cases of rape as inevitable aspects of war leads to condoning it. Recognizing the ubiquitous nature of rape as a weapon of war throughout history will force national militaries to be more aware of the problem, and encourage the international community to hold them to a higher standard. It will decrease skepticism when reports of widespread rape in conflict zones inevitably appear again. In time, it will begin to decrease the stigma surrounding the women that have suffered war rape and increase our ability to provide these women with the appropriate resources. Finally, it will honor, for the first time in history, the millions of women who have suffered this horrific fate and been forced to remain silent.

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POPPIES AND PILLS AT THE POLITICAL-ECONOMIC NEXUS:
Coming to Grips with the Golden Triangle

Shannon Mckimmin

After a century of international efforts in tackling the illicit-drug economy, the trade has proven itself resilient and adaptive—so much so, that the world's drug problem today is more entrenched and encompassing than it ever has been. Despite decades of experimentation and continued failure, anti-drug efforts still rely heavily on eradication and punitive measures aimed at reducing supply. In taking a look at the trade in opiates and amphetamine-type substances (ATS) in Southeast Asia, this paper explores why such drug-control policies have not—and ultimately cannot—succeed without addressing other issues first. The drug trade flows through a complex and multi-tiered network of various actors and localities, one that is intimately tied to political and developmental issues more than anything else, and coming to terms with this political-economic nexus is a crucial prerequisite for any successful anti-drug initiative.

Introduction

A study of the Golden Triangle offers crucial insights into a complex phenomenon that is played out by various actors on local, regional, and global levels. From peasant farmers to petty street dealers, state officials to transnational criminal networks, the drug trade epitomizes the illicit underside of globalization. As such, it also demonstrates how attempts to locate and eliminate any presumed source is futile, for the drug economy's sources are increasingly dispersed and transposable and will therefore elude any fantasy of "containing" the world's growing drug problem. It is clear that any agenda aimed at eradication or punitive measures will prove both ineffective and counterproductive, and yet such an agenda continues to inform our global anti-drug initiatives.

Following a brief primer on international drug-control efforts over the last century, the discussion will centre in on the regional level and in Burma itself, where opiate and ATS[1] production have seen a boom in recent years. In taking a critical look at anti-drug efforts in mainland Southeast Asia, this paper attempts to highlight what its author thinks is

a fundamental yet largely neglected stumbling block. While there have been calls to address drug production in the context of development, with many strides made in that direction and with some success, the political side of the equation is still often left out of the discussion. The drug problem is political as well as economic in nature—and not criminological—and while these spheres are often difficult to disentangle, such a re-conceptualization of the issue is critical if anti-drug initiatives are to have any significant impact.

A Century Later: The Trials and Errors of International Drug Control

From their beginnings at the International Opium Commission of 1909, global drug control regimes have a short and less than venerable history. In spite of three major international conventions (1961, 1971, 1988) and the creation of a specialized UN body to deal with the issue, "the 'Drug Free World' proclaimed by the motto of the UN anti-drug agency has proved an elusive goal."[2] Tending to the interests of the world's main consumer countries (namely, the United States and those in Western Europe), the flow of these illicit substances has been targeted mostly at producing countries in an attempt to eliminate drug supplies at their presumed source. A shift in attention from supply to demand has been welcomed in recent years, yet little of it has proved forthcoming and efforts remain focused on the former. There are many reasons for this intransigency, and ample literature has been written on the subject. While "the zero tolerance ideology embedded in the 1961 UN Single Conventions is increasingly challenged by calls for decriminalization, harm reduction, and embedding human rights principles in drug control," writes Tom Blickman for the Transnational Institute, "the bottom line is that we are stuck with a convention that is obsolete, impossible to amend and which has lost its integrity."[3]

Unfortunately, governments in producing and transit countries have followed this lead, often failing to acknowledge the realities of drug dependence and relying heavily on punitive measures. "A socio-economic issue is addressed from a legal standpoint," writes Chouvy, and as a consequence drug production "is targeted as a cause of further problems—illegality, corruption, addiction, etc.—rather than seen as a consequence of poverty related problems…"[4] As with the US-led 'War on Drugs' and the forced eradication campaigns that continue to guide policymakers, development-based alternatives have also left much to be desired. In addition to being "inadequate, ill-funded, and improperly

sequenced," what prevents these approaches from achieving any lasting and meaningful success at global or regional levels is a fundamental ignorance of how illicit drug economies work and an inability (or unwillingness) to address the conditions that created those drug-producing regions in the first place.[5] They have failed, in other words, to address the political side of drug economies. As a result, many of these schemes have only served to exacerbate the problem. As McCoy put it in his seminal study over thirty years ago:

> In the decades after World War II, drug prohibition would foster a global illicit economy that funded criminals, warlords, rebels, terrorists, and covert operations. Failing to understand the character of these commodities, the international community would persist with a range of ineffective, ultimately counterproductive, policies in a self-defeating attempt at prohibition of all illicit drug use.[6]

According to the latest statistics provided by the UN Office of Drug and Crime (UNODC), the global area under opium poppy cultivation has declined by 23 percent since 2007.[7] These apparent signs of success, however, need to be put in context: since 1998, when the General Assembly first held a 'Special Session' (UNGASS) devoted to the drug problem, and at which time a ten-year plan of action was launched to address the issue, the estimated potential for global opium production has increased by 78 percent.[8] Production levels for other illicit drugs such as coca and, in particular, ATS are no less troubling.[9] "Ten years later," UNODC Executive Director Antonio Maria Costa laments, "people question whether the world has become a safer place."[10] After coming under the spotlight the UNODC can no longer afford the dubious tactics its office has been criticized for in the past, such as "rewriting history" in an attempt to "hide its failures," and the social costs of supply-side measures and mismanaged development schemes continue to garner criticism.[11]

Lessons from the Golden Triangle

Southeast Asia's Golden Triangle—where the borders of Thailand, Laos, and Burma intersect—has long been infamous for its opium production. While the drug's use by ethnic minorities in the highlands was known for centuries, a number of disparate developments have been linked to increased production, the switch to heroin and, more recently, to ATS. Opium cultivation was first exploited for criminal purposes by remnants of the Kuomintang seeking sanctuary in the area,

particularly in northeast Burma, from 1950 onwards.[12] It was during the same period that governments began cracking down on the trade, and so heroin—which is more compact and easier to smuggle than raw opium—became more popular in the process. So it was that the French and American wars in Vietnam and the closing of the Turkey-Marseille route of heroin traffic in the 1970s further galvanized a burgeoning drug economy.[13]

While pharmaceutical amphetamines appeared during the same period, first as over-the-counter "speed" brought over from South Korea, their use remained limited and was largely restricted to Thailand.[14] When in 1967 the substance was criminalized in the same category as heroin by the Thai government, it seems to have all but disappeared. In the 1990s, however, permanent laboratories were established across the country, and after 1996—as a result, it is commonly thought, of a crackdown on the heroin trade and the surrender of infamous Sino-Burmese drug lord Khun Sa and his Mong Tai Army—"the use of methamphetamine swept over Thailand like an epidemic."[15] While centered on Burma, the production and use of ATS has since become widespread throughout East and Southeast Asia, and its spread shows little sign of abating (fig. 1 and 2).

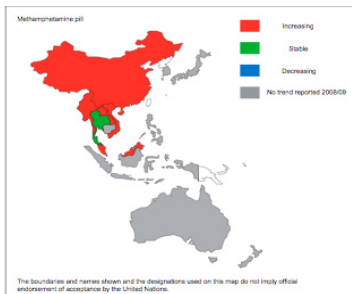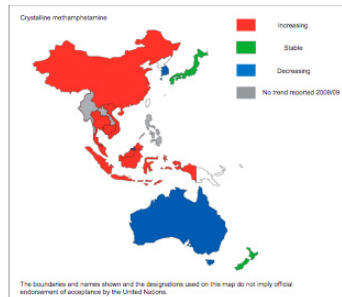Fig. 1: Methamphetamine pill use trend, 2009   Fig. 2: Crystalline methamphetamine, 2009


Source: AIPAC

Until very recently, overall levels of opium eradication in the Golden Triangle have been impressive in terms of fallen output (fig.3). UNODC can proudly report that Laos and Thailand "have both reached such low levels of opium poppy cultivation that they no longer produce

opium for the international market."[16] While in the 1990s Afghanistan emerged as the primary source of heroin it is today, the Golden Triangle "has seen its opium crop plummet to just a fraction of world supply" over the same period, and some believe it may provide the secret for anti-drug campaigns in Afghanistan.[17] Yet the eradication of opium cultivation and heroin production in Thailand and Laos has not solved the region's drug problem by any means—and with the rise of ATS, many believe it has actually gotten worse. Indeed, by driving up prices and shifting production to other areas, 'success' in Thailand and Laos has likely contributed to increased production in Afghanistan and Burma. And this is to say nothing of the social costs of that success, which also need to be weighed in.

Fig. 3: Opium production in Southeast Asia (metric tons), 1998-2010
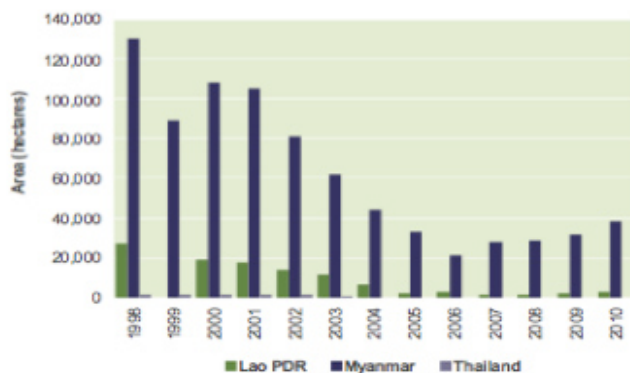
Source: Southeast Asia Opium Survey 2010 (UNODC)

Opium bans were implemented in Burma in the mid-2000s, and while declines have been suggestive—with its global share of opium production falling from 32 percent in 1998 to just 5 percent in 2006—it remains the second largest producer after Afghanistan.[18] Moreover, one ought to maintain a long-term perspective: "In regards to the quantity being harvested," Lintner and Black remind us, "the production is merely back to what it was before the opium boom of the 1990s."[19] 2010 also marked the fourth consecutive year of growth, with production increasing 76 percent and bringing its global share back up to 16 percent in that year alone.[20] The estimated value of the 330 tons of opium thought

trafficked out of Burma in 2009 was US$360 million for those plying the trade from within the country, and up to $3 billion at its destination markets.[21]

Most of Burma's opium is grown in Shan state, the country's most populous region and one of Southeast Asia's most conflict-ridden areas, playing host to a variety of ethnic armed groups. Of these diverse groups, powerful members of the Wa State and its army are now in control of areas where opiate and ATS production are most concentrated. Having promised to lay down their weapons in 1989, the Burmese government "gave the former insurgents virtual freedom to engage in "private" business activities, a euphemism for narcotics trafficking."[22] In the two decades since the ceasefire, Burmese authorities have not conducted any major campaigns against drug trafficking organizations.[23]

The role played by Wa State officials, either as supervisors or merely as profiteers or even pawns, is open to some debate. It is beyond the scope of this discussion to explore to what extent each actor is involved, as important as this will prove for effective policymaking. For our purposes the point is to show the diversity of actors engaged and to demonstrate that the drug trade does not begin and end with producers or with those in the area in which drugs are produced. Suffice it to say that, while the heroin trade helped to fund insurgencies in the 1970s and 1980s, "[o]ver the past two decades the drug trade has remained one of the few viable businesses in this traditionally very poor area." [24]

Making the least profit from this lucrative business, farmers in the area do not play a role in the opium trade or in transforming the opium into heroin. "Although the low-level buying and selling of opium in the Wa area can be observed in the marketplaces or villages in the remote hills," explains Chin in his study of the Wa drug economy, "mid-level and high-level transactions are conducted out of sight by a tight network of opium merchants."[25] Key players in this network included Burma's Luo Xinghan and Khun Sa until the mid-1990s, while today Wei Xuegang's group and certain members of the Wa government—such as the Bao brothers and their associates—are most prominent.[26]

In spite of apparent efforts to dismantle it in the past, faced with such an entrenched drug economy and a complex political situation, state authorities in the Wa area necessarily play a part in enabling the trade. Officials at different levels of government "facilitate the free flow of opium from farmers to heroin producers by taxing, purchasing, and trading opium," says Chin, "both as individual entrepreneurs to enrich themselves and as representatives of their respective official units to fill

their government coffers."[27] Farmers will therefore cultivate opium with encouragement from authorities and as a means of survival, while for local leaders it is a lucrative business opportunity that generates both personal wealth and goes to funding state building in the area. Every level of society within this drug economy, then, may have a vested interest in its perpetuation, and it is no easy task discerning its victims from its beneficiaries.

Relations between powerful Chinese 'entrepreneurs' and local government officials, such as those between Wei and the Bao brothers today, are also largely symbiotic. As Lintner and Black explain:

> Without the Baos' physical control over a large territory, Wei would never under present circumstances be able to conduct his nefarious businesses in peace. And without Wei, the Baos would not have access to the regional and international crime networks through which they market illicit products from their area. And this is precisely one of the critical points that UNODC officials, as well as certain researchers who have written on the subject, seem to have thus far overlooked or otherwise chosen to ignore.[28]

It is also likely that at least some members of the central government (SPDC[29]) have a direct hand in the trade. "There is growing evidence that Burma's military regime," writes Dupont, "far from prosecuting the war against drugs, has effectively become part of the nation's drug problem."[30] Yet, as with the Wa officials who profit for both personal gain and state building, the role of the state junta is by no means straightforward. There are different levels of involvement. A "self-support system" for troops in the fields and their families has meant taxes on production and the expansion of the army's own poppy fields, while at higher levels the "role of the military authorities is not to buy and sell drugs but to protect the trade."[31] Then again, according to various sources, Burma's economy and its massive military spending budget are kept afloat in large part by money coming from drug lords like Wei.[32] Those drug lords, in turn, have been allowed to invest in major legitimate business ventures throughout the country and along its borders, including casino resorts and national banks.

Yet, as one Burmese drug enforcer Chin interviewed has said, "from our point of view, involving drug lords in legitimate businesses is the best way to lure them away from the drug scene."[33] From the government's perspective, then, drug control involves more than just prevention and suppression measures. "Very often, drug control in Burma

is politicized," writes Chin, "and political considerations probably play a more important role than any other concerns."[34] This speaks to a crucial aspect of the drug trade that cannot be but often is ignored, particularly where a deeply entrenched drug economy has spun such an intricate web, implicating actors at every level of the country's social and political hierarchy, and beyond.

Given the involvement of all these diverse actors and the complex relations between them, to assert that the "illegal drug trade in the triangle has long been dominated by ethnic Chinese gangs" would be mistaken, or at best only partly true.[35] Dupont does explain how remnants of the Kuomintang formed symbiotic relations not only with local ethnic armed groups like the Wa and perhaps with the SPDC itself, but also "political and business associations with Chinese Triad gangs in Hong Kong, Macau, Thailand, Malaysia, Taiwan, and China itself," providing them with "the crucial distribution and financial networks for heroin trafficking."[36] Lintner and Black give such organized crime groups even greater significance, identifying them as one of the main obstacles to peace in Shan State, stating that "their power and influence—as well as their ability to manipulate local rebel leaders, government officials, and drug enforcement agencies—is considerable."[37]

They are therefore critical of anti-drug and law enforcement agencies that "tend to concentrate their efforts on the armed bands—and hilltribe peasants—inside Shan State, as if they had contacts in Hong Kong, New York, and Amsterdam."[38] Lintner and Black's criticism is supported here, but perhaps both they and Dupont are simplifying the picture somewhat. For his part, Chin believes that "there is little evidence to suggest that traditional Chinese organized crime groups such as the triads, tongs, and gangs in Asia and the United States dominate the Southeast Asian heroin business."[39] Rather, he sees a new criminal type in "otherwise legitimate businesspeople who are also opportunists and risk takers," none of whom are organized into any group and as such will prove much more elusive.[40] Chin depicts the region's drug economy in an altogether different light, one that sounds closer to the truth and, if it is, unfortunately complicates the problem there beyond anything most other observers have so far been able to fathom:

> The assumption that Wa leaders, Burmese authorities, and traditional organized crime groups all work together to promote the drug trade in the Golden Triangle fails to provide us with an objective and nuanced understanding of the problem. There are many other groups in Burma that are involved in the drug business (e.g. the Kokang, Mengla, Kachin, and Shan), Burmese

authorities are unfairly accused of major participation in the drug trade, while organized crime groups do not play a dominant role in the Southeast Asian illicit drug industry.[41]

"In the past quarter century," Maria Costa has written, "global governance has failed to keep pace with economic globalization" and, "[d]espite the gravity of the threat, [transnational] organized crime is insufficiently understood."[42] That may be true where organized crime is concerned, but his statement also betrays a failure to acknowledge how much transnational crime may have moved away from being "organized" as such. The drug trade emanating out of Burma as Chin presents it is revealing in that regard. While, admittedly, there has been recognition within the UNODC that "both highly structured and loosely structured organizations are involved in transnational organized crime" and that "the former are losing out to the latter," it nonetheless fails to capture the radically fluid, horizontal and opportunistic form these 'networks' are increasingly taking.[43] With reports in 2009 that members of "Mexican syndicates were arrested in the region smuggling chemicals used in the production of methamphetamines" and that "East African gangs" were active in Thailand and Laos, it is just as likely that these individuals had little to do with "syndicates" or "gangs" at all.[44]

Conclusions

The failure to acknowledge these complexities leads not only to failed policy initiatives but, as Thailand's 2003 war on drugs demonstrated, can also jeopardize the security and human rights of the many people inevitably caught up in the illicit economy. Beyond the illegality of extrajudicial killings in those months, some question whether "the Thai government unjustifiably went after low-level drug dealers while ignoring the fact that so many Thai police, politicians, and government officials were implicated in the drug trade."[45] While UNODC does train customs and law enforcement agencies in the region, it is usually carried out at regional conferences "where no one mentions the fundamental hurdle that must be overcome if any drug eradication is to be successful: official complicity in the trade."[46]

For a country with relatively little crime yet some of the worst prison crowding in the world, in 2003 Thailand listed ninth for the numbers incarcerated relative to the size of its population.[47] A punitive response to spreading ATS use has already placed a considerable burden on the justice system for many countries—in Brunei, Cambodia, Laos and Thailand, methamphetamine-related arrests accounted for over

seventy-five percent of arrests for drug law violations in 2008.[48] "While drugs may have a pernicious effect on individual lives and society," UN Special Rapporteur Anand Grover has protested, "this excessively punitive regime has not achieved its stated public health goals, and has resulted in countless human rights violations.[49]

Fig 4: Major trafficking routes

Given that opium/heroin derives from a crop-based plant, and indeed if one looks at a map of trafficking routes in the region (fig. 4), it is easily understood why many continue to approach the problem as if it had a tangible source or main culprit. Where are the drugs being produced, and who is moving them? We have seen how misguided this common-sense approach is, for no single group or actor is ultimately responsible for the trade, and the policies inherent to such an approach have proven not only counterproductive but in many cases inhumane. And with the alarming rise of ATS this reality is becoming less escapable. The drug is produced in small and often mobile labs, while ATS traffickers are more numerous and tend to carry small quantities of pills across borders, forming what Thai authorities have disparagingly called an "ant army."

Rather than relying on 'quick fixes' like eradication and punitive measures, we need a radical shift away from supply-side initiatives that engender a futile search for sources, and focus instead on demand reduction, alternative development and political reform. In Burma, as in Afghanistan, addressing the political situation remains the fundamental stumbling block—yet, as developments since the 1989 ceasefire have demonstrated, relative peace and political stability will not ensure an end to the drug economy on its own. Illicit drug production "has benefited not only from synergies between war economies and drug economies," notes Chouvy; "it has also thrived on underdevelopment and poverty."[50] We need to re-conceptualize the drug trade and begin addressing it

systemically if any meaningful change is to be brought about, and this means not only moving away from the punitive response but giving equal attention to the politics and economics behind drug production in the region.

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[1] The term 'amphetamine-type stimulants or ATS is used to refer to a category of drugs that includes methamphetamines, amphetamines and 'ecstasy'.

[2] Pierre-Arnaud Chouvy, Opium: Uncovering the Politics of the Poppy (2010): xiv.

[3] Tom Blickman, "Time for a realistic new international drugs framework" (March 2011): <http://www.tni.org/article/time-realistic-new-international-drugs-framework>

[4] Pierre-Arnaud Chouvy, Opium: Uncovering the Politics of the Poppy (2010): 158

[5] Ibid: xiv.

[6] Alfred W. McCoy, *The Politics of Heroin* (2003): 11.

[7] UNODC *World Drug Report: Executive Summary* (2010): 11.

[8] Ibid: 13.

[9] While global cocaine production is said to have "declined significantly" between 2004 and 2009, it has increased 5% since 1998. Due to the decentralization of production, it is difficult to track global trends in ATS markets but, after tripling in the early years of this decade, ATS seizures have "remained largely stable at very high levels in 2008." (UNODC *World Drug Report* 2010)

[10] UN Doc CA/SHC/3947 <www.un.org/News/Press/docs/2009/gashc3947.doc.htm>

[11] Transnational Institute, "Rewriting history: A response to the 2008 World Drug Report." Drug Policy Briefing No. 26 (June 2008).

[12] Alan Dupont, "Transnational Crime, Drugs, and Security in East Asia," *Asian Survey* 39:3 (May/June 1999): 441.

[13] Daniel Ray Lewis, *UNODC Report: The Long Trip Down the Mountain* (2001): 24.

[14] Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 10.

[15] Daniel Ray Lewis, *UNODC Report: The Long Trip Down the Mountain* (2001): vii.

[16] UNODC, *Opium Poppy Cultivation in Southeast Asia* (2009): 9.

[17] Alastair Leithead, "Secret of Thai Success in Opium War," *BBC Online* (Feb. 19th 2009).

[18] UNODC, *Opium Poppy Cultivation in Southeast Asia* (2009): 11.

[19] Bertil Lintner and Michael Black, *Merchants of Madness* (2009): ix.

[20] UNODC, *Southeast Asia Opium Survey* (2010): 11.

[21] UNODC, *Transnational Organized Crime Threat Assessment* (2010): 257.

[22] Alan Dupont, "Transnational Crime, Drugs, and Security in East Asia," *Asian Survey* 39:3 (May/June 1999): 443.

[23] Ko-Lin Chin, *The Golden Triangle: Inside Southeast Asia's Drug Trade* (2009): 195.

[24] Ibid: 2.

[25] Ibid: 82.

26 Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 67-85.

27 Ko-Lin Chin, *The Golden Triangle: Inside Southeast Asia's Drug Trade* (2009): 82.

28 Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 76.

29 The central government in Burma, formerly known as the State Law and Order Restoration Council (SLORC), now refers to itself as the State Peace and Development Council (SPDC).

30 Alan Dupont, "Transnational Crime, Drugs, and Security in East Asia," *Asian Survey* 39:3 (May/June 1999): 444.

31 Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 96.

32 Ko-Lin Chin, *The Golden Triangle: Inside Southeast Asia's Drug Trade* (2009): 197.

33 Ibid: 197.

34 Ibid: 197.

3   Thomas Fuller, "UN Says Opium is Expanding in Myanmar," *New York Times* (December 14th 2009).

36 Alan Dupont, "Transnational Crime, Drugs, and Security in East Asia," *Asian Survey* 39:3 (May/June 1999): 441.

37 Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 60.

38 Ibid.

39 Ko-Lin Chin, *The Golden Triangle: Inside Southeast Asia's Drug Trade* (2009): 228.

40 Ibid: 232.

41 Ibid: 234.

42 UNODC, *Transnational Organized Crime Threat Assessment: Executive Summary* (2010): ii.

43 UNODC, *Transnational Organized Crime Threat Assessment* (2010): 27.

44 Thomas Fuller, "UN Says Opium is Expanding in Myanmar," *New York Times* (December 14th 2009).

45 Ko-Lin Chin, *The Golden Triangle: Inside Southeast Asia's Drug Trade* (2009): 204.

46 Bertil Lintner and Michael Black, *Merchants of Madness* (2009): 13.

47 Daniel Ray Lewis, *UNODC Report: The Long Trip Down the Mountain* (2001): ix.

48 AIPAC, "Regional Trends" <www.aipac.org>

49 UN Doc A/65/255 (August 2010)

50 Pierre-Arnaud Chouvy, *Opium: Uncovering the Politics of the Poppy* (2010): xiv.

LABOR LAWS VERSUS ECONOMIC DEVELOPMENT: The Incentive Structure faced by Local Governments in China

Elizabeth Ann MacArthur

ABSTRACT

This paper seeks to explain why local government cadres in China allow low labor standards to persist within their jurisdictions. I argue that the central government provides local governments with no incentive to enforce national labor laws. On the contrary, utility-maximizing cadres are rewarded for creating a firm friendly environment that will attract potential investors with fiscal incentives. Local governments are prepared to turn a blind eye to these labor violations until social stability is substantially threatened by potential riots and strikes. Only when these movements challenge government authority or the investment friendly environment are local government cadres prepared to make concessions in favor of labor standards.

Question

Why do many Chinese local governments neglect to enforce the state mandated 1995 Labor Law and the 2008 Labor Contract Law, thereby enabling poor labor standards to persist within their respective jurisdictions?

Hypothesis

Local government cadres are utility-maximizing agents who face a Target Responsibility System (*mubiao zerenzhi*, TRS) incentive structure that rewards economic development but not labor law enforcement. Therefore, many local governments are motivated to promote economic growth, even when it comes at the expense of labor standards, to the extent that it does not infringe on social stability. Only when social stability, a TRS veto target, is challenged, will local governments intervene on behalf of labor law enforcement.

Introduction

The wave of recent strikes this past summer, like those at Foxconn and Honda, drew the attention of the international media to the low labor standards within the Pearl River Delta in Guangdong province. This region has one of the highest concentrations of foreign firms within China, and supplies brand name corporations like Nike, Apple and Disney. In 2007, the province exported US$ 300 billion worth of products, amounting to a third of China's total exports[1]. Violations of both the 1995 and 2008 labor laws occur in many of these export factories.

This paper seeks to demonstrate, firstly, that given the incentive structure created by the Target Responsibility System and faced by local governments, it is within cadres' interests to "turn a blind eye" to violations, such as wages below the legal minimum or not paid at all, enforced overtime that is in excess of the legal maximum and unsafe working conditions[2]. Finally, I argue that local governments have incentive to increase labor standards only in cases of real or potential strikes, riots and protests - situations where social stability is at stake.

A number of caveats are in order. First, while this paper focuses predominately on local governments' failure to enforce labor laws, I do not posit that this lack of enforcement is the sole cause of poor labor standards in China. Rather, it is a predominate reason why a variety of corporate responsibility initiatives have not been successful in improving labor standards. Secondly, this paper focuses almost exclusively on the labor standards within foreign-invested factories, as they occur in the export-oriented and labor intensive Guangdong province. These firms rely extensively on "labor practices that are repressive, arbitrary, and abusive"[3]. I therefore do not seek to make generalizations about labor standards across firm types or across China.

Incentives for Cadres within a TRS Framework

The TRS system has been used as a tool by the central government to control the fiscal resources of lower governments since Deng Xiaoping's decentralization reforms of the 1980s. Under the TRS, the central government issues performance criteria down through the successive layers of government to ensure that the policies of lower level governments are commensurate with the priorities of the center. Government cadres sign responsibility contracts (*zerenshu*) detailing the targets for the various tasks that have to be attained within a given period of time in addition to the rewards and penalties depending on

the over- or under-fulfillment of those targets[4]. For example, bonuses for local cadres are pegged to their performance, and top cadres with the most target over-fulfillment can easily earn as much as 30 percent more than ordinary cadres of equal rank[5]. Furthermore, these targets are weighted and some targets have veto power greater than that of others. Social stability, for one, is enforced as a veto target nation-wide, reflecting its importance to the Communist Party[6]. After veto targets, the highest priority target is economic performance. Indeed, in a scheme for provincial leading cadres, 60 points of 100 were assigned to targets related to economic performance[7][8].

Additionally, the incentive for cadres to over-fulfill economic targets is amplified by the likelihood for promotion, which increases with economic performance and vice versa[9]. Unlike corporate managers or western politicians, if a Chinese government official is separated from the government hierarchy, "[t]here is virtually no avenue for her/him to find a job elsewhere"[10]. Thus, it would be appropriate to consider the Chinese political hierarchy as a single internal labor market without outside options. This "lock-in effect," combined with the fiscal benefits of remaining a government cadre, greatly reinforces the incentive for officials to allocate their resources towards the achievement of targets that will be most rewarding[11]. As a result, local governments strive to over-fulfill economic targets by attracting FDI at the expense of labor laws, just as much so as not to endanger social stability, in the hopes of attaining a promotion or fiscal rewards.

Unfortunately for local governments, as TRS targets pass down through each successive tier of government, more mandates are often added, sometimes leading to a cascading effect. The final burden resting on local governments can, therefore, be enormous[12]. Given that many of these additional targets are not funded by the central government, but their attainment is still essential to the cadre's success, local governments must generate their own resources through attracting FDI. All local governments have an incentive to increase their resources, and one of the best ways of attracting foreign investors is by permitting low labor standards within their jurisdictions, thereby attracting firm owners who wish to keep their labor costs artificially low[13]. Once the enterprise is established, cadres have a variety of means of extracting revenue. These can range from becoming a joint-venture partner with the corporation or starting a spin-off enterprise, to predatory activities that involve extracting (often illegal) user fees, levies and various other rents. Much of this predatory behavior derives from individual cadres who wish to enrich themselves; but some of the expropriation is more institutional

in nature, and involves extraction by local officials on behalf of their "cash-starved" agencies who require resources to meet TRS targets[14].

Economic Targets at the expense of Labor Laws

It has been two years since China's landmark Labor Contract Law (LCL) took effect. Yet, a number of Chinese labor standard experts, including Anita Chan and William Greider, believe that conditions have actually deteriorated within the Pearl River Delta, and that China continues to "define the bottom" of developing countries' labor standards. This comes regardless of one and a half decades of increased corporate social responsibility (CRS) on the part of many multinational corporations (MNCs) in China. Such MNCs as Reebok have generated a host of executive conferences, increased factory "monitoring" by social auditors, and gained the attention of the international media, but actual change within factories has yet to occur[15]. In 2004, China's Ministry of Labor and Social Security announced that "studies show the [monthly] salary of a migrant worker in the Pearl River Delta area has grown by a mere yuan (US$8.20) over the last 12 years" (Ministry of Labor and Social Security Report). This increase was so small that, as demonstrated by figure 1 and 2 in Anita Chan's "Corporate Facilitated Trade Union Elections in Chinese Factories" (see figures below), the effect was cancelled out by inflation[16].

Figure 1

Relationship between Average Monthly Wage of Urban Employees and Minimum Wage in Outer Shenzhen, 1993-2007

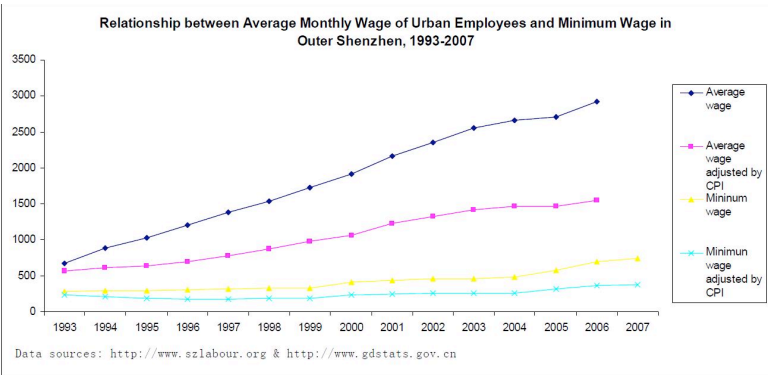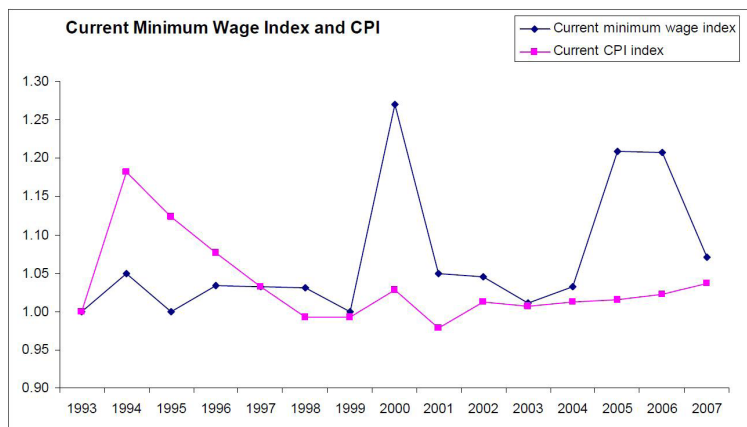Data sources: http://www.szlabour.org & http://www.gdstats.gov.cn

Figure 2

The bottom line of figure 1 traces the real legal minimum wage for a 40-hour week for the Outer Shenzhen region. The nominal minimum wage did indeed seem to increase after 2004, but once adjusted for CPI, the increase was marginal. Figure 2 shows the relationship between minimum wage and CPI. A substantial increase in minimum wage in 2005 was due to a labor shortage, but with double digit inflation that year, the spike was cancelled out.

According to the 1995 Labor Law, the minimum wage in each locality is not merely supposed to keep up with inflation; it should be set by the local government between the range of 40% to 60% of the *average* wage within that locality[17]. However, 1993 was the only year in which all minimum wages satisfied the Chinese government's own criterion of reaching at least 40% of average wages. Since then, in most localities, the average wage hasn't met the 40% mark, in direct violation of Chinese Labor Law[18]. Generally, the trend in minimum wages has been one of stagnation and decline, especially in Guangzhou and Shenzhen. Despite the fact that these two cities have the highest average wages in the country, they have the lowest minimum wages in all of China. It is no coincidence, then, that these regions also happen to be the heaviest concentrated export regions - minimum wages are kept especially low, often below the 30% of average wages mark, for the purposes of wooing foreign investment[19].

Worse still, many workers in export oriented factories are forced to work so many hours of unpaid overtime that they are actually paid *less* than the minimum wage, which on its own is already illegally

low[20]. It is not unusual for workers to work 10 to 11 hour days, some 6 or 7 days a week. During a factory's peak production season the hours may extend up to 17 or 18 hours a day, where it is not uncommon that workers sleep on the factory floor to allow for as much rest as possible[21].

This past June, the New York Times published an article on 19 year old Ma Xiangquan. Mr. Ma was one of Foxconn's 420 000 workers, and he worked 11-hour shifts seven nights a week, forging plastic and metal amid fumes and dust making iPods at the Shenzhen factory.

Mr. Ma's pay stub shows that he worked 286 hours, including 112 hours of overtime, about three times the legal limit. For all of that, even with extra pay for overtime, he earned the equivalent of $1 an hour[22].

Until he jumped from the highest floor of his high-rise factory dormitory, Mr. Ma worked in conditions identical to many other Guangdong factory workers' - including the 12 other workers who killed themselves within the same year, at the same Foxconn plant.

Apart from the intolerable working hours, workers in these factories are often subject to intimidations, physical punishment, corporate punishment, and control of bodily functions. In a survey of 1, 530 workers in fifty footwear factories, 81% reported that there were restrictions on toilet going, and 70% said that they needed to obtain a tag to do so[23]. Working conditions in the factories can, furthermore, be extremely militaristic, and simple pleasures such as snacks and dating are often denied, as they are at Foxconn. Yet, despite promises of reform, the only major change that the Foxconn plant has seen is the installation of wires over its windows to prevent workers from jumping to their deaths[24].

Before we can claim that local governments are deliberately neglecting to enforce the labor laws on companies such as the Foxconn, we must first determine whether or not they are aware that violations are taking place. Evidence indicates so. As Jenny Chan explains, government cadres "adopt an instrumental view of the law, using it as a tool of control over society, while allowing the state to remain largely insubordinate to it"[25]. Legal scholar William Alford adds that Chinese authorities "wish to reap the advantages of liberal legality… [given its] perceived capacity to support economic growth, engage the international community, and legitimate the existing regime…, [and] aspire to do so without being unduly subject to its constraints"[26]. At the local level, governments are content to bend the labors laws for their own economic and political interests. For example, in explanation of

a failure to perform their mandatory monitoring duties, a labor official from Guangdong stated, "Our job is to educate employers on the Labor Law, not punish them." Another municipal official went so far as to say:

> I tell [foreign investors] … [t]he Communist Party invites you to invest in our country, you need profits, [and] our union's work is to protect your stability [and] help you make profits, [not to let] workers make trouble for you[27].

Government auditors, furthermore, warn foreign factories of inspections beforehand. Factory managers are thus given a chance to inform underage workers to take a day off. At times managers bribe auditors to "turn a blind eye to violations" when they are spotted[28]. Local governments and foreign investors, as a result, collude with each other to maximize economic gains at the expense of workers' rights and in violation of the Chinese Labor Laws.

The *shangfang* (petition) system is further evidence of the local governments' awareness of the violations. The system is an institutionalized means for citizens to petition the local letters and visits bureau with their complaints and demands. Countless case studies have shown that workers frequently come to their local governments with complaints of labor law violations yet achieve little if nothing. Local government incentives to ignore Labor Law violations are two-fold. First, "there is a deep-seated institutional conflict between legalistic legitimization and local accumulation"[29]. That is, if local governments wish to achieve and exceed their economic development targets, they must make themselves attractive to foreign investors. Due to decentralization, this has become increasingly difficult, given not only provincial competition for FDI, but also competition between "cash starved" localities[30]. Therefore, as localities are forced to make themselves increasingly attractive to investors, this creates a "race to the bottom" in terms of labor standards, in violation of numerous Chinese Labor Laws.

The second reason is that cadres fear a crackdown on violations would result in mass layoffs and social unrest. Basic supply and demand economics dictates that as the cost per worker increases (as it would if enterprises were forced to pay minimum legal wages), progressively fewer workers can be employed, thereby resulting in aggrieved unemployed workers with the potential to form a collective dispute and cause a social disturbance.

Protests, Strikes and Riots: The Case for Labor Law Enforcement

The notion that local governments will intervene on the side of labor laws only when social stability is jeopardized seems to be a well-known fact among low-wage workers given their maxim: Big disturbances, big solution; small disturbance, small solution; no disturbance, no solution[31]. Unofficially, at least one strike involving more than 1,000 workers occurs every day in the Pearl River Delta region, to say nothing of the many smaller spontaneous strikes[32]. Officially, in 2005, there were 87, 000 worker protests, a trend that only seems to be increasing[33].

According to Ching Kwan Lee, author of "Is Labor a Political Force in China?", labor protests at their most effective have resulted not only in the repayment of pensions and wages to aggrieved workers, but also fundamental pension reforms, policy changes in local governments' handling of unemployment and bankruptcy procedures, and the punishment of abusive local cadres[34]. As I will demonstrate, protestors seek to cause disruptions so as to attract the attention of higher-level officials who can pressure subordinate officials to comply with labor laws. If social stability is breached, local governments may fail to attain their social stability veto target, thereby jeopardizing a potential promotion or risking termination. Therefore, utility-maximizing cadres will have the incentive to appease those whose working conditions are so bad that they are either on the verge of a strike, protest or riot, and to dismantle all social disturbances as soon as possible, so as to comply with the stability veto target.

Guangdong in particular shows a marked tendency toward collective disputes due to the volume of foreign invested firms within its borders. "[L]abour disputes in [these firms]… are not only more frequent, they are also more likely to be collective, to include more workers, and to lead to strikes, slowdowns, and general social instability"[35]. As shown in the figure below, in 2001, labor dispute rates in foreign firms were twice the rate in private firms and nearly six times the rate in SOEs[36].

As mentioned earlier, foreign firms tend to be labor-intensive and export oriented sectors, and often rely on labour practices that are "repressive, arbitrary, and abusive"[37]. It is, therefore, very likely that there is a connection between this type of labor management and the large volume of collective disputes. However, as ownership lines have blurred, and Chinese firms increasingly mimic foreign practices, labor practices between firm types are becoming increasingly less

Labor Disputes per 100,000 Employees, by Ownership Type, 1998–2001

Type of firm	1998	1999	2000	2001
State-owned enterprises	24.5	31.2	40.4	56.1
Urban collectives	69.2	106.2	154.6	197
Foreign-invested	384	456	327	300.6
Private enterprises	110	132	159	156.6
Rural collectives	9.6	7.9	3.1	1.8
Joint-owned and stock	81	66.5	108	199
Individually owned (geti)	7.0	10.2	19.1	30.1

differentiated[38]. This could be partially responsible for why disputes across all types of ownership are continuing to rise rapidly.

Despite the occasional neighbourhood-based collective disputes, "bankruptcy and non-payment protest are the most common and the most politically sensitive"[39]. When repeated visits to the local government fail to produce owed pensions, for example, or when migrant workers become frustrated by the pro-employer decisions of arbitrators, petitioners often take their demands to the streets in the form of what is known as "cellular activism"[40]. According to Ching Kwan Lee, "cellular activism describes not only the locality- or work unit-based unrest but also the intra-firm divisions among workers who have formed themselves into different 'interest groups,' to use their own terminology"[41].

A good example of a cellular interest group occurred on May 22, 2002, when 60 construction workers in Shenzhen went to the local government to complain about wage arrears. When the government declared that it was unable to help the workers because they had no written contract with the contractor and they could not prove the registration of the construction company for which they worked, the workers became frustrated. They marched angrily down the main road and when they came to the intersection in front of a huge portrait of Deng Xiaoping, one by one, the workers began to sit down in the road. Others followed, and soon they were able to form a human chain that blocked traffic for 15 minutes before police came. [42]

One of the worker representatives who was interviewed explained:

All of us are from Sichuan. We have worked for 3 months… Working twelve hours each day. The boss only loans us money, several hundred RMB a person, from time to time… We went on strike twice and each time they promised to pay within a week. The last time we went on strike… the boss threatened us, announcing in public, "I'll kill anyone who dares lead a strike again." We realized that we could not trust him anymore, and we feared for our safety[43].

The second worker said:

We [complained] legally and tried legitimate means but got no response. They [the local government] are forcing us to shed blood, to take the criminal route. As we left the city government and walked down the street, some of us suggested bombing the company. Others cursed that it's better to be run over by cars that to work without getting paid[44].

These cellular activists wisely employed a technique used by many aggrieved workers, focusing the public attention on their plight, publicizing their grievances, and undermining the image of the city as stable and therefore capital-friendly[45]. In Shenzhen, it is not uncommon for workers to resort to protest rather than labor arbitration or lawsuits. This practice is so rampant that in 1997 the local government established a "back pay fund," to be used in cases of emergency to pay aggrieved cellular activists.

Further evidence suggests that the government takes social stability very seriously. In 2002, the central government earmarked 86 billion RMB for a social stability plan to make up for the short fall in pension payments, stating explicitly that the aim was to maintain social stability[46]. In many cities, local governments "buy off" social stability by paying protestors to disperse. As scholar Jean Louis Rocca has stated, "According to officials themselves, social stability has become a very important criterion in the evaluation of their careers…Most local cadres feel that they are trapped between the demands coming from above in terms of stability, and the lack of funds and the increasing demands coming from the grassroots"[47].

Despite the fact that often funds from provincial and central budgets must be provided to local governments in times of social unrest to prevent protests from spreading, local cadres and enterprise managers are seldom reprimanded for permitting illicit labour practices[48]. It seems that as long as social unrest is contained, the Chinese government is quite prepared to "buy off" protesters on a regular basis if it means

economic targets are being met. Therefore, it is clear that the government is quite aware that Labour Law violations are taking place. Yet they have the incentives to intervene only when their social stability veto target is threatened by the possibility of large social disturbances, a practice underlined by the context of competition for foreign investment.

Further Research

While conditions in many foreign-invested firms may be abysmal, there has yet to be any reliable study that compares labor standards across firms types through time and space. It is unlikely that conditions in Township-Village Enterprises or private Chinese enterprises are much better. Some research recently revealed that even conditions in State-Owned Enterprises are deteriorating, given their need to become more competitive on the market[49]. This area of study would benefit greatly from research that confirms these suspicions. However, it may be difficult since firms are generally protected from public scrutiny by their close connections with local governments.

Furthermore, this paper does not take labor conditions outside of the Guangdong province into consideration. My readings suggest that labor conditions in the rest of China aren't much better, especially in other export heavy regions like Liaoning where many FDI factories are located. Additionally, many labour experts like Mary Gallagher have reported that China's interior is currently lowering its standards in hopes of drawing foreign investment away from the coast and into the rest of China. A study that took into consideration export-intensive areas along with areas from the rest of China would be an improvement. I predict that these findings would mirror my own, since cadres across the country are faced with a similar incentive structure that rewards social stability and economic development.

Contributions and Conclusion

The value of this paper is two-fold. First, it helps to explain why despite over one and a half decades of Labour Law, corporate social responsibly initiatives, and international media attention, horrific labour standards within China have not only remained stagnant, in certain areas they have actually deteriorated. Secondly, the current paper contributes to the literature on cadres' incentives by focussing more specifically on the implementation (or lack thereof) of labor law. It demonstrates that how the center rewards its increasingly decentralized local governments

is a significant predictor of their behaviour.

Given that local governments are only motivated to intervene on behalf of laborers when faced with the threat of social instability, it is not surprising that large-scale strikes like those at Honda and Foxconn are occurring more and more frequently. Until Chinese local governments are given incentive to enforce their own labor laws, I would not be surprised if we saw many more large-scale strikes in the coming months.

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LAOS: THE LITTLE STATE THAT COULD

Stephen Ullstrom

Laos is an often-overlooked country in the middle of Southeast Asia. With little pre-planning, it was formed when the French withdrew from their colonies and protectorates following the Second Indochina War, it became part of the battleground for the Vietnam War, and has since continued as an impoverished, Communist state. There have been questions raised not only about the legitimacy of its creation -- for historical and ethnic reasons -- but also about its current ability to be successful. Yet this paper will show not only how Laos came to be, despite the odds, but wil also argue that there are compelling reasons why Laos can be successful today. Through examining Laos' industry, tourism, agriculture, and regional relations, I suggest that a proper focus on agriculture and a grassroots economy, as well as regional partnerships, will be sufficient to met the needs of the Laotians, which is all that should be asked of an impoverished state. I also show that despite poor treatment of the minoriies by the Communist and Lao-dominated government, ethnic tension is acually not an issue, but instead thegoal for all is eonomic stabilty.

Introduction

Laos has often had the odds stacked against it. It is poor, landlocked, long dominated by powerful neighbors and imperialists, and is ethnically fragmented. There are good historical, economical, and geopolitical reasons why Laos should not exist. Indeed, since the 1800s, there have been multiple interpretations of the facts by various groups -- the French, the Pathet Lao (Communists), the Nationalists, Thailand -- all seeking to use Laos for their own purposes.[1] Yet Laos is, and will likely remain, an independent country. At issue are not its ethnic divisions or powerful neighbors. Instead, accepting that Laos remains a one-party, change-resistant, Communist state,[2] I will focus on measures needed to foster economic sustainability. I define success as being able to provide for its people and working with, but remaining autonomy from, its neighbors. This will be largely though agriculture, but also increasingly through tourism and the exploitation of natural resources. Further, Laos will need to utilize its vantage as the geographic centre of mainland Southeast Asia, as well as continuing its long tradition of *mandala* politics, which speaks to autonomy via political interdependence.

Historical Arguments Against a Lao State

The historical argument against Laos rests on Lan Xang, the last Lao state of note prior to the twentieth century, disintegrating in 1700 into three smaller kingdoms, all of which eventually fell under the sway of Siam. This was due to the "balance of power in mainland Southeast Asia [that] was shifting in favour of . . . coastal kingdoms that could profit from increased seaborne trade."[3] Thailand later used this when, in the early 1900s, they tried to annex Lao territory on the grounds that an independent Lao state had never really existed.[4]

Yet when the traditional *mandala* understanding of inter-state relations is considered, the Thai argument is weak and anachronistic. Under the *mandala*, power is ruler-centric, and is maintained through tribute and client-patron relationships. For example, in Volker Grabowsky's study, the small principality of Chiang Khaeng was simultaneously paying tribute to three states -- two Siamese and one Burmese -- which were in turn paying tribute to their respective regional powers.[5] Land was somewhat important -- Michael Vickery makes a convincing argument through primary documents and logic that for the Laotian Kingdom of Vientiane, at least, territory was carefully delineated and hence important,[6] while others claim that boundaries were often left fluid as the goal was the control of people[7] -- but regardless, the Thai claim is weakened as it was based on a western view of power and statehood rather than this traditional view.

The French imperialists who arrived in the late nineteenth century also add to the historical argument against Laos as without them, Laos probably -- despite the weak Thai claim -- would have been assimilated into Thailand as Southeast Asia switched from the *mandala* to a western understanding of the state as a clearly demarcated territory governed by an institution.[8] The concept of fixed borders and uniform rule of law, without the need for tribute, would have allowed Thailand to annex weaker neighbors. But with a superior military force, the French claimed Laos first.

France's official reason was to protect Laos from Thailand,[9] but the reality was that the French were seeking resources and access to China. While they did seek to cultivate a Lao elite, steeped in French culture, it was to strengthen the political status quo and make the Lao dependent on the French, rather than to promote Lao nationalism and independence.[10]

The development of the elite and the stability provided by the French did, however, allow some elites to begin developing a Lao

consciousness, with a focus on Lao culture and history.[11] This became particularly acute when France failed to protect Laos during the First Indochina War and WWII, showing some, at least, that eventual independence was both needed and inevitable.[12] This came true in 1954 after the French withdrew from their Asian holdings after being defeated by the Viet Minh in the Second Indochina War, leaving Laos to be fought over by the nationalists and Communists.[13] Despite its rough, unplanned beginning, Laos was a Western-style state.

Ethnic Arguments Against a Lao State

Besides the historical argument against Laos' sovereignty, an ethnic argument against its legitimacy and against its current chances for success can also be made. Thailand used the argument that the Thai and the Lao are actually the same people due to great cultural, linguistic, and ethnic similarities.[14] There is some truth to this, especially along the Mekong River and in northern Thailand.[15] Due to the similarities and the ease of crossing the Mekong, the Lao government does fear Thailand's cultural and economic influence.[16]

The second ethnic argument is that only about half of Laotians are ethnically Lao. The other half is composed of various minorities.[17] The dominant Lao have long seen this as a threat to national unity, and so have sought ways to incorporate or dominate the minorities. Prince Phetsarah Rattanavong, one of the early nationalist leaders under the French, chose to whitewash ethnic differences in order to promote a Laotian consciousness.[18] Following him, the Pathet Lao also recognized the need for the inclusion of the minorities to achieve power and national unity, and so gained minority support through proactively including minorities in the revolutionary forces and later government, and through promising them religious and economic concessions.[19]

Unfortunately, the Pathet Lao backtracked on their promises.[20] Ethnicity was redefined to claim that all Laotians were related.[21] Steeve Daviau paints a very dark picture of intentional control, first as the state sought to mold all to the socialist ideal, and then, as the state switched to a capitalist model, by strongly urging all to abandon traditional lifestyles to join the market economy.[22] Olivier Evrard describes somewhat better treatment, depending on which side the individual supported in the war. Those who accepted Communist ideology did well, well those who did not were initially persecuted, but either way minority culture and livelihood has been trampled.[23] The current discourse is such that the "lowland/upland [or Lao/minority] dichotomy is almost institutionalised

in Laos," with "references, both official and informal, to the duality between 'modern lowlands' and 'backwards uplands' … recurrent,"[24] while the current focus on economic development means that the government has little interest in understanding and meeting minority needs.[25]

Yet, ethnic conflict seems unlikely. Daviau also discusses subtle ways in which the the Tarieng, the group he studies, are resisting the authorities, showing that there is room for some creative autonomy without resorting to open conflict.[26] The Hmong, most well-known for their armed resistance, are broken. Reports from the last decade indicate a hemmed in, ill, wounded, and woefully under-equipped force. It seems that the Hmong threat long ago ceased to exist, and that it has been the government, rather, which have been perpetuating the conflict for their own reasons.[27] Further, the revered Hmong leader, General Vang Pao, recently died in exile in January 2011.[28] An armed insurgency now seems very unlikely.

Instead, Evrard and Yves Goudineau implicitly found, in their study of the government's resettlement policy, that despite social and cultural upheaval, the minorities were still seeking economic and agricultural stability, much like the Lao lowlanders, and that the resettling was leading to greater integration between the groups.[29] Commenting in 2008, Bertil Lintner wrote that a much more pressing problem than ethnic conflict was the growing inequality between urban and rural areas.[30]

The Future: Possibilities and Challenges

To be successful, Laos needs to build a sustainable agricultural economy and utilize its geographical position so that it is land linked, rather than landlocked.[31] Laos currently has two means of wealth. The more attractive option for the government, since it means money from foreign investment, is "resourcification," in which Laos' minerals, hydroelectric potential, and land, used as concessions to lure foreign investment, are seen as fully exploitable in return for development.[32] However, there are a number of concerns with exploiting resources. Given low government wages, corruption, and a brain drain of educated Laotians seeking higher paying jobs with foreign companies and organizations, are both problems, as is the issue of whether or not development will lift the local populace out of poverty.[33] Also of concern is environmental degradation, which will be examined more closely in regards to the Mekong and hydroelectric development.

Since Laos opened up to foreign investment in the 1980s, hydroelectric development has been seen as a prime area of development due to Laos' long stretch of the Mekong and numerous tributaries, Laos' need for cash, and the numerous private investors willing to be involved.[34] Yet dams are also controversial. Formerly, by conceptualizing anything less than dams as under-development, the many vital ways in which the river is used, such as for fishing, transportation, and irrigation, was ignored.[35] This changed when, acknowledging traditional uses along with the fear of environmental degradation, the Mekong River Commission (MRC), of which Laos is a member, decided to shelve plans for dams in favour of monitoring and preserving the Mekong.[36] Yet ten years later hydroelectricity is again being considered, now with the additional rationale of it being a cheap, renewable, and environmentally-friendly power source. In 2010 Laos submitted an application for a new dam, and the MRC is again considering the issue.[37]

At issue is environmental degradation and social cost, with few clear answers. It has been shown, for Laos particularly, that poverty and environmental problems often go hand in hand,[38] and so at the grassroots level dams could have a very negative impact. Previously dams have also been poorly executed, revealing what problems could be created, while additional environmental concerns have been raised for Laos and downstream countries.[39] Yet Jeffrey Jacobs does point to a holistic approach to dam building, considering more than just technical details, and the MRC has promised to keep sustainability and the environment at the forefront of their deliberations and recommendations.[40] Perhaps a sustainable, environmentally friendly dam is possible, yet it is also instructive to examine the second means of wealth in Laos, which is agriculture.

Olivier Ducourtieux and his co-authors state that "[i]n a country where agriculture provides more than half the GDP and employs more than 70 per cent of the population, rural development is crucial for political stability and future prosperity."[41] Writing about four years later, Omkar Shrestha states that "[t]he country's quest for securing a poverty-free economy . . . critically hinge[s] on its ability to sustain high growth in agriculture." This is because "the Lao PDR remains a country whose development is constrained by inadequate infrastructure, insufficient capital, shortage of skilled human resources, a limited telecommunications system, and an overwhelmingly large proportion of its population subsisting on agriculture."[42]

Yet even agriculture has not been without problems. Since the late-1980s the Lao government has linked environmental preservation with rural development, and slash-and-burn, or swidden, farming with deforestation and erosion.[43] The solution has been to resettle and consolidate upland villages and to classify the land, severely limiting land available for agricultural use.[44] To sweeten the change, and to encourage greater production with limited land, farmers were given land title.[45] This coincided with the New Economic Mechanism policy, started 1986, which has successfully sought to integrate rural areas with a market economy,[46] while simultaneously indirectly encouraging highlanders, such as through zoning and the building of roads in some areas but not others, to resettle in order to participate and change livelihoods.[47]

Unfortunately, there are several problems inherent to this plan, not least of which is that it is apparently unnecessary. Ducourtieux claims that given the low population in the highlands, and the centuries of experience the people possess, swidden farming is actually sustainable.[48] For example, traditional swidden farming allows land to lie fallow longer, which means that expensive mechanical and chemical help is largely unnecessary.[49] Scholars have also noted that despite the meeting of some goals -- such as allowing some reforestation and integrating people into a market economy[50] -- poorly planned resettlement has often led to such problems as multiple migrations, food shortages, poverty, and loss of cultural identity, leading more skeptical commentators to suggest that the government's real agenda is to gain control over the minorities and the land.[51] Peter Vandergeest tries to point the way forward, recognizing the benefits that land reform, for example, can have, but insisting that if only imposed from above without citizen input, efforts will be counterproductive.[52]

A better model would be to bring the means for development to the highlands, but encourage the people to create their own solutions. Joost Foppes and Souvanpheng Phommasane discuss successful Market Information Systems, which allow farmers to cooperate in the production and sale of agricultural and forest goods through better knowledge of market conditions.[53] Yayoi Fujita also emphasizes the importance of these information networks, particularly as the farmers are shifting from subsistence farming to cash crops.[54] Sithong Thongmanivong and Fujita further point out that the switch to cash crops, at least in northern Laos near the Chinese border, is often to meet a growing Chinese market, which also speaks to the importance of Laos' neighbors in spurring economic growth.[55] The primary point, however, is that it is possible

to encourage economically and environmentally sustainable farming without resorting to resettlement or top-down policies.

In addition to agriculture and resources, tourism and industry are often cited as means of development. However, these are not currently significant. Rajah Rasiah, in his discussion of the garment industry in Laos, repeatedly cites a small, poorly trained labour pool; lack of infrastructure; and being landlocked as substantial barriers to a successful manufacturing industry. Indeed, he suggests that the sole reason for the current industry is preferential contracts, which may not be renewed. Therefore, Rasiah specifically concludes that garment manufacturing -- and by inference all types of industry -- be kept complementary to the "large mineral and agricultural base."[56]

Regarding tourism, Wantanee Suntikul and co-authors report that the people in their area of study, Viengxay, are open to tourists and are aware of the potential benefits, but there is again a lack of infrastructure and trained personnel. While the authors do accept that pro-poor tourism -- defined as tourism that meet the needs of the local poor, rather than exploit them[57] -- has a future in Laos, they are not sure if it will substantially reduce poverty. However, their greatest finding is that despite the presence of internationally accepted indicators of poverty, the people generally do not identify themselves as poor.[58] This speaks volumes, and points to the fact that Laos should not measure success by mimicking other states, but by meeting the needs and expectations of its own people.

This said, Shrestha states that the population of Laos will double in twenty-five years, and so to provide jobs it may be wise to start now in improving industry and tourism.[59] This speaks to how Laos interacts with its neighbors. Since Laos became Communist, its two most influential neighbors have been China and Vietnam. China provides development and political support against Western pressure in return for resources, access to Thailand, and support in the international arena for Chinese policies.[60] For Vietnam, the relationship is primarily about securing its border by having a friendly, Communist neighbor. Laos also benefits from more comprehensive political and economic assistance than from China, as in advisors in addition to capital.[61] No other country has similar influence.[62]

Stuart-Fox has a positive view of Laos' relationship with China and Vietnam, seeing it as a modern continuation of the *mandala* with Laos balancing one neighbor off the other despite the two being politically and economically more powerful.[63] A differing view is that

of Randi Jerndal and Jonathan Riggs, who see the neighboring powers, including Thailand, as carving out spheres of economic influence which could break Laos' unity. This is because internal communication and transportation is still poor, and so many regions of Laos have easier access to their neighbors' markets than to internal ones.[64]

One solution, obviously, is to improve infrastructure and communication, but this to not simply to unify the state, but to also improve regional links. Writing on the concept of land linked versus landlocked, Stuart-Fox discusses the extensive infrastructure development in Laos currently undertaken by China, particularly in the north. Part of this is to improve transportation routes to facilitate trade, so that, for example, one could drive from Singapore to Beijing.[65] Being located in the midst of Thailand, Vietnam, Burma, China, and Cambodia, Laos can be seen as the link between all of these larger economies, which turns Laos from a backwater into a potential regional hub.[66] Taking a historical perspective, Anoulak Kittikhoun finds that Souphanouvong, the former public face of the Pathet Lao, succeeded in gaining and keeping control of Laos "precisely because he understood both the geographical constraints *and* opportunities…and focused on mobilizing the particular Lao spatial identity that evolved through centuries of interaction and socialization with neighbors."[67] (emphasis in original) Current leaders could do well to do likewise.

Looking forward to the twenty-first century, Laos has great potential to thrive. The Vietnam War and armed insurgencies are over; its neighbors and closest allies, Vietnam and China, are increasingly pragmatic about capitalism; and instead of ethnic tensions the minority groups and Lao alike are seeking stable livelihoods. Development for Laos will unlikely mean matching Western standards, but rather to thrive by meeting the economic needs of its people through agriculture, carefully built industry and tourism, and by utilizing its resources and location in the centre of Southeast Asia to become a regional hub. This would both fulfill the French vision of Laos as a source of resources, and rebut claims of Laos as an irrelevant backwater, and not worthy or capable of sovereignty. Of course, all of this has yet to fully materialize, and there is much work to be carefully done. But the vision is in place, as are examples of what could be encouraged on a larger scale. Despite its difficult past, Laos has what it needs to be a success.

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DELEGATIVE DEMOCRACY IN VENEZUELA: UNDERMINING REPRESENTATION AND ACCOUNTABILITY

Kaan Yalkin

Abstract:

Throughout the second half of the 20th Century, Venezuela enjoyed decades of relative political stability under successive semi-democratic administrations. However, popular unresponsiveness and widespread disregard for the will of the electorate paved the way for the rise of a new power. In 1998, on the tide of the so-called 'Bolivarian Revolution', President Hugo Chavez and his party rose to power. Since that time, they have survived coup and re-election and have seen success in referenda extending their power.

It might be observed that Hugo Chavez's rule, rather than being democratic *per se*, might be characterized by what one political commentator has termed 'delegative democracy'. Argentine political scientist Guillermo O'Donnell describes delegative democracies as electoral democracies lacking checks and balances and other mechanisms of constitutional accountability but enjoying populist support from the electorate.

Not only do O'Donnell's criteria for delegative democracy aptly describe the Venezuelan case study, they also, as a result, shed light on the quite serious effects that might be felt by the Venezuelan judiciary and community councils. The implications of Venezuela exhibiting characteristics of a delegative democracy may be far-reaching in both time and effect and serve to seriously undermine the future success of democracy in that country.

Introduction:

The term 'delegative democracy' was coined by Argentine political philosopher Guillermo O'Donnell to describe countries in which electoral democracy exists without horizontal accountability. Countries in which delegative democracies exist are typically populated by elected leaders who often enjoy broad public support and win elections by large majorities. The president is generally given a mandate to govern the

country as he sees fit and regards institutions such as congress or the judiciary as nuisances. His political base is more than just party support; it is a movement.[1] Present day Venezuela, under the rule of President Hugo Chavez, presents a compelling case study for O'Donnell's definition. Although the Chavez administration seems to be acting as a de facto dictatorship, there is popular consent and increasingly broad public support for his presidency.[2]

Delegative democracy has far reaching implications for freedom of political expression and political stability, and it often involves the weakening of institutions within a country.[3] O'Donnell stresses the importance of strong institutions as the basis for a successful transition to and the endurance of a democratic regime. His theory is made flesh in the example of Venezuela: delegative democracy has seriously affected the quality of Venezuelan political expression. Using the underlying premise of delegative democracy for political support, Hugo Chavez and the executive have placed increasing pressure on and have sought to exercise greater control over the country's institutions. This can be most clearly seen in the pronounced attack on the community councils and judiciary and the passage of new enabling laws that facilitate easy adoption of legislation by the executive.

This article will begin by outlining O'Donnell's theory. It will then show how his theory is applicable to Venezuela, given the country's current political environment. It will end by suggesting that, given the similarity between O'Donnell's theory and the facts, there is good reason to have grave concerns for the future of Venezuelan democracy and, by definition, human rights, freedom of expression, and equality of treatment.

Theory

Robert Dahl's essential features for polyarchy are satisfied in many Latin American countries.[4] This would lead us to the conclusion that democracy is alive and well in these countries. However, there is unquestionably a crisis of democracy in some Latin American countries. Because of this, it is both right and salutary to consider what other theories might better explain what is truly going on in some Latin American nations. O'Donnell provides a viable explanation in his theory of delegative democracy. Delegative democracy focuses on institutions. O'Donnell argues that strong institutions are essential to democratic expression. The mere existence of institutions is not sufficient; they too must be effective. In assessing the degree to which democratic institutions

might be effective, O'Donnell provides a list of characteristics.[5] He characterizes a strong institution as:

1. Clearly identifying its agents
2. Shaping outcomes within defined parameters or constraints
3. Allowing agents to work together effectively[6]
4. Representing their constituencies well by working in the best interests of the electorate
5. Allowing actors to predict a certain range of outcomes based on their actions along with consensual and incremental change
6. Enjoying a certain degree of stability.

Clearly, this is not a straightforward definition, and there are different levels of achievement of a well-functioning set of institutions, which, at their best, would lead to a form of competitive cooperation that is essential to consolidated democratic regimes.[7] Such well-functioning democratic institutions ensure that human rights are not violated, that political expression is not stymied, that checks and balances work correctly, that there is equality of treatment, and that corresponding individuals are included in the political process. This set of institutions, although it can lead to high levels of bureaucratization and exclusion, is not characteristic of delegative democracies; most importantly, delegative democracies typically do not contain a legitimate group of intermediate-level actors, which work to allow and exclude certain voices and groups from participating in the political process.[8] This is why Venezuelan social and political life has been engulfed into one vicious circle. This has resulted in the weakening of two key institutions affected by the presence of delegative democracy: the community councils and the judiciary. The president has co-opted both in order to garner more robust support for his policies.[9]

The Community Councils

Community Councils were first established in 2006 and were created to facilitate a greater degree of grassroots participation and input in the political process. The councils are made up of members of a community working together at the same level as spokespeople for their collective. The goal of the councils is for members to come together to plan and design projects, apply for funding, and then arrange implementation.[10] Councils can vote to grant loans to local, small businesses and support various initiatives when it comes to promoting education within the community.[11] The consensus among the Venezuelan people is that these councils have been very successful, and a large portion of the population is eager to participate.

Throughout the course of his rule, Hugo Chavez has increased direct influence over the community councils, to the point that they are almost completely dependent on government support to function. Even the supporters themselves have acknowledged the executive power of the president as intrinsic to the success of the councils. One supporter of the councils hails their success, saying, 'now, with the integration of the councils and the executive powers of the president, we can begin to give answers to our communities.'[12] Closer analysis yields cause for concern; the Chavista movement has significantly increased its influence and power over the electorate by linking the majority of government initiatives with the operations of the councils.[13]

The majority of funding for the Councils is provided by different governmental agencies.[14] Inexperienced Chavista supporters have replaced many of the high-ranking officials and ministers working in influential roles in those government agencies.[15] The 2007 referendum included a vote on whether 5% of government funds should be indefinitely allocated to the Councils. The proposal failed with the referendum; however, it is symbolic that Chavez wanted to strengthen his financial dominance by imposing a minimum spending requirement with respect to a popular, grassroots institution his party controls. Also alarming is that council spokespeople receive certain incentives, such as discounts on subscriptions to the government-run telecommunications company CANTV, which is well-known for broadcasting propaganda and is tightly controlled by the executive.

The president claims he promotes the councils, because traditional state institutions are not sufficiently responsive to the needs of the rank-and-file. By doing this, he consolidates and exercises executive power not in traditional institutions, but in the councils. The pitfall to this is that community members are forced to rely on the power of the president because of a reduction in power from municipal, regional, or national decision-makers. Chavez and the executive have created a situation where the grassroots rely on his support and the different levels of government in between are excluded from the legislative process. Although the president's goal is to make the bureaucracy more sensitive and receptive to the electorate, mayors and governors, who form the basis of strong municipal institutions, are forced to relinquish a significant amount of power to the councils. Subsequent tensions develop between politicians and community members, leading to those leaders taking credit for council projects through announcements indicating these are their government's accomplishments.[16] One Venezuelan mayor, Leopoldo Lopez, expressed his outrage at the corruption embodied in

the providing of council registration and funding in exchange for loyalty to the president. He states, 'Political power is being concentrated in the president's hands. Community organisations that don't think like the president cannot succeed.'[17]

The encouragement for direct participation at the grassroots level is certainly a large accomplishment, but the effort of the executive to use the councils to mobilize along political lines has led to a violation of the separation of powers.[18] The government's direct influence has politicized democracy; by using these councils as focus points for partisan campaigning, persuasion, and perhaps even indoctrination, the government has eliminated the authority and independence of the councils. In addition, the councils now exclude a legitimate group of actors from the decision-making process and bring about radical rather than incremental and consensual changes. A similar situation has occurred with the quality and scope of the country's courts, which have been notoriously weak since Chavez took office.[19]

The Judiciary

When Hugo Chavez was first elected in 1998 through a landslide election—following the removal of Carlos Andres Perez from office on charges of misappropriation and embezzlement[20]—there was little doubt in the minds of Venezuelans that the country's judicial system needed extensive reform. Even the strongest critics of the newly elected Chavez government supported his call to cleanse the judicial system after years of pervasive corruption, dysfunction, and inefficiency.[21] In 1999, the country voted and approved two referenda with overwhelmingly high percentages of 88% and 82%.[22] This allowed for the adoption of a new constitution, which laid out the framework for a strong, accountable, and independent judiciary. For the first five years, the constitution appears to have functioned fairly well. Of note, the reforms included the creation of a new high court and imposed the requirement of a two-thirds majority vote of the National Assembly to indict a judge. In 2003, the World Bank even noted that 'The [judicial] reform effort has made significant progress—the STJ [Supreme Court] is more modern and efficient.'[23]

Unfortunately, the judicial branch did not remain so, and in the following years underwent significant changes imposed by the Chavez government. Visibly displeased with some of the decisions the court was returning, the government decided to institute wholesale reforms. These included an expansion of the Supreme Court from 20 to 32 members following a vote in the National Assembly, which would also allow judges

to be appointed based on a simple majority within the legislature. In addition, it became easier for that body to remove judges, also requiring just a majority rather than the previous two-thirds. This provides the government of the day with the power to dismiss and appoint judges with increasing ease. Within weeks following the enactment of the new laws, legislation was passed in favour of the Chavez government, and, in the years that followed, the extremely polarized Supreme Court "fired hundreds of lower court judges and appointed hundreds more to permanent judgeships."[24]

As a result, the Venezuelan Supreme Court continues to be rocked with criticism and scandal. As recent as 2009, the president was accused 'of creating a climate of fear among his country's legal profession' in which 'Reprisals for exercising their constitutionally guaranteed functions...among the judiciary and lawyers' profession serve no purpose except to undermine the rule of law and obstruct justice.'[25] These allegations by UN Human Rights investigators paint the picture of an unstable institution where rapid, un-consensual change led to a poorly functioning court system. These allegations followed the imprisonment of Supreme Court judge María Lourdes Afiuni following her decision to order the release of accused prisoner Eligio Cedeño, arguing that his human rights had been violated after he had been held for three years without receiving a fair trial.[26] It is important to note that her decision was far from unilateral; she claimed the accused had to be freed based on the advice of a United Nations' working group on arbitrary imprisonment.[27] The imprisonment is a clear example of abuse of power by the executive, as it not only interferes and impedes the independence of the judiciary, but goes as far as to deny the judge the right to a public defender. Showing a flagrant disregard for the separation of powers, Chavez broadcasted his view of the case on national television. He stated that he would push for support to pass new legislation to achieve the granting of a 30-year prison sentence to Afiuni, citing her involvement with corruption, accessory to an escape, criminal conspiracy, and abuse of power.[28] As of April 2011, the judge remains imprisoned, her health is deteriorating, she receives threats regularly, and she is in danger from other inmates. Speaking out against the treatment of Afiuni, veteran Supreme Court judge Blanca Rosa Mármol de León states, 'Before there was a lot of fear on the bench but now there's panic. In 35 years in the judicial system I've never seen judicial power so submissive.' Marmol continued with strong criticism of the judiciary with regard to autonomy and independence, citing a clear concern for deterioration of democracy and decay of that institution.[29]

Enabling Laws of 2010

More recent developments as a result of the president's autocratic agenda regarding lawmaking continue to exhibit a pronounced deterioration in the quality of democracy and human rights. New enabling laws passed by the Venezuelan House of Representatives in December 2010, alleged to facilitate efficient natural disaster response, give pause for concern. Under the new laws, the president has the power to pass legislation in nine areas, including international cooperation, the nation's socio-economic situation, and legal security, without the support of the legislature.[30] In the face of domestic and international criticism, the government argues that under the Venezuelan constitution of 1999, this sweeping power granted to the president is indeed lawful and legitimate. With no constitutional court to rule on the validity of the law, international bodies, such as the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS), have responded, expressing serious concern over the new laws as concentrating significant power in the executive.[31] Opposition also exists within the country. Governor Capriles Radonski denounced the laws as being a wholly political and partisan tactic. He states that 'if the excuse for the approval by the National Assembly of an enabling law for the President of the Republic is the current emergency, this is simply a mockery of all our people.'[32] This is yet another example of how legitimate actors' voices are excluded from the legislative process.

Analysis

The judiciary and community councils in Venezuela present irrefutable examples of O'Donnell's critique; the relevancy of democratic institutions affects the quality of democracy in a country. Despite their notable differences, both the community councils and the judiciary are key decision-making actors shaping Venezuelan law and policy in fundamentally important ways.

The Chavez government has penetrated the community councils. By doing so, the government has enabled itself to wield a great deal of influence in the decision-making process of this grassroots institution. In doing so, the government has both polarized and weakened the country's institutional fabric. It has become increasingly difficult for the progressive community councils to make meaningful contributions in their communities without the direct support of the government, as funding must come from a variety of partisan agencies. Since these institutions rely so heavily on the influence and decisions of the executive,

there is no doubt that other levels of government, and even those at the ground-level with opposing views, get lost in the decision-making process. The influence on the judiciary has posed a similar problem when it comes to sway and impact of the Chavistas.

The Supreme Court has emerged as another institution that has been nominally altered since the beginning of the Chavez presidency. The passage of legislation allowing more influence over the Supreme Court and a strong majority in the National Assembly has allowed Chavez to mould and form the institution in the way he sees fit, including the packing and purging of judges when necessary to push forward his agenda. It is unfortunate that through an attempt to actually protect another prisoner's human rights, judge María Lourdes Afiuni had her own human rights flagrantly violated through an unconstitutional removal coupled with strong opposition from the international community.[33]

Many characteristics of the current state of Venezuela and a reflection of the Chavez presidency have made a coherent and intelligible case for the presence of delegative democracy. The president claims to embody the whole of the nation but has separated himself from key institutions and taken full responsibility for the functioning of others.[34] His government has reduced the quality of democracy and created an environment in which 'mechanisms for internal critical discussion, organizational solidity, and institutionalization of new rules of the game that are conducive to participation on a regular basis'[35] have been largely absent. As we have seen, the mere presence of institutions does not necessarily justify a high level of democracy, as they can be severely flawed. As scholar Max Weber states, charismatic leadership frequently impedes the creation and maintenance of legal structures.[36] As for the future of delegative democracy in Venezuela, perhaps Chavez will not fulfill his goal of a democratic-socialist revolution under the premise that 'these Presidents suffer the wildest swings in popularity: today they are acclaimed saviors, tomorrow they are cursed as only fallen gods can be.'[37]

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FOREIGN AID HAMPERS DEVELOPMENT OF LOCAL INDUSTRIES IN SUB-SAHARAN AFRICA – FUNDAMENTAL REFRAMING OF AID DISCOURSE NEEDED

Mélanie Suter

Foreign aid is an inherent part of Western culture – more than US$ 300 billion has gone into development assistance on the African continent since 1970 – and yet, aid, as it is executed in Sub-Saharan Africa today, has to a great extent failed to produce the desired result – that is the reduction of poverty. This paper argues that foreign aid itself lies at the root of the problem. The volatile and patronizing nature of aid, as well as the one-size-fits-all approach, have a paralyzing effect on local industries and economic development in Sub-Saharan Africa. Consequently, a fundamental reframing of the aid discourse is needed – a shift to one of empowerment and self-determination with individual and tailored solutions. Not reduction of poverty, but creation of wealth is a key element to success.

Introduction

In Western society, foreign aid and philanthropy are an inherent part of the culture and are seen as an obligation to the developing world. Through the engagement of countless celebrities like Bono, Bob Geldof, Angelina Jolie and Madonna foreign aid has even become chic. Over the past few years, however, foreign aid and Western aid programs in particular, have increasingly been criticized. Misguided aid, aid inefficiency, aid dependence and corruption are central issues in the debate around foreign aid. Despite this criticism, the dominant paradigm over the past 60 years has been that aid is working and is the answer to reduce poverty; rich countries just have not given enough yet. At the center of attention is Sub-Saharan Africa. The G8 summit in 2005, for example, concluded that Africa needs significantly more aid in order to escape poverty.[1] However, more than US$ 300 billion has gone into development assistance since 1970, yet there seems to be a never-ending cycle of corruption, disease, poverty and aid-dependency.[2] In what donors classify as Sub-Saharan Africa, aid, as it is executed today, has to a great extent failed to produce the desired result – that is the reduction

of poverty. Many reasons such as geography, history, culture, tribal structures, institutions and even ethnicity have been offered as to why many African countries are still struggling. These explanations have one thing in common – the reason for failure is located within the recipient countries. None of them considers the possibility that the problem could be aid itself. This paper argues that the volatile and patronizing nature of aid, as well as the one-size-fits-all approach, have a paralyzing effect on local industries and economic development. A fundamental reframing of the aid discourse is needed – a shift to one of empowerment and self-determination with individual and tailored solutions. Not reduction of poverty, but creation of wealth is a key element to success.

Problem with aid begins with framing of 'Africa'

The continent of Africa covers one fifth of the world's land surface. More than one out of ten people are African. More than one out of four nations is African, in which over 800 million people live an extraordinary variety of lives – different natural environments, historical experiences, religious traditions, forms of government, languages, and livelihoods.[3] However, most of the discourse about Africa does not refer to specific African nations, societies, or localities, but to 'Africa' or 'Sub-Saharan Africa' as one big entity. In the Western world the image of Africa is one of despair, famine, HIV/AIDS and civil war; all of which appeals to sympathy, pity and charity. Poor people are victimized and it is seen as the Western world's duty to save these people. This image of Africa, however, is only half the truth. Africa's 53 nations are full of potential and opportunities.

So what are donors' motivations for giving foreign aid? First of all, there are different types of aid – humanitarian or emergency aid, charity-based aid, and systematic aid provided through either bilateral aid (government-to government) or multilateral aid (World Bank, IMF). Depending on what type of aid we are looking at, the rationale can vary. For multilateral and bilateral aid the motivation for giving aid is twofold. On one hand, there is an ideological commitment to a moral obligation felt in the Western world to reduce poverty, protect human rights and spread democracy. On the other hand, and arguably the dominant motivation, donors pursue their own goals such as strategic geopolitical influence, national security and economic gain. Aid has and is still being mostly shaped by the strategic considerations of the donor countries.

Volatility of aid hampers sustainable development and paralyzes local initiatives

The allocation of foreign aid is a highly political process and sensitive to all sorts of dynamics, for example, the financial crisis in 2008. Through the tight connection between distribution of foreign aid and political agendas – which are usually short-term oriented – the flow of foreign aid is anything but stable. Successful foreign aid, however, is dependent on long-term strategies. Such a long-term strategy has been neglected in favor of respective political agendas. The current Rwandan president Paul Kagame said in an interview with *Time* magazine in 2007 that the reason there is so little to show for the more than US$ 300 billion of aid that went to Africa is that "in the context of post-Second World War geopolitical and strategic rivalries and economic interests, much of this aid was spent on creating and sustaining client regimes of one type or another, with minimal regard to developmental outcomes on our continent."[4]

Aid has had a paralyzing effect on local industries in two ways. Firstly, through aid, many African governments have been enabled by the international donor community to avoid building productive arrangements with their own citizens and instead encouraged to engage in endless discussion with the World Bank and IMF, which, in turn, tells them what the recipient's citizens need.[5] This practice has put African people on the sidelines from policy-making, policy-orientation, and policy implementation. Furthermore, Andrew Mwenda, a journalist who has spent his career fighting for free speech and economic empowerment throughout Africa, says in his TED Talk in 2007 that "the IMF, the World Bank, and the cartel of good intentions in the world have taken over our rights as citizens, and therefore what our governments are doing, because they depend on aid, is to listen to international creditors rather than their own citizens."[6] Dambisa Moyo, international economist and book author, agrees and likewise argues in "Why Foreign Aid Is Hurting Africa" that "a constant stream of 'free' money is a perfect way to keep an inefficient or simply bad government in power. As aid flows in, there is nothing more for the government to do – it does not need to raise taxes, and as long as it pays the army, it does not have to take account of its disgruntled citizens."[7] In some respects, aid fosters laziness on the part of policymakers. Secondly, aid's patronizing nature has, as Mwenda argues, stripped the African continent of self-initiative. Moyo states that one of the main problems with aid is that "Africans are viewed as children, unable to develop on their own or grow without

being shown how or made to. […] Africa is fundamentally kept in its perpetual childlike state."[8] The aid discourse has been colonized by mostly non-African white economists and scholars such as Jeffrey Sachs, Paul Collier and William Easterly. Also, as Moyo cynically notes, Hollywood stars seem to get more attention these days than presidents of African nations. Furthermore, Philippopoulos et al. prove in their study of 2008 "Does foreign aid distort incentives and hurt growth? Theory and evidence from 75 aid-recipient countries,"[9] that aid causes rent seeking and therefore hampers economic development. Paul Polak in "Out of poverty – What works when traditional approaches fail" says that the problem with aid is that people appreciate the free ride they are getting, knowing all along that it will not last.[10] Resignation and a lack of self-initiative are the result.

      A typical example of how aid can hamper local industries is mosquito nets, which are distributed by the World Bank and other organizations to decrease the number of malaria infections. The vast majority of malaria deaths occur in Sub-Saharan Africa which, of course, also has a negative effect on economic development. Jacqueline Novogratz in her TED Talk in 2005 states that "malaria is a disease that kills one to three million people a year – 300 to 500 million cases are reported. It is estimated that Africa loses about 13 billion dollars a year to the disease."[11] A simple, affordable and effective method in the battle against malaria has been the distribution of affordable insecticide-impregnated mosquito bed nets.[12] However, what may appear to be a successful intervention and a simple yet effective way of providing aid can also have destructive consequences on a local industry. Moyo names the example of a mosquito-net maker in a small-town in Benin, West Africa, who employed 10 people, who together manufactured 500 nets a week. Assuming that each employee supported up to 15 family members, 150 people lost financial support when this local manufacturer went out of business due to a program sponsored by the World Bank, which distributed 100,000 free mosquito nets in the region. Moyo's criticism is that such "short-term efficacious intervention, may have few discernible, sustainable long-term benefits."[13] At this point, the fight against poverty is fought by treating the symptoms rather than curing the cause. And the patronizing nature of aid can have a very negative effect on the recipient country's local businesses. Local conditions are often ignored and under the liberal paradigm of the free market economy 'aid' programs are implemented ruthlessly. Instead of strengthening local industries and supporting countries in building a healthy and strong economy, they

are pressured into international dependency. Increased poverty is the result.

Millennium Development Goals as answer to poverty?

The international community's current answer to poverty is the UN-sponsored Millennium Development Goals initiative, headed by Jeffrey Sachs and backed by 189 governments. Through the Millennium Development Goals the UN plans dramatic improvements by the year 2015 in the eradication of poverty and hunger: access to water and sanitation; decreases in child and maternal mortality; gender equity; prevention of the spread of malaria, tuberculosis, and HIV/AIDS; cessation of environmental degradation; debt relief; access to information technology, and the status of landlocked and island states.[14] Despite the commendable intentions of the Millennium Development Goals, Polak criticizes that all of this is supposed to "be accomplished by doing much more of essentially the same things we have been doing until now."[15] The Millennium Development Goals Report 2010, published by the United Nations to chart the progress made in halving the percentage of people in Sub-Saharan Africa who live on less than $1.25 a day, is discouraging. In fact, the report indicates that there is little to show for the massive investments in aid in Sub-Saharan Africa.[16] Between 1990 and 2005 the percentage of people living on less than $1.25 a day was reduced from 58 percent to 51 percent. However, the absolute number of poor people rose from 296 to 388 million.[17] Moyo argues that "Africa's real per capita income today is lower than in the 1970s, leaving many African countries at least as poor as they were forty years ago."[18] Polak states, "in Sub-Saharan Africa, we are moving backward in our attempts to eradicate poverty."[19] According to both Polak and Moyo, one of the greatest myths about poverty eradication is that people can be donated out of poverty.

One potentially fatal flaw of the Millennium Development Goals is their one size fits all approach. Polak locates the problem with "big infrastructure investments, big agriculture projects, big irrigation, and big budgets controlled by the governments of developing countries. [...]. These are exactly the same things that have failed repeatedly in the past."[20] Mwenda states that "some aid may have built a hospital, fed a hungry village. It may have built a road, and that road may have served a very good role. The mistake of the international aid industry is to pick these isolated incidents of success, generalize them, pour billions and trillions of dollars into them, and then spread them across the whole world, ignoring the specific and unique circumstances in a given village,

the skills, the practices, the norms and habits that allowed that small aid project to succeed – like in Sauri village in Kenya where Jeffrey Sachs is working – and therefore generalize this experience as the experience of everybody."[21]

Fundamental reframing of aid discourse needed

If this is the discouraging balance of the efforts made in Sub-Saharan Africa in the past 60 years, is there any reason for hope left? The answer is yes. However, a fundamental reframing of the aid discourse is needed – creating one of empowerment and self-determination with individual and tailored solutions. There has to be a movement away from the negative approach of poverty reduction, towards a discourse of wealth creation. Ngozi Okonjo-Iweala, former Finance Minister and Foreign Minister of Nigeria, stated in her TED Talk in 2007 that what is desperately needed is getting young people employed – getting their creative juices flowing.[22] Polak sums the situation up: "while it certainly is true that powerlessness, poor health, poor education, and absent transport infrastructure are important root causes of poverty, there can be no question that the most direct and cost-effective first step out of poverty is to find ways to help poor people to increase their income. This allows them to make their own choices about which root causes of poverty to address."[23] Both Okonjo-Iweala and Polak advocate a strategy of empowerment and self-determination. Polak's grassroots approach, by helping the people who live on less than a dollar a day to earn more money through their own efforts, has, up to this date, enabled millions of people to move out of poverty. He argues that the solution for people to move out of poverty is that poor people have to invest their own time and money.[24] C.K. Prahalad in "The Fortune at the Bottom of the Pyramid" argues that we have to "stop thinking of the poor as victims or as a burden and start thinking of them as resilient and creative entrepreneurs and value-conscious consumers."[25] With this shift of thinking, a whole new world of opportunities will open up. However, Polak points out that "very few multinationals know how to make a profit from serving customers who survive on less than a dollar a day, and who have no access to mass media."[26] Furthermore, he says the problem is that 90 percent of the world's product designers spend their time on working on solutions for the richest 10 percent of the world's customers. The things the poor need to make their lives easier and more efficient are very simple and obvious, however, these products have to be cheap enough to be affordable to the poor.[27] Polak argues that "poor people

will not invest in a product or service unless the designer knows enough about the preferences of poor people to create something they truly need and value."[28] Groundwork by talking to the people and understanding their needs is absolutely crucial in the process of designing products. Polak's approach to the eradication of poverty is one of empowerment. He repeatedly emphasizes the importance of truly understanding the needs of people living in poverty – insight that cannot be gained from a World Bank desk in Washington or elsewhere in the developed world. Furthermore, he illustrates the significance of tailored solutions that take individual needs – which may vary from village to village – into account.[29] The question has to be, how can poor people be supported to help themselves? This requires solutions that are individually tailored for specific countries, regions, or even villages.

Let us look at our mosquito net example again – even though the approach the World Bank chose in Benin led to the destruction of a local manufacturer, there was a similar case in Tanzania, which was based on an engagement strategy with sustainable development. Novogratz states that Tanzania, the largest traditional bed net manufacturer in Africa, was granted a loan of $US 350,000 to transfer technology from Japan and manufacture longer-lasting mosquito nets, which are cheaper and can be produced in larger quantities. Three years later, the company had already employed another thousand women. In 2005, the company contributed about $US 600,000 in wages to the economy of Tanzania and produces approximately three million nets a year – by the end of 2006, it was seven million nets. Even if the UN buys 95 percent of the nets to distribute them to people in need, a sustainable local industry could be strengthened and expanded. Furthermore, she argues that "it is about understanding that people really do not want handouts, that they want to make their own decisions, they want to solve their own problems, and that by engaging with them, not only do we create much more dignity for them, but for us as well."[30] Local solutions can also be applied in food aid. Instead of flooding African nations with foreign food, which puts local farmers out of business, aid money should be used to buy food from local farmers, within the respective country, and then distributed to local citizens. With this model, local industries can be supported and strengthened sustainably. In combination with Polak's approach of improving the affordability of goods, a creation of wealth can be achieved.

Conclusion

Ultimately, the volatile and patronizing nature of aid as well as one-size-fits-all solutions have proven to impose a paralyzing effect on local industries and economic development. Aid is not *per se* a bad thing or generally doomed to failure. There are plenty of projects that have at least temporarily improved the situation in certain African countries. Furthermore, emergency aid and charity-based aid have helped many people in desperate situations. However, aid projects too often treat symptoms instead of curing the cause. A fundamental change in thinking about the purpose and nature of aid has to take place. Up to this date aid is executed and allocated in a rather patronizing, if not imperial, fashion. The discourse of aid has been hijacked by Western experts and scholars and the very concept of aid is built on the notion that donor countries are superior to recipient countries. Furthermore, aid is not bound to specific timelines. This infinite nature of aid is not sufficiently solution-oriented and does not provide adequate incentives for recipient countries. There are a number of issues throughout Sub-Saharan Africa that need to be solved. However, there are just as many possibilities to create wealth. The key is sustainable, empowering solutions that create long-term improvements, create opportunities, and create jobs. The end result might not be a carbon copy of Western models, but an African solution. Maybe the idea of systemic aid has to be abandoned altogether, in order to give African nations the chance to emancipate themselves. It is time for African nations to grow up and it is time for the international community to let them – to respect what is in each country's best interests and to acknowledge the incredible diversity that holds so many opportunities.

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